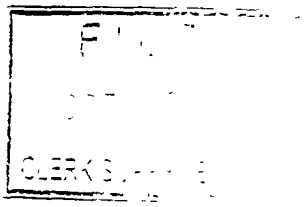
**IN THE COURT OF APPEALS OF IOWA**

No. 9-166 / 98-0439
Filed October 15, 1999



**VIRTUS C. PITTMAN and**
**BETTY LOU PITTMAN,**
Appellants,

vs.

**BLACKHAWK ROCK & GRAVEL, INC.,**
**WILLIAM L. BUSS, JOHN B. BERGDALE,**
**LINDSAY J. BERGDALE, RICHARD T. LARSON,**
**GREGORY L. STEEGE, and JOEL K. WIKNER,**
Appellees.

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Appeal from the Iowa District Court for Sac County, Joel E. Swanson, Judge.

Plaintiffs appeal a judgment in favor of the defendants finding that the defendants had not breached a gravel lease which authorized them to remove sand and gravel from land owned by the plaintiffs. **AFFIRMED.**

Frank J. Comito of Neu, Minnich, Comito & Hall, Carroll, and Colin J. McCullough of the McCullough Law Firm, Sac City, for appellants.

David E. Vohs, Sioux City, for appellees.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

**STREIT, J.**

Virtus and Betty Lou Pittman complain Blackhawk Rock and Gravel did not pay for 250,000 tons of gravel it hauled out of their property. Although Blackhawk had a duty to provide accurate records of its gravel consumption, Pittmans failed to carry their burden of establishing a breach. Because the trial court's decision is supported by substantial evidence, we affirm.

***I. Background Facts & Proceedings.***

In 1992 Blackhawk Rock and Gravel Incorporated (Blackhawk) executed a gravel lease authorizing it to remove sand and gravel from land owned by Virtus and Betty Pittman. The lease covered three separate parcels, but the present dispute involves only one of those parcels, the Wall Lake Pit. The lease was to expire on February 28, 2002, or when the product was fully depleted from the Wall Lake Pit.

According to the lease, Blackhawk would pay twenty-five cents per ton on all materials sold. The lease did not require any verifying documentation as to the tonnage sold. Blackhawk was, however, required to weigh all materials coming out of the pit.

Believing they were being underpaid due to inaccurate reporting, Pittmans employed an engineer to take measurements of the pit. These measurements were then used to calculate the estimated volume of the pit, which allowed the Pittmans to estimate the tonnage removed by Blackhawk. The engineer calculated that 1,430,221 tons of material had been removed. Blackhawk had paid for only 1,086,301 tons.

Because some material had not sold or was otherwise categorized as waste, Pittmans believed they had not been paid for approximately 257,912 tons.

Pittmans filed a petition alleging Blackhawk was in breach of the contract by failing to pay them $64,478 in royalty payments. Following a bench trial, the court ruled the Pittmans failed to prove Blackhawk underpaid for the material it had mined. Pittmans appeal.

***II. Standard of Review.***

Whether a contract was breached is a question for the trier of fact. *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 165 (Iowa App. 1993). The district court's findings of fact are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1). For purposes of sustaining a district court's finding of fact, evidence is substantial when a reasonable mind could accept it as adequate in reaching a conclusion. *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 261 (Iowa 1991). "When reviewing evidence for its substantiality, we view it in the light most favorable to upholding the trial court's judgment." *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995) (citation omitted).

When the district court denies recovery due to a party's failure to sustain its burden as to any element, we will not meddle with the trial court's decision unless the party has carried that burden as a matter of law. *Id.* "We will conclude a party has carried such a burden only when evidence is so overwhelming that only one reasonable inference on each critical fact issue can be drawn." *Id.*

***III. Pittmans Failed to Show Blackhawk Breached the Contract.***

To establish a breach of contract claim the complaining party must prove: "1) the existence of a contract, 2) the terms and conditions of the contract, 3) that it has performed all of the terms and conditions required under the contract, 4) the defendant's breach of the contract in some particular way, and 5) that plaintiff has suffered damages as a result of the breach." *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993). The district court ruled Pittmans failed to carry their burden of showing Blackhawk breached the contract. Pittmans counter by arguing Blackhawk breached an implied covenant of good faith and fair dealing when it failed to keep accurate record of the gravel removed from the pit. Pittmans rely on volume-based calculations as evidence of this breach.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance . . . ." Restatement (Second) of Contracts § 205 (1979). Iowa, at least in general terms, has adopted this implied duty. *See Engstrom v. State*, 461 N.W.2d 309, 314 (Iowa 1990). Encompassed within this duty is an obligation not to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 17A Am. Jur. 2d *Contracts* § 380 (1991). "This would include an obligation . . . to furnish an accurate accounting." *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 52 (2d Cir. 1989). We tacitly recognize Blackhawk's implied duty to provide accurate records regarding its gravel consumption.

This tacit recognition, however, does not absolve Pittmans from their burden nor save them from the trial court's credibility findings. Pittmans must still show a breach by a preponderance of the evidence. They attempted to do this through expert testimony. The trial court found Pittmans' volume-based calculations to be mathematically sound, but found the numbers utilized in those calculations too speculative. There was conflicting testimony regarding the mining of Wall Lake Pit prior to the lease, the volume of the pit, and possible errors in the calculations. The trial court weighed this conflicting testimony and determined the Pittmans failed to carry their burden. We do not find Pittmans' evidence so overwhelming as to impinge upon the credibility finding of the trial court. Differing inferences could easily be drawn from this record. The trial court's decision was within its sound providence, and we affirm its decision.

**AFFIRMED.**