FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EDWIN J. COPPER, Appellee,	)	
vs.	)	
KROP-KEEPER MIDWEST, INC., Defendant,	)	Filed March 29, 1978
GLASS FAB, INC., Cross-Appellee,	)	
LARRY O. KURTENBACH, and **CHARLES HABERLY,** Appellants,	)	292 2-58363
DOUGLAS S. APPELMAN, WILLIAM HOLS and E.B. MENKE, Appellees-Cross Appellants/Intervenors.	)	

Appeal from Chickasaw District Court - Dennis D. Damsgaard, Judge.

Defendant corporate officer and director appeals trial court's judgment finding him liable for actual and punitive damages to purchasers of fiberglass silos. Reversed. Intervenors-purchasers appeal finding that component manufacturer of fiberglass panels is not liable. Affirmed.

Sherry Raduenz, of Strand, Anderson & Raduenz, Decorah, for Appellant Larry Kurtenbach.

William King & Ralph Walker, of Thoma, Schoenthal, Davis, Hockenberg & Wine, Des Moines, for Appellee-Cross Appellants/Intervenors.

Richard P. TeKippe, New Hampton, for Appellant Charles Haberly.

James F. Smith, Charles City, and Leslie P. Turner, Nashua, for Appellee Edwin Copper.

William Pappas, Mason City, for Cross-Appellee Glass Fab.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Larry O. Kurtenbach appeals an adverse finding of the trial court finding him liable for fraud and deceit arising out of the sale of fiberglass silos. On appeal, Kurtenbach alleges the trial court's findings of fraud and deceit were erroneous and not supported by substantial evidence, were contrary to the pleadings and therefore not properly before the court, and that the evidence provided no basis for an award of punitive or exemplary damages. Intervenors Douglas Appelman, William Holz and E. B. Menke also appeal the verdict in favor of Glass Fab, Inc., on the sufficiency of the evidence to support the trial court's findings of no liability. We consider each appeal separately.

Defendant Kurtenbach's first contention on appeal is that the trial court erred in finding him liable for fraud and deceit because such finding is clearly erroneous and not supported by substantial evidence or justified as a matter of law. Our review is not de novo, but on errors assigned. Phoenix v. Stevens, 256 Iowa 432, 435-6, 127 N.W.2d 640, 642 (1964). Findings of fact in a law action tried to the court have the effect of a special verdict and are binding upon the appellate court if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure. If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. Phoenix, supra.

The elements of fraud cannot be presumed but must be affirmatively proved by the one who relies on fraud either for the purpose of defense or attack. Scheer v. Swanson, 209 N.W.2d 53, 58 (Iowa 1973). It must be established by a preponderance of the evidence by proof that is clear, satisfactory and convincing—such as to overcome the presumption in favor of fair dealing. Wyckoff v. A & J Home Benevolent Ass'n., 254 Iowa 653, 119 N.W.2d 126, 128-9 (1962). The essential elements of fraud, each of which must be established by a preponderance of the evidence, are: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance and (7) resulting injury and damage. Hall v. Wright, 261 Iowa 758, 766, 156 N.W.2d 661, 666 (Iowa 1968). The burden was on the intervenors to prove each of these elements by a preponderance of the evidence. Scheer, supra.

The trial court found Kurtenbach and Charles Haberly, as officers and directors, made false representations to the intervenors in their brochure advertising the Krop-Keeper silos. The brochure stated the silo was scientifically designed, that it had been field tested since 1961 and had been engineered to work by Krop-Keeper agricultural engineers who had been pioneers in high moisture grain storage. The trial court found these representations to be patently false and that Kurtenbach and Haberly had actual knowledge that they were false.

Further, as officers and directors Kurtenbach and Haberly had the sales personnel use the brochure for the purpose of inducing people to buy the silos. The court found they had the sales personnel take prospective customers to see the old type 1971 silos and have them talk to satisfied customers of the old style silos. Kurtenbach and Haberly never directed their sales personnel to advise prospective customers that the silo they were selling had been redesigned, that no prototype had been made or tested and that the new silo being sold had lighter fiberglass panels and would save both material and erection costs.

Finally, the trial court found both Kurtenbach and Haberly on behalf of themselves and the corporation, intentionally, willfully and for the purpose of inducing the intervenors to buy the silos, had the necessary intent to defraud the intervenors by having them act upon the false representations as to the quality, design, capabilities and cost advantage of the redesigned silos. As a conclusion, the court found the intervenors relied on the false representations made and as a result of such reliance, bought the silos and suffered damages when the silos failed.

A review of the testimony discloses the record is devoid of any evidence that these specific intervenors relied on any of the allegedly false statements contained in the brochures. There is nothing in the testimony of intervenor Appelman about seeing or reading any brochures; neither is there any testimony about any representations made to him by Kurtenbach or anyone else concerning the newly redesigned Krop-Keeper silo. Finally, there is nothing in Appelman's testimony that establishes he relied on any false representations or that any false representations were made. The testimony of intervenor Menke is similarly lacking in any evidence of false representations and reliance thereon.

The testimony of intervenor Holz establishes that he talked to two Krop-Keeper salesmen when he purchased his silo. They presented him with a brochure showing the 1971 Krop-Keeper unit with the old type design. That is the extent of the testimony concerning the sales representations. Holz did not testify that he read the brochure or relied thereon. Neither did he testify that he thought he was purchasing the 1971 design. Finally, although intervenor Holz was the only one taken to view the old 1971 style silos by Krop-Keeper salesmen, there is no evidence he relied on the 1971 design when purchasing his silo.

In short, there is no clear, satisfactory or convincing evidence that any of these intervenors relied on any alleged fraudulent acts of defendant Kurtenbach. This is true even if we accept the trial court's finding that Kurtenbach personally redesigned the brochure and that his intent was to mislead prospective purchasers through the false representations contained therein. As there is no showing of reliance on the alleged misrepresentations, the intervenors failed to sustain their burden of proving fraud. Hall, supra; Wyckoff, supra. Evidence of materiality, scienter and intent to deceive is also far from the clear, satisfactory and convincing proof required to establish a case of fraud and overcome the presumption in favor of fair dealing. Wyckoff, supra.

In their brief, the intervenors argue that a person can also be guilty of fraud where there is a suppression of the truth as well as by misrepresenting by truth. See Wyckoff, supra. In support thereof, the intervenors argue that Kurtenbach was also guilty of fraud because he failed to disclose a known defect—that the panels were defective. First, this assumes there was a duty to disclose which the intervenors have failed to establish. Secondly, there is no showing that Kurtenbach either appreciated or knew the extent of the defects in the panels.

The intervenors argue that Kurtenbach knew the panels were defective by the number of panels he personally rejected and because of his knowledge of Glass Fab's lack of quality control. However, the evidence shows that the reason the panels were rejected was for cosmetic reasons and not because of any known defects in the tensile strength of the panels themselves. Although Kurtenbach knew some of the panels did not fit together tightly and that some of the holes in

the panels had to be redrilled or realigned, there is no evidence that he knew or had the expertise to know that a problem existed. Nor is there any evidence that Kurtenbach knew that any of his sales people were stressing the necessity of one panel impinging tightly on the other as an advantage of the new design.

At best, this raises a question of fraud against the corporation Krop-Keeper, but it does not establish fraud on the part of Kurtenbach as an officer or director. An officer or director is not liable for the acts of the corporation because he is an officer or director; he is only liable for the corporation's acts where he participates, authorizes or consents thereto. Stambaugh v. Haffa, 217 Iowa 1161, 1163, 253 N.W. 137 (1934). The intervenors have also failed to establish fraud through a failure to disclose a known material fact.

Because of our holding that the intervenors failed to establish their claim of fraud, we need not reach Kurtenbach's second assignment on appeal, that the trial court erred in considering allegations of fraud and deceit which were not properly before the court for determination. Kurtenbach's third assignment of error is that the trial court erroneously awarded punitive or exemplary damages where there was no basis for a finding of fraud and deceit in the record.

Exemplary damages may be awarded where it appears the defendant is guilty of fraud. Northrup v. Miles Home, Inc. of Iowa, 204 N.W.2d 850, 859 (Iowa 1973). However before an award of exemplary damages is justified, there must first be an award of actual and substantial damages. Claude v. Weaver Construction Co., 261 Iowa 1225, 1229-30, 158 N.W.2d 139 (1968). Since the trial court erroneously found Kurtenbach liable for fraud and deceit it also erred in awarding exemplary damages to the intervenors. The judgment of fraud and deceit against Kurtenbach in favor of intervenors Appelman, Holz and Menke is reversed as is the award of exemplary damages.

The second part of this appeal concerns the appeal of Intervenors Appelman, Holz and Menke from the part of the trial court's findings of fact which held that the negligence of defendant Glass Fab, Inc., if any, was not a proximate cause of the plaintiff/intervenor's damages, nor a substantial contributing cause of the failure of the silos and the resulting damages. On appeal, the intervenors argue the

trial court's finding that the negligence, if any, was not a proximate cause of the damages is clearly erroneous and not supported by substantial evidence nor justified as a matter of law. The intevenors also argue the trial court erred in finding Glass Fab was neither negligent in design nor strictly liable in tort and in failing to award exemplary damages and damages for economic loss.

Intervenors' first contention is that the trial court erred in finding the negligence, if any, of Glass Fab was not a proximate cause of intervenor's damages. They argue Glass Fab was negligent in manufacturing the fiberglass silos and failed to meet the general industry standards of care. See Kunzman v. Cherokee Silo Co., 253 Iowa 885, 114 N.W.2d 534 (1962). However, Glass Fab was not a manufacturing company in the sense of manufacturing silos; rather, it was a component manufacturer. The industry standards of care were appilicable to Krop-Keeper, not Glass Fab.

The intervenors also point to the fact that initially as many as 50% of the panels were rejected and that Kurtenback testified there was a general lack of quality control at Glass Fab. However, the panels which were initially rejected were for the most part rejected for cosmetic reasons; there is no indication that these rejected panels were otherwise defective. Further, it was only Kurtenbach's opinion that quality control was lacking. There is no evidence that any mistakes which occurred during manufacturing produced defects which in turn caused the silos to collapse.

The intervenors also allege Glass Fab was negligent in failing to test the fiberglass panels citing West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 212 (Iowa 1972), which held the standard for testing is one of reasonable care. However, the responsibility for testing was on Krop-Keeper, not Glass Fab, as the manufacturer of the silos. Additionally, there was no showing the component parts manufactured by Glass Fab were so negligently made as to render the products in which they were incorporated unreasonably dangerous for use. See Restatement (Second) of Torts, § 395, Comment m (1966). In fact, there was no showing that the parts themselves were negligently made.

The intervenors also argue that Glass Fab's experts were unable to determine

the precise contribution of the excessive thinness of the panel to the failure of the panels themselves. However, the responsibility to prove the effect of excessive thinness was on the intervenors; the burden was not on Glass Fab to disprove any causal contribution. Rules 5 and 8, R. App. P. Any objections as to the competency of expert Johnson to testify are untimely and therefore not preserved for appeal. Finally, although the record clearly establishes significant variations in panel thickness, the intervenors failed to establish the consequences of such variations.

The intervenors also argue the panels did not fit together properly and thus there was a serious deficiency in the panel's ability to carry the intended load of the other panels. They argue that an injury may have more than one proximate cause and that two or more individuals may be concurrently negligent. See Gunnison v. Torrey, 216 N.W.2d 361, 364 (Iowa 1974). The evidence adduced at trial was sufficient to establish that defendant Krop-Keeper was negligent in designing its "improved" silos. The silo walls as revised were incapable of bearing the weight of higher walls when the silo itself was filled with grain. The faulty design was the proximate cause of the collapse of the silo. The trial court implicitly found that the intervenors failed to establish that Glass Fab's negligence, if any, was a proximate cause of their injuries. There is substantial evidence to support this finding.

Intervenors argue that the trial court erred in not finding Glass Fab was negligent in its design of the fiberglass panels. In support of their argument, the intervenors point to Hammerberg's involvement in the initial negotiations and his approval of Haberly's computations and Haberly's reliance on Hammerberg's expertise and familiarity with the characteristics of fiberglass. However, there is substantial evidence to support the trial court's findings that Krop-Keeper alone, through its employee Charles Haberly, was responsible for the design. Glass Fab's participation in the design, if any, was limited to the extent required for its part in the initial manufacturing of the component parts.

The intervenors argue the trial court erred in not awarding exemplary damages as a result of Glass Fab's breach of its duty of reasonable care in

manufacturing the silo panels. Although there is no question that the intervenor's damages were other than nominal, the trial court found that Glass Fab was not liable for these damages. See Kuhn v. Chicago, M. & St. P. R. R. Co., 74 Iowa 137, 37 N.W. 116 (1888); Cf. Claude v. Weaver Const. Co., 261 Iowa 1225, 158 N.W.2d 139 (1968). Since no actual damages were assessed against Glass Fab, the trial court did not err in not awarding exemplary damages. Claude, supra.

The intervenor's second contention is that the trial court erred in not finding Glass Fab strictly liable in tort. There is nothing in the record which conclusively establishes that a manufacturing error was the cause of the collapse; however, the record is full of testimony which suggests that Krop-Keeper's faulty design was the proximate cause of the collapse. Glass Fab was not in the business of selling fiberglass silos. Rather its business was making fiberglass components for others. See Restatement (Seconds) of Torts, § 402A (1966).

Although a component manufacturer may under certain circumstances be held strictly liable in tort, especially where the component undergoes no substantial change, the component first must be found to be defective to impose strict liability. See W. Carmichael, Strict Liability in Tort, 20 Drake L. Rev. 528, 557 (1971). The question on appeal is not whether § 402A applies, but whether there is evidence to support the trial court's finding that Glass Fab was not proximately liable for the intervenors' injuries. The trial court did not err.

The intervenors' final contention is that the trial court erred in finding that it would be speculative to base an award for economic loss on the reasonable expectations of the use of the defective silos had they been fit for their intended purpose. As the issue of liability was resolved adversely to the intervenors, we need not reach the question of economic loss and reasonable expectation. The findings of the trial court as to the liability of Glass Fab to Intervenors Appelman, Holz and Menke is affirmed.