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IN THE COURT OF APPEALS OF IOWA

**GARY GRAHAM and
SANDRA GRAHAM,**

Appellants,

vs.

**ROBERT J. TRAUFFER, d/b/a
TRAUFFER HOME BUILDERS, and
PETERSEN PLUMBING AND
HEATING COMPANY,**

Appellees.

Filed April 26, 1979

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2-62225

Appeal from Scott District Court - Nathan Grant, Judge.

Plaintiffs appeal from a judgment in favor of defendants in a suit to recover on a contract to install a septic tank, alleging that substantial evidence did not exist to support the trial court's findings and that the trial court erred as a matter of law.

AFFIRMED.

Clyde D. Stoltenberg, of Van Der Kamp, Crampton & Snyder, Rock Island,
for Appellants.

John P. Donohoe, of Vollertsen & Britt, and Berger and Lane, Davenport, for
Appellees.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiffs appeal from a judgment in favor of defendants in a suit to recover on a contract to install a septic tank. We affirm.

Defendant Trauffer was the general contractor in charge of building plaintiffs' new home. Peterson Plumbing was a subcontractor hired to install the septic tank system. After plaintiffs instituted this suit against defendant, Trauffer was granted summary judgment on his cross-petition against Peterson Plumbing asking for indemnification for any award against him. Peterson Plumbing proceeded to defend against plaintiffs' allegations of breach of implied warranty and negligence.

The trial court found that the damage suffered by plaintiffs was due largely to errors made in the specifications and selection of a field with an appropriate absorption capacity and possibly due to a broken lid on the installed septic tank. The trial court further found that plaintiffs were voluntarily responsible for the selection of the field and the preparation of the perc field absorption test. Because plaintiffs did not show that they relied on the skill, knowledge or judgment of Peterson in selecting the field and conducting the perc test, they could not recover against defendants on an implied warranty theory. The trial court also concluded that plaintiffs failed to show by a preponderance of evidence that any act on the part of Peterson Plumbing or Trauffer caused the septic tank lid to break.

Plaintiffs on appeal essentially assert that substantial evidence did not exist to support the trial court's findings and that its conclusion concerning defendant's breach of implied warranty was incorrect as a matter of law.

This action was tried at law and our review is not de novo. Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 456 (Iowa 1978); Knauss v. Kemen Industries, Inc., 267 N.W.2d 56, 57 (Iowa 1978); Iowa R. App. P. 14(f)(1). The trial court's findings of fact have the force of a jury verdict and are binding on appeal if supported by substantial evidence. Id. A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence, Briggs Transportation Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978), and if reasonable minds would accept it as adequate to reach a conclusion. City of Davenport v. Pub. Employment Relations Bd., 264 N.W.2d 307, 311 (Iowa 1978). A reviewing court construes evidence in a light most favorable to

judgment, whether contradicted or not, and will not weigh the evidence or pass on the credibility of the witnesses. Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978). However, a reviewing court may determine if a conclusion of law made by the trial court is correct. Id. at 706.

I. An examination of the record as a whole indicates that substantial evidence existed from which the trial court could reasonably infer that plaintiffs conducted the perc test themselves on a field of ground which they selected and that plaintiffs did not rely on the skill, knowledge or judgment of Peterson Plumbing in choosing the field site and conducting the test. Plaintiffs prepared holes for the perc test on two different field sites. The county subsequently examined these holes and determined that one of those sites was workable and issued a permit. Peterson Plumbing installed the septic tank system at this particular site pursuant to the permit.

II. But plaintiffs assert that even if this finding of fact is supported by substantial evidence, the trial court erred as a matter of law in concluding that plaintiffs could not recover under an implied warranty theory. Plaintiffs cite section 554.2314 and section 554.2315, The Code 1977, as support for this theory of recovery. These code sections essentially incorporate into Iowa law section 2-314 and section 2-315 of the Uniform Commercial Code.

We find that the trial court did not err in concluding that the implied warranty theory of recovery is not applicable under the particular facts of this case. The construction contract provided in part for the installation of a septic tank system. Plaintiffs in their original petition cite inadequacies in both the materials used and the services provided. We note, without so holding, that this transaction, which is service-oriented, may not be governed by Article 2 of the U.C.C. For general discussions on the applicability of Article 2 to service-sales transactions, see Greenfield, Consumer Protection in Service Transactions -Implied Warranties and Strict Liability in Torts, 1974 Utah L. Rev. 661 (1974); Signal, Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services, 12 New England L. Rev. 859 (1977); Note, The Application of Implied Warranties to Predominantly "Service" Transactions, 31 Ohio St. L. J. 580 (1971); Note, Contracts for Goods and Services and Article 2 of the Uniform Commercial Code, 9 Rut. - Cam. L. J. 303 (1978).

But even if this transaction were deemed to be an Article 2 transaction, section 554.2314 and section 554.2315, The Code, are not applicable since plaintiffs were unable to show that they relied on defendant Peterson's skill and judgment in selecting the field and conducting the perc tests. Implied warranties of merchantability and fitness for ordinary and particular purposes do not attach unless the buyer relies on the seller's superior skill, knowledge and judgment. Ertl Co. v. Lange Plastics Co., 158 N.W.2d 93, 98 (Iowa 1968); Farmers State Bank v. Cook, 251 Iowa 942, 946, 103 N.W.2d 704, 706 (1960); Worrell, 87 Nev. 204, 207-08, 484 P.2d 573, 576 (1971); Newmark, 102 N.J. Super 279, 286, 246 A.2d 11, 15 (1968), aff'd 54 N.J. 585, 258 A.2d 697 (1969); Vitro Corp. of America v. Texas Unified Supply Co., 71 N.M. 95, 106-07, 376 P.2d 41, 49 (1962); Singal, supra at 883.

Plaintiffs claim, though, that defendants were bound contractually to furnish permits and to perform excavation, backfilling and grading tasks and that plaintiffs' selection of the field site and preparation of the tests did not relieve defendants from liability under an implied warranty theory since a specific designation of goods by the buyer does not render the warranty inoperative. Section 554.2314, I.C.A. 311, comment 3 (West 1965). Furthermore, plaintiffs maintain that even a buyer who relies on his own skill and judgment in purchasing goods can recover under an implied warranty basis if the discovered defect was a latent one. Section 554.2316, I.C.A. 351, comment 8 (West 1965); Farmers State Bank, 251 Iowa at 947, 103 N.W.2d at 707. We note, however, that plaintiffs' selection of the field site and preparation of the perc test did not relieve defendant Peterson of liability since defendant was not bound by the contract to select the field site and conduct the perc test, nor did defendant ever voluntarily assume responsibility for these actions.

Likewise, the fact that the contract called for the excavation of a 600 square feet field, coupled with the fact that the trial court found that 675 square feet field into which the septic tank was eventually installed was inadequate, does not impose liability on defendants. The record indicates that it was the practice of Peterson to install septic systems only after a field site had been approved by the county. The size specification in the contract appears to represent an estimation of the field that defendants expected to work with rather than a warranty of fitness. The trial court did

not err as a matter of law.

III. Finally, plaintiffs assert that the trial court erred in failing to find defendants negligent. Plaintiffs assert that compliance with the sanitary engineer's permit does not necessarily relieve defendant Peterson of liability for its own negligence. Plaintiffs further maintain that the broken septic tank lid caused the damage and that evidence exists from which it could be found that defendant Trauffer's trucks drove over the area, causing the lid to break.

In order for a plaintiff to recover in negligence, he must prove that defendant was negligent and that this negligence was the proximate cause of the damage suffered by plaintiff. Froman v. Perrin, 213 N.W.2d 684, 687 (Iowa 1973). Plaintiffs failed to show by a preponderance of the evidence that defendant Peterson had a duty to conduct tests of its own once a field site had been approved by the county sanitary engineer. Plaintiffs further failed to show that defendant Trauffer's or defendant Peterson's trucks had driven over the septic tank field, thus causing the tank lid to break.

The trial court's findings and conclusions were proper in all respects.

AFFIRMED.