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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MAPLEHURST OVA TRANSPLANTS, INC., an Iowa Corporation,

Plaintiff-Appellee,

vs.

HARVEY M. OURY,

Defendant-Appellant.

Filed March 31, 1987 239

6-471
85-1853

Appeal from the Iowa District Court for Keokuk County (No. 21469) James D. Jenkins, Judge.

Defendant appeals from judgment for plaintiff in a contract action, asserting that the evidence was insufficient to support an award of damages to plaintiff and that the evidence was sufficient to establish defendant's right to recover upon his counterclaim. **AFFIRMED.**

Ann Fitzgibbons of Scalise, Scism, Sandre & Uhl, Des Moines, for defendant-appellant.

Frederick B. Anderson of LaMarca, Marcucci, Wiggins & Anderson, P.C., Des Moines, for plaintiff-appellee.

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

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PER CURIAM

On January 27, 1984, the appellee, Maplehurst Ova Transplants, Inc., initiated the present action wherein it seeks monies allegedly due from embryo transfer services rendered. Appellant, Harvey M. Oury, followed with an answer and counterclaim which denied Maplehurst's allegations and contended that Maplehurst had breached a contract entered into by the parties. The case proceeded to trial by the court on November 13, 1985. The district court found that Maplehurst was entitled to recover $7,563.85 from Oury. The court further found that Oury had failed to establish his counterclaim and ordered it dismissed. Oury brings this appeal in order to challenge both these determinations.

The principles which guide our review of Oury's claims are well established and often cited. They are summarized in Prestype, Incorporated v. Carr, 248 N.W.2d 111, 113 (Iowa 1976), as follows:

> "On appeal from a law action tried to the court, as here, review in this court is only on errors assigned and the matter is not triable de novo. Under this limited extent of review the findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. If supported by substantial evidence and justified as a matter of law, they are binding on us and the judgment will not be disturbed on appeal.
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> Further, we must construe the evidence in the light most favorable to the trial court's judgment, and this court will not weigh the evidence or pass on the credibility of the witnesses.
>
> However, the rule does not preclude inquiry into the question whether, conceding the truth of a finding of fact, a conclusion of law drawn therefrom is correct, nor does it apply if in arriving at a finding the trial court erred in its ruling on evidence or in other respects upon questions of law which materially affect that decision. . . . [citing authorities]."

(quoting Whewell v. Dobson, 227 N.W.2d 115, 117 (Iowa 1975).

Oury first contends the district court erred in determining that Maplehurst was entitled to judgment on its petition. Oury does not take issue with the district court's finding that an open account existed between himself and Maplehurst. Neither does he quarrel with the amounts Maplehurst claims were expended in providing embryo transfer and related services on several of Oury's cows. Oury claims, however, that Maplehurst agreed to provide, free of cost to him, embryo transfer services on one of the cows as compensation for errors Maplehurst allegedly made during prior dealings with Oury. In addition, Oury claims the charges assessed with respect to the second cow were the unnecessary result of Maplehurst's negligence in not discovering the cow's sterility earlier.

The record discloses that, excluding one witness who testified briefly in rebuttal, all the testimony in this case came from Oury and Dr. Richard A. Carmichael, president of Maplehurst. Carmichael denied that Maplehurst agreed to provide the services to Oury free of charge. While he agreed that Maplehurst "owed two pregnancies" to Oury, Carmichael testified that those pregnancies had been replaced by Maplehurst with no charges assessed to Oury for the embryo transfer services involved. The district court was, of course, free to accept Carmichael's testimony. Hawkeye Specialty Company v. Bendix, 160 N.W.2d 341, 343 (Iowa 1968). The record also includes the billing statement card which was mailed monthly to Oury for the cow at issue. The card details the services rendered and the costs incurred. The billings continued for approximately nine months. We think this evidence fully supports the district court's determination that Oury's contention is "not credible."

As to Oury's allegation that the charges made in connection with the second cow were unnecessary, we believe the evidence adequately supports a contrary determination. At the time Maplehurst received the cow, she was experiencing several health problems. Carmichael testified that Maplehurst attempted to

stabilize her, bring her into heat, and breed her. After failing to successfully complete this cycle, Maplehurst examined her for problems with her reproductive system. Oury does not direct our attention to any evidence which would tend to show that Maplehurst was negligent in not detecting the problem earlier, and our independent research discloses no such evidence. Consequently, we think Oury's assignments of error connected with Maplehurst's claim are without merit.

Oury also contends the district court erred in dismissing his counterclaim. That counterclaim alleged that Maplehurst breached a contract for services entered into by the parties in 1978. We note initially that Oury's claim has undergone a metamorphosis during this appeal so that he now argues, in brief, that the agreement was entered into in 1982. Whereas the contract which Oury pled in the district court dealt with certain embryo transfer services to be received, the agreement Oury now claims existed between the parties concerned itself with Maplehurst's alleged promise to perform separate, and later, services without charging Oury for them. Although at trial Oury alleged the breach occurred when Maplehurst failed to adequately perform certain services on Oury's cows, Oury now contends the breach occurred when Maplehurst billed him for the later services. In essence, the agreement that Oury, on appeal, contends existed is the same agreement he maintains provides him with a defense to Maplehurst's petition. We have discussed that claim above and have found it to be without merit.

Even assuming Oury's original counterclaim to be properly before us, but see Iowa R. App. P. 14(a)(3) ("[f]ailure in [an appellate] brief . . . to argue . . . an issue may be deemed waiver of that issue"), we think the record supports the district court's determination that the claim was not proved. Oury alleged in his counterclaim that Maplehurst breached the 1978 agreement by failing

to insure certain bull semen prior to shipment and by performing transfer services and shipping cattle contrary to methods agreed to. Each of these contentions must fail in light of the fact that Oury presented no evidence, independent of his own testimony, as to the substantive provisions of the alleged agreement and the contractual duties Maplehurst assumed thereunder. To the extent his testimony may have provided such evidence, the district court did not find it credible. It was within its rights to do so. Hawkeye Specialty Company, 160 N.W.2d at 343. Oury additionally claims that Maplehurst breached the alleged agreement by negligently failing to discover a certain cow's barrenness. We have dealt with, and rejected, that issue earlier.

Finding the district court's decision fully supported by the record, we are bound to affirm.

AFFIRMED.