

FILED

DEC 30 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**GILBERT W. STANFORD and
HELEN STANFORD,**

Plaintiffs-Appellees,

vs.

POLK COUNTY, IOWA,

Defendant-Appellant.

Filed December 30, 1981

1-280
2-65403

Appeal from Polk District Court - Harry Perkins, Judge.

Defendant county appeals from judgment for plaintiffs in an action for damages arising from the county's erroneous issuance of a building permit. REVERSED.

David W. Hibbard, Assistant County Attorney, Des Moines, for defendant-appellant.

R. J. Wagener of Wagener & Day, Ankeny, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant county appeals from judgment for plaintiffs in an action for damages arising from the county's erroneous issuance of a building permit. We reverse.

The facts of this case are largely undisputed. Plaintiffs, Gilbert W. Stanford and Helen Stanford, purchased a vacant lot in Polk County on January 2, 1976, paying \$500 down and the \$4500 balance on April 12, 1976. On January 6, 1976, plaintiffs entered into an agreement with a contractor to build a house, including a sewage system, on the vacant lot for a total price of \$33,000. Plaintiffs paid the contractor \$1000 at the time the construction contract was executed, agreed to make two progress payments, and then pay the balance upon completion of the work.

The contractor, in application for a building permit, submitted his plans for the home and sewage system for approval on April 5, 1976. The plans were approved and a building permit was issued on April 8, 1976. The building permit contained a notation to the effect the plans were approved by the Health Department, when in fact, the county sanitarian had not approved the proposed sewage system plans.

The plaintiffs proceeded with the construction of the home pursuant to the proposed plans. In May, the plaintiffs were informed the proposed sewage system was not approved by the Health Department and only a more expensive and effective system would be approved by the department. The plaintiffs installed the more expensive sewage system. The plaintiffs then filed suit against the county, maintaining they incurred additional expenses they would not have incurred had not the county negligently and erroneously issued the building permit.

The case was tried to the court at law. The trial court held the plaintiffs met their burden of proving by a preponderance of the evidence that Polk County negligently and erroneously issued a building permit, which directly caused the plaintiffs' damages. The court entered judgment against the defendant county for the sum of \$2694 with interest from the date of the judgment.

Our review is on errors assigned. Iowa R. App. P. 4.

The court in B & H Investments, Incorporated v. City of Coralville, 209 N.W.2d 115 (Iowa 1973), stated:

Generally speaking, a permit issued under mistake of fact or in violation of law confers no vested right or privilege on the person to whom the permit has been issued, and may be revoked, notwithstanding he may have acted upon it, and any expenditures made in reliance upon such permit are made at his peril.

Id. at 118. The court in Rehmann v. City of Des Moines, 200 Iowa 286, 291-93, 204 N.W. 267 (Iowa 1925), held a building permit issued by a city council on proper plans, duly approved by the city authorities, on which the permittee has to some extent acted, is not revocable by the council on the grounds the building and businesses carried on there would be objectionable to the residents of the neighborhood. However, in Crow v. Board of Adjustment of Iowa City, 227 Iowa 324, 328, 288 N.W. 145, 146, the court held Rehman does not apply if the building permit was not legally granted. See B & H Investments, Incorporated v. City of Coralville, 209 N.W.2d 115, 119 (Iowa 1973). Thus, if the building permit was issued to the plaintiffs in violation of a county ordinance, the permit was invalid ab initio and can be "revoked" by the appropriate authority. Id. Furthermore, the court in Rehmann v. City of Des Moines, 204 Iowa 798, 215 N.W. 957 (Iowa 1927), held a city is not liable for damages resulting from the council's wrongful attempt to revoke a previously granted building permit.

Applying those principles to the case at hand, we conclude the trial court erred in granting judgment for the plaintiffs. The plaintiffs cannot recover damages from the county arising from the erroneous grant or attempted revocation of a building permit. B & H Investments, Incorporated v. City of Coralville, 209 N.W.2d 115, 118 (Iowa 1973); Rehmann v. City of Des Moines, 204 Iowa 798, 215 N.W. 957 (Iowa 1927). If issuance of the permit was in the first place legal and not in violation of any county ordinance, the plaintiffs' remedy would be to enjoin the county from revoking the building permit. Rehmann v. City of Des Moines, 200 Iowa 286, 204 N.W.267 (Iowa 1925). If the permit was initially issued in violation of a county ordinance, expenses incurred in reliance on the permit were invested at the individual's peril. B & H Investments, Incorporated v. City of Coralville, 209 N.W.2d 115, 118 (Iowa 1973). The issuance of the permit was not in accordance with the relevant ordinances in this case and was, for that reason, improper. Therefore, we reverse the trial court's judgment for plaintiffs.

While judgment for the defendant in this case may superficially appear unfair, because it was the county's mistake that created the problem, closer scrutiny of the facts dispel that concern. Had the permit initially been denied, plaintiffs would have had the opportunity to decide whether to finish construction of their house with the more expensive sewer system or abandon the entire project. Plaintiffs claim the

county's mistake deprived them of that opportunity. Plaintiffs, however, failed to introduce evidence on the amount of damages they had sustained as a result of losing their chance to make that decision. We also note that, by the time the plaintiff's contractor had applied for the building permit, the plaintiffs had purchased the vacant lot and had entered into a contract for the construction of the house on their lot. In fact, construction had commenced prior to the issuance of the building permit by the county. And finally, since plaintiffs failed to show they would have abandoned the project if given the opportunity, we fail to see how they have been damaged. Plaintiffs are now in the same position they would have been in had the county originally required the installation of the more expensive sewer system.

REVERSED.