

IN THE COURT OF APPEALS OF IOWA

No. 5-389 / 94-1271

FILED

SEP 22 1995

CLERK SUPREME COURT

J. L. CROUCH and MAXINE CROUCH,

Plaintiffs-Appellees,

vs.

THE CITY OF ARMSTRONG, EMMET COUNTY, IOWA,

A Municipal Corporation,

Defendant-Appellant,

KENNETH TIETJE,

Defendant.

DARWIN BUNKOFSKE and VENETTA BUNKOFSKE,

Plaintiffs-Appellees,

vs.

THE CITY OF ARMSTRONG, IOWA, A Municipal Corporation,

Defendant-Appellant.

Appeal from the Iowa District Court for Emmet County, Joseph J. Straub, Judge.

The City of Armstrong appeals a judgment of the district court finding it negligent in maintaining, repairing, and operating its sanitary sewer system.

AFFIRMED.

David A. Lester of Fitzgibbons Brothers Law Firm, Estherville, for appellant.

Bradley Howe of Berg & Howe, Spencer, for appellees Crouch.

Michael R. Bovee of Montgomery, Barry & Bovee, Spencer, for appellees Bunkofske.

Considered by Donielson, C.J., and Cady and Huitink, JJ. Sackett, J., takes no part.

HUITINK, J.

The city of Armstrong appeals a district court judgment finding it negligent in maintaining, repairing, and operating its sanitary storm sewer systems and awarding plaintiffs Bunkofskes \$8000 damages for their labor costs in repairing and cleaning up their home. We affirm.

During the early morning hours of June 4, 1991, the City of Armstrong received five to six inches of rain in a relatively short period of time. As a result, a number of the city's residents experienced sewer backup in their basements. Plaintiffs Jerry (now deceased) and Maxine Crouch experienced eight to ten inches of raw sewage in their finished basement after the downpour. The basement had been furnished as an independent living unit, complete with kitchen, bath, bedroom, and living area. The Crouches also experienced sewage backup after heavy rains in 1983 and 1984. The sewage ruined drywall, paneling, carpet, floor tile, furniture, books, an electric train set, and numerous other items.

Plaintiffs Bunkofskes also experienced sewage backup. Following the June 4, 1991, downpour, sewage backed up six to eight inches deep on the ground floor and up to three feet in the basement. The Bunkofskes had experienced serious sewer backup in 1979 and 1981 as well. Numerous appliances, furniture, carpet, and paneling were destroyed. The Bunkofskes were unable to use their ground floor until October

1991, and their basement until one year later. They completed all the restoration work themselves.

The Crouches and Bunkofskes complained to the city council and other elected officials. They filed separate actions against the city alleging negligence in the maintenance and repair of the sewer system. On October 21, 1993, the city filed a motion for leave to amend its answer, claiming the Crouches' and the Bunkofskes' claims were barred by Iowa Code section 670.4(8) (1991). The court granted this motion and also granted a second motion to amend.

At trial both plaintiffs testified as to the extensive damage done to their homes and the hours spent engaged in cleanup efforts. Both plaintiffs also argued that the city had been aware of the problem for several years, but had no repair or maintenance program to combat the sewage backup problem and that the problem could have been alleviated if the city had repaired the damaged manholes. Because they asserted the main cause of the problem to be heavy runoff flowing through the manhole covers, the parties alleged that the only thing the city needed to do was begin pumping manholes soon after a heavy rain commenced. They argued the city paid several employees to perform such tasks.

The Bunkofskes noted that in 1985 the city hired a consulting firm, Kuehl & Payer, to report on proposed improvements to the sanitary system. At trial, Neal Kuehl testified the city had not properly repaired its sanitary sewer lines for a period of

thirteen years and that the city should have taken action to solve the backup problem. He specifically stated the city should have ensured that sump pumps were not discharged into the sewer system. He stated the total cost of repairs to the east half of the system between 1981 and 1991 was only \$4000.

The city maintained that for years they tried to obtain numerous block grants to repair the system but were continually turned down. The city further argued that they implemented all the changes suggested by a 1983 survey done by McClure Engineering. The city claimed it was performing the repairs recommended by Kuehl at a cost of \$3.5 million.

The district court concluded the city was negligent in not updating the various intersections where the storm sewer and sanitary sewer intersect. The court ruled the city knew or should have known the manholes in place were the cause of the problem.

The court noted that when city employees pumped these manholes during period of heavy rain no sewage backup occurred. The court determined the Crouches suffered damages to the home and personal property in the amount of \$6359. The court awarded the Bunkofskes damages in the amount of \$15,709, including \$8000 for labor and clean up of their home. The city has appealed.

Our review is for correction of errors at law. Iowa R. App. P. 4. Findings of facts in a law action are binding on us if supported by substantial evidence. Iowa R. App. P. 14(1)(1). We construe the trial court's findings broadly and liberally. *Grinnell*

Mut. Reins. Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). In case of doubt or ambiguity we construe the findings to uphold, rather than defeat, the judgment. *Id.* We are prohibited from weighing the evidence or the credibility of the witnesses. *Id.*

A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. In evaluating sufficiency of the evidence, we view it in its light most favorable to sustaining the court's judgment. We need only consider evidence favorable to the judgment, whether or not it was contradicted.

Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978).

"Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings." *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 846 (Iowa 1989) (citation omitted). Evidence is not insubstantial merely because it could support contrary inferences. *Grinnell Mut. Reins. Co.*, 431 N.W.2d at 785 (citation omitted). With these principles in mind, we turn to the issues raised on appeal.

The city asserts that the district court erred in finding the city of Armstrong negligent in the maintenance and repair of its sewer system. The city contends that the testimony of its expert, Neal Kuehl, established that the city undertook extensive efforts to correct its sewer problems and that, as a result, it should not be found negligent. We, however, find substantial evidence in the record to support the trial court's finding of negligence.

A municipality which provides drains and sewers to its residents may be liable in tort if it fails to exercise reasonable skill and care in providing that service. *Scholbrock v. City of New Hampton*, 368 N.W.2d 195, 197 (Iowa 1985). The municipality is liable only for negligence in the performance of its duty or to the public. *Id.*

We find substantial evidence in the record to support the trial court's finding of negligence. Based on the evidence presented at trial, it was reasonable for the trial court to conclude that relatively modest expenditure of funds could have prevented plaintiffs' damages. The testimony of the city's expert, Neal Kuehl, supports the court's finding that by updating the crossings where the sanitary and storm sewers intersect the city could have lessened the probability of sewage backup at a cost of only \$1000 to \$2000 per crossing. Moreover, the evidence shows that had city crews pumped the manholes at these crossings immediately upon the onset of heavy rain, damage to plaintiffs' homes would likely have been lessened, if not avoided altogether.

We turn now to the trial court's ruling that the city of Armstrong was negligent in failing to adopt a sump pump ordinance prior to the June 1991 rainstorm. Based on the testimony of Mr. Kuehl, the trial court concluded the city was in fact negligent in failing to adopt such an ordinance. The city asserts on appeal that a municipality's decision whether to adopt a sump pump ordinance is a discretionary function, thus exempting the city from liability under Iowa Code section 670.4(3). The city failed to

assert this defense in its pleadings or at trial and raises it for the first time on appeal. Generally, an issue should not be considered on appeal in a civil proceeding unless fairly raised by the pleadings. *City of Clinton v. Loeffelholz*, 448 N.W.2d 308, 310 (Iowa 1989). Because the city did not raise the section 670.4(3) defense in its pleadings or at trial, we will not consider this defense on appeal. In any event, we need not address this issue because we have already found sufficient evidence supporting the district court's findings with regard to plaintiffs' other specifications of negligence.

The city further contends the trial court erred in awarding the Bunkofskes damages for their labor costs in repairing and cleaning up their home. The city asserts that such damages are purely speculative. We, however, find sufficient evidence in the record to support the trial court's award. Iowa courts recognize a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated. *Orkin Exterminating Co. v. Burnett*, 160 N.W.2d 427, 430 (Iowa 1968); *see also O'Tool v. Hathaway*, 461 N.W.2d 161 (Iowa 1990) (awarding plaintiffs damages for their own labor and the labor of their friends in cleaning up water spillage in plaintiffs' basement). At trial, the Bunkofskes offered into evidence an itemization of the time spent cleaning and repairing their home after the June 4, 1991, backup. The

exhibit showed that the Bunkofskes spent 1775 and three-fourths hours engaged in clean up and repair for which they were claiming to be entitled to \$7.50 per hour in payment. The trial judge allowed \$8000 in damages for this labor. We conclude that the Bunkofskes' testimony and exhibits establish a reasonable basis by which the trial judge determined this figure. The trial court did not err in awarding the Bunkofskes damages for the clean up and repair of their home.

We find substantial evidence in the record to support the trial court's finding of negligence and award of labor damages to the Bunkofskes. The decision of the trial court is affirmed.

AFFIRMED.