IN THE COURT OF APPEALS OF IOWA

No. 5-578 / 94-1943

FILED
MAY 31 1996
CLERK SUPREME COURT

000357

NORMAN D. SWANSON,

Appellee,

vs.

CITY OF SIOUX CITY, IOWA,
A Municipal Corporation,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

The City of Sioux City appeals a judgment awarding the plaintiff damages on his claim the City was negligent in maintaining its sewer system. **AFFIRMED.**

James L. Abshier, City Attorney, and Timothy A. Scherle, Assistant City Attorney, for appellant

Michael P. Jacobs of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs, & Mohrhauser, Sioux City, for appellee

Considered by Sackett, P.J., and Habhab and Streit, JJ. Vogel, J., takes no part.

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STREIT, J.

The appellant, the city of Sioux City, appeals the trial court's award of a judgment in favor of the plaintiff The city argues: 1) it was not negligent in its maintenance and repair of a sanitary sewer; 2) the plaintiff unreasonably failed to avoid an injury; and 3) the trial court's award of damages was excessive and lacking in evidentiary support. We affirm.

I. Standard of Review.

The standard of review in this case is for errors at law. *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa App 1988) Findings of facts in a law action are binding on us if supported by substantial evidence Iowa R. App. P. 14(f)(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). Evidence is not insubstantial merely because it could support contrary inferences. *Grinnell Mut. Reins. Co.*, 431 N.W.2d at 785. With these principles in mind, we turn to the issues raised on appeal.

II. Maintenance and Repair of Sewer.

The plaintiff, Norman Swanson, owns a commercial property at 4415 Stone Avenue in Sioux City, Iowa. At the time in question, the front portion of the building had a main floor and a basement suitable for use as office space. Swanson leases this portion of the building and uses the back portion for his heating and air conditioning business.

On May 7, 1992, the city received a report about sewage water on the street near plaintiff's business. City employees found a blockage had occurred in the Stone Avenue sewage line. The employees "jetted" the sewer line to dislodge the blockage. The city employees who jetted the sewer thought they had corrected the problem.

One of the plaintiff's employees observed sewer water on Stone Avenue on May 8. On May 11 one of Swanson's employees discovered the sewer line had backed up resulting in about three feet of sewage being deposited in Swanson's basement.

The sewage extensively damaged the basement. Due to the seepage and stench of the sewage, Swanson had to eventually gut the basement, including the removal of carpet, paneling, insulation, and the wood wall studs. Swanson obtained estimates for the repair of the damage, and someone on behalf of the city evaluated the damage in

July 1992. Before Swanson had commenced any repairs, a second sewage backup occurred at the property on August 2, 1992. Within the last year, Swanson had leased the property for $1200 a month. Swanson had no tenant at the time of the May 1992 sewage backup. Prior to the sewage problem Swanson had been negotiating with a prospective tenant to rent the property for $900 a month. After the sewage damage, the assessed value of the building was reduced by $28,000.

Swanson leased a portion of the building in August 1993. The uncontroverted evidence indicated the building still smelled bad at that time.

Swanson filed a petition at law seeking damages for the city's alleged negligent failure to maintain and repair the sewer line. The city filed an answer denying liability and raising several defenses, including Swanson's comparative fault

Following an August 1994 bench trial, the district court found the city was negligent in maintaining the sewer line and its negligence was a proximate cause of Swanson's damages The court awarded Swanson $17,253 in damages for the cost of restoring the basement The court assigned a rental value of $900 per month to the damaged property and awarded $9,000 for loss of use of the property

It is well-established that when a city undertakes to provide a sanitary sewer system it is chargeable for damages caused by its negligence in maintaining it *See Hansen v City of Audobon*, 378 N W 2d 903, 904 (Iowa 1985). The evidence at trial indicated the City inspected the sewer in question every Friday. Following the jetting

procedure on Thursday, May 7, 1992, no inspection was done on Friday, May 8, as the employee who regularly did the inspections was not working. The City employee responsible for the inspections testified preventive sewer maintenance would have required a weekly inspection on Friday, May 8, even though the sewer had been jetted the day before.

The City claims the trial court erred in applying the standard negligence test and should have applied the elements set forth in Iowa Civil Jury Instruction 2900.1. That instruction is intended to encompass the obligations imposed by Iowa Code section 364.12(2) for maintaining public places. Assuming, without deciding, that statute and instruction apply to the maintenance of sewers, we conclude the record supports the trial judge's decision

The City had an obligation to maintain and repair the sewers. It was aware of a blockage on May 7 Despite its practice of weekly inspections, the City did not follow-up and verify the condition had been corrected after the May 7 jetting of the sewer main Sewage water continued to appear on the street on May 8, a condition the City could have discovered if, in the exercise of ordinary care, it had conducted its regular Friday inspection of the sewer The defendant had a reasonable opportunity to correct the condition but did not The plaintiff was damaged by the sewer blockage, and his injuries were proximately caused by this condition Given our scope of review, substantial evidence supports the trial court's decision.

III. Failure to Avoid Injury.

The City's second argument is that plaintiff unreasonably failed to avoid an injury. The City concedes it did not plead mitigation as an affirmative defense but argues the plaintiff's own evidence and the doctrine of avoidable consequences support its position. At the outset, we note the doctrine of avoidable consequences is not applicable in this case. "Avoidable consequences . . . occur *after* the defendant's negligence, but *before* an injury results." *See Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 149 (Iowa 1992) (emphasis added). The defendant points to nothing in the record to establish what the plaintiff could have done after the occurrence of the city's negligence but prior to its injury to avoid the consequences of the defendant's negligence. The record in this case does not support application of this doctrine.

To the extent the defendant is arguing the plaintiff failed to mitigate his damages, an unreasonable failure to mitigate damages constitutes "fault" under the Iowa Comparative Fault Act. *McDonnell v. Chally*, 529 N.W.2d 611, 613 (Iowa App. 1994). In determining whether a party has failed to mitigate damages, the defendant has the burden of demonstrating the failure to mitigate was unreasonable under the circumstances. *Kirk v. Union Pacific R.R.*, 514 N.W.2d 734, 737 (Iowa App. 1994).

We assume, without deciding, the plaintiff's evidence gave rise to the issue of mitigation and defendant's failure to plead the defense is not a bar to its consideration. *See F.S. Credit Corp. v. Shear Elevator, Inc.*, 377 N.W.2d 227, 233 (Iowa 1985).

(mitigation of damages is special defense which must be pled and proved by defendant or defendant is limited to circumstances growing out of plaintiff's testimony). In its brief the defendant suggests it was unreasonable for the plaintiff to delay making the necessary repairs to the basement The City directed the plaintiff to obtain two estimates for the repairs, which he did. The City waited nearly two months after the first sewage back-up to send its own person to verify the damage.

A second sewage back-up occurred in August 1992. The smell in the basement persisted even after plaintiff's crews removed the damaged property. Given the circumstances of this case, the defendant did not prove the plaintiff failed to mitigate his damages

IV. Amount of Damages.

In its final argument the City contends the trial court's award of damages was excessive and lacking in evidentiary support In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict *Clausen v. K-Products, Inc.*, 514 N W 2d 900, 903 (Iowa 1994) The trial court is generally in a better position to determine whether the evidence was sufficient to justify an award *Id*

The plaintiff had obtained estimates of the cost of full repair of the basement He had expended approximately $10,000 on repair work at the time of trial but had not completed the work "Where the injury is such that the premises may be restored to as

good condition as it was before, the measure of recovery is the fair and reasonable cost and expense of such restoration." *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 21 (Iowa 1975). We find no error in the trial court's award of the estimate amount for full repairs.

The value of loss of use may be measured by the rental value of the property. *See Mills v. Guthrie County Rural Elec. Coop. Ass'n*, 454 N.W.2d 846, 850 (Iowa 1990). There was evidence to indicate the plaintiff's property previously had a rental value of $900 to $1200 a month. The damage and stench rendered the property unrentable. The plaintiff was entitled to damages for lost use, and we find no error in the trial court's award

AFFIRMED.