

IN THE COURT OF APPEALS OF IOWA

No. 1999-292 (9-522) / 98-2287

Filed December 27, 1999

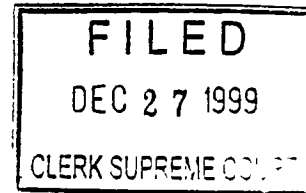
CAROL P. ENNENGA,

Appellant,

vs.

ERNEST J. MIDDLETON,

Appellee.



Appeal from the Iowa District Court for Black Hawk County, Stephen C
Clarke, Judge.

Appellant appeals following the denial of her action against her former
landlord alleging the landlord was negligent in failing to maintain the furnace in good
condition which caused a fire in her home. **AFFIRMED AS MODIFIED AND
REMANDED.**

Robert L. Rausch of the Rausch Law Firm, Waterloo, for appellant.

David R. Zellhoefer of the Zellhoefer Law Offices, Waterloo, for appellee.

Heard by Streit, P.J., and Vogel, and Vaitheswaran, JJ.

VAITHESWARAN, J.

Carol Ennenga rented a house from Ernest Middleton. The house caught fire. Ennenga sued, contending a defective furnace caused the fire. The district court dismissed the petition following trial. We affirm as modified and remand.

I. Background Facts and Proceedings

In late 1984 or early 1985, Ennenga, her husband and four of her nine children moved into a three bedroom house in Waterloo owned by Ernest and Hattie Middleton. The house was located in an auto salvage yard operated by Ennenga. Ennenga initially had an oral lease, paying \$75 per month. Over the years, the rent increased to \$100, \$125, and finally \$150 per month. On February 2, 1996, Ennenga entered into a written lease agreement.

In May 1995, Ernest suffered a stroke and Hattie began managing the couples' rental properties. Ennenga and her family continued to live in the house until October 21, 1996, when the house caught fire. Following the fire, Hattie had the house torn down. Ennenga continued to store salvage articles on the property.

Ennenga sued Ernest, asserting he was negligent in failing to: (1) comply with the Landlord Tenant Act and applicable building and housing codes affecting health and safety; (2) make necessary repairs to the home's liquid petroleum furnace; (3) have the furnace properly inspected to ensure the premises were in a fit and habitable condition; and (4) warn Ennenga of the condition of the furnace. Ernest counterclaimed for past due rent. Following trial, the district court dismissed

Ennenga's petition and entered judgment against her for unpaid rent in the amount of \$4250.

II. Standard of Review

We review this action for errors at law. *Estate of Vasquez v. Hepner*, 564 N.W.2d 426, 429 (Iowa 1997). We are bound by a district court's fact findings if they are supported by substantial evidence. *Id.* "In case of doubt or ambiguity, findings will be construed to uphold rather than defeat the judgment." *Byers v. Contemporary Indus. Midwest, Inc.*, 419 N.W.2d 396, 397 (Iowa 1988). "When a district court in a law action tried to the court denies recovery because a party failed to carry the burden of proof on an issue, we will not interfere on appeal unless we find the party carried its burden of proof as a matter of law." *Id.*

III. Error Preservation

Ennenga pursues a number of tort based concepts, without specifically identifying each theory. The district court did not separately address each theory, but made reference to negligence principles, an implied warranty of habitability, and statutory violations of Iowa Code chapter 562A. On appeal, Ennenga only raised negligence and statutory claims. Therefore, we will not consider the implied warranty of habitability theory. Iowa R. App. 14(a)(3); *Estate of Vasquez*, 564 N.W.2d at 429 (noting implied warranty of habitability is distinct from a negligence claim). In light of our disposition of the negligence claim, we need not address the statutory claim.

IV. Notice

The district court dismissed Ennenga's petition in part because she failed to give Ernest notice of the defective furnace, as required by her lease and the Landlord Tenant Act. Ennenga contends this was error. The undisputed evidence suggests Ernest had actual notice of the furnace defects. However, we need not here decide whether this actual notice obviated the need for formal, written notice, because we choose instead to uphold the trial court's decision on the basis of its proximate cause analysis.

V. Proximate Cause

Questions of negligence and proximate cause are ordinarily given to the factfinder. *Hagen v. DeNooy*, 563 N.W.2d 4, 8 (Iowa App. 1997). "The law does not impose liability for negligence unless the breach of a duty of care is also the actual and legal cause of the injury." *Rieger v. Jacque*, 584 N.W.2d 247, 251 (Iowa 1998). In conducting the inquiry, we look to: (1) whether the harm would not have occurred but for the defendant's negligence and (2) whether the defendant's negligence was a substantial factor in bringing about the harm. *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 567 (Iowa 1997). The substantial factor test is based on the proximity and foreseeability of the harm. *Id.*

Assuming without deciding that Ennenga proved the existence of a duty and breach of that duty, she cannot recover unless she also proved Ernest's breach proximately caused the fire. The district court concluded Ennenga "failed to prove by a preponderance of the evidence that the proximate cause of the fire was the

furnace defect rather than the plaintiff's own negligence in storing flammable materials within inches of the furnace."

The court found that proximate cause turned on the opinions of dueling experts, fireman Stephen Weliver and Waterloo's chief mechanical inspector Brian Baker. Weliver was called to the scene of the fire. He conceded the furnace was malfunctioning but opined that the fire was fueled in the basement by combustible materials assumed to have been stored near the furnace for a long period of time.

Baker conceded that, because the furnace had no cover as required by city code, the furnace could have ignited nearby combustible items in the basement, if the furnace became too hot. However, he rejected this scenario, on the grounds that there were no signs the furnace itself had burned. Baker opined that the rewired furnace and bypass of the thermostat could have caused the ignition of dry wood or building materials above the furnace.

The court chose to adopt Weliver's opinion, reasoning "he was present at the time of the fire and examined the home and contents immediately after the fire was extinguished." The court explained that Baker, in contrast, "saw the furnace 23 months after the fire occurred and had no opportunity to view the house after the fire to determine a cause of the fire."

We conclude these findings were supported by substantial evidence. While the record contains evidence to support a contrary finding, we cannot conclude as a matter of law that Ennenga satisfied her burden of proving proximate cause. Therefore, we affirm dismissal of the petition.

VI. Ernest's Counterclaim for Rent

The district court awarded Ernest damages of \$4250 for delinquent rent. It is undisputed Ennenga could no longer live in the home after the fire in October, 1996. It also is undisputed the rent she was paying at the time of the fire included house and lot rent. After the fire, she used the lot only for storage of salvage vehicles.

The record contains no evidence of the lot rent. Therefore, we remand for proceedings to determine the amount of lot rent and for entry of judgment consistent with that amount. Costs on appeal are assessed to Ennenga.

AFFIRMED AS MODIFIED AND REMANDED.