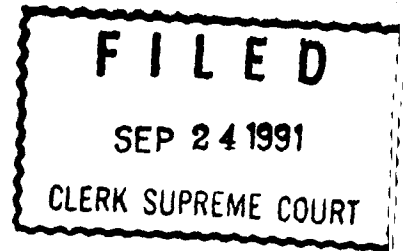


IN THE COURT OF APPEALS OF IOWA

No. 1-215 / 90-1236



KENNETH JEANES,

Appellee,

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vs.

DAVID L. CLINEFELTER and PAMELA S. CLINEFELTER,

Appellants.

Appeal from the Iowa District Court for Decatur County,
Jerrold W. Jordan, Judge.

The Clinefelters appeal from an adverse jury verdict in
favor of Kenneth Jeanes, the builder of their house.

AFFIRMED.

Robert A. Rolfe of Phipps & Rolfe, Lamoni, for
appellants.

Lylea Dodson Critelli and Nick Critelli of Nick
Critelli Associates, P.C., Des Moines, and Scot M.
Halverson, Leon, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

Kenneth Jeanes is a home builder. David and Pamela Clinefelter hired Jeanes in July of 1987 to build a new house for them. Pursuant to the parties' oral agreement, Jeanes commenced construction in late August or early September, 1987. The house was constructed using drawings showing the size of the house and general construction details. The house plans were for a two-story home with a walk-out basement. The two main floors of the home were approximately 2,800 square feet.

Jeanes began construction on the house prior to the parties signing a written contract. After the house was framed, the Clinefelters presented Jeanes with a written contract which he signed. The written contract provided the house was to be completed by January 31, 1989. The contract price was \$87,000. Clinefelters urge this contract limits Jeanes' right to recovery.

The Clinefelters paid a first progress payment of \$29,000. Jeanes worked on the home for several months after January 31, 1989, and the Clinefelters paid Jeanes a second payment of \$29,000.

The parties dispute whether the January 1988 completion date was critical. Each blames the other for delays in construction. On May 3, 1988, the Clinefelters wrote to Jeanes. They advised him they were scheduled to move into the house on May 21. The Clinefelters did move into the house in May, before it was totally completed.

Dissatisfied with Jeanes' completion performance, the Clinefelters decided to hire other contractors to finish the project.

On May 26, 1988, Jeanes filed a mechanic's lien for the sums he calculated were then due and owing in the amount of \$61,391.15. On June 3, 1988, the Clinefelters wrote to Jeanes. They formally advised him they had hired other people to finish the work and they would be deducting sums from their payment.

The Clinefelters maintain as they completed the home, they discovered substantial defects in workmanship. Some of these they could repair, but others were incapable of being repaired at a reasonable cost.

On August 16, 1990, Jeanes set into motion the legal proceedings which culminated in this appeal. Jeanes began by filing a petition to foreclose his mechanic's lien. The Clinefelters counterclaimed against Jeanes. They sought damages in the amount of \$90,000. Jeanes filed a reply and an additional counterclaim. The court file grew rapidly. Ultimately, the district court ruled on September 26, 1989, the pleadings should be re-cast or reformed so they could be submitted intelligently after evidence had been received.

The district court suggested Jeanes could dismiss his mechanic's lien action and recast the pleadings to state any claims arising from this transaction. Jeanes followed the trial court's suggestion. After the Clinefelters'

motions to dismiss were denied, this matter proceeded to trial. The jury ultimately returned a verdict finding for Jeanes in the amount of \$64,935.86 on his claims, and for the Clinefelters in the amount of \$14,328.08 on their counterclaims. Thereafter the Clinefelters filed a motion for new trial citing the excessive nature of the verdict, and the lack of substantial evidence. The district court denied the Clinefelters' motion, allowing the judgment against the Clinefelters in the net amount of \$50,607.78 to remain in effect.

The Clinefelters have appealed. They insist Jeanes should not be paid more than the cost of materials and his own labor in a total amount of \$88,322.74. They claim the jury's award which entitled Jeans to receive the total sum of \$108,607.78 was not supported by any substantial evidence. Clinefelters argue the proper measure of damages in this case should have been measured by comparing the difference in value between what the home would have been worth if it had been built without defects, and the value of the home as it was built. They complain they were denied the opportunity to present this evidence from their expert witness and request a new trial. Clinefelters also believe the trial court abused its discretion in allowing Jeanes to replead his case, because his replead case raised the same issues he voluntarily dismissed in his mechanic's lien foreclosure action. Because the mechanic's lien action had been dismissed with prejudice, the Clinefelters

raise the doctrine of res judicata. They allege the court erred by overruling their motion to dismiss.

This was a law action tried to a jury. Therefore, we review for errors of law. Iowa R. App. P. 4. The jury's findings are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We construe the findings in a law action broadly and liberally. See cf. Grinnell Mut. Reinsurance 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 would accept it as adequate to reach the same findings. Waukon Auto 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. Reinsurance Co., 431 N.W.2d at 785. With these principles in mind, we turn to the issues raised on appeal.

I. Sufficiency of the Evidence.

The Clinefelters argue the jury verdict is excessive and not supported by the evidence. They argue the basement should not have been included in the jury's calculation. There was an additional dispute over the exact amount of finished square footage of the house. The Clinefelters further dispute the jury's method of calculating the award on a cost per square foot basis.

The basement in this house was apparently finished. Thus it becomes a jury question as to whether the basement was to be included or excluded in the final price. Likewise the final amount of finished floor space is a question of fact for the jury. We determine the jury's findings on both these items is supported by substantial evidence. We affirm on these issues.

Turning to the method of calculating damages, we find there is evidence in the record showing square footage is often used in calculating the cost of a house. There is evidence in the record a house similar to the Clinefelters could cost as much as \$42 per square foot. Apparently the jury calculated the cost per square foot at only \$31.07, the average cost of per square foot under the original contract. We determine the jury's method of calculating cost on a square footage basis is supported by substantial evidence. We affirm on this issue.

We dismiss the Clinefelters' argument Jeanes is only entitled the the reasonable value of his services under the

contract. There is evidence this extra square footage was not covered by the original contract. There is also evidence of "extras" requested by the Clinefelters which added significantly to Jeanes' cost of construction. The jury's award is supported by substantial evidence. We affirm on this issue.

II. Expert Witness.

The Clinefelters alleged the trial court erred in excluding testimony from their expert witness. The expert witness would have testified as to the reduced value of the house due to the allegedly poor workmanship and deficient materials. This would have provided an alternative method for valuation of damages.

The trial court excluded this testimony on two grounds. First, it ruled the expert was not qualified to opine as to the cost of repairs, as the witness was a real estate appraiser and not a contractor. Second, the trial court ruled diminution in value was not the correct measure of damages in this case.

In so ruling, the trial court relied on the rationale laid out in the Iowa Supreme Court case of Farrington v. Freeman, 251 Iowa 18, 99 N.W.2d 388 (1959). We recently relied upon Freeman in deciding a case somewhat analogous to the present one. See Moore's Builder and Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 194 (Iowa App. 1987).

Our review of Freeman convinces us that case is controlling.

Under a contract such as between the parties to this action, where substantial performance has been proven by the builder, he is entitled to his contract price less deduction for the value of any defects in performance.

Freeman, 251 Iowa at 23, 99 N.W.2d at 391.

There is no allegation the contract was substantially performed. That the trial court was correct in admitting testimony on damages to conform to the criteria laid out in Freeman. "[W]hen the contractor has substantially complied with his contract he is entitled to recover the contract price with deductions for any defects or incompletions." Moore's Builder, 409 N.W.2d at 194.

The Clinefelters argue the defects went to the heart of the subject matter and were unreasonably expensive to repair. They contend the doctrine of substantial performance should not apply in this case. However, when this matter was submitted to the jury, it awarded only \$14,328.08 for defects and repairs. This finding certainly does not support the contention the defects went to the heart of the subject matter, a house which cost over \$100,000. Nor does our review of the record reveal any reason why the doctrine of substantial performance should not be applied in this case.

We determine the trial court did not abuse its discretion in refusing to qualify the Clinefelters' witness on the issue of cost of repairs. We further determine the

trial court did not abuse its discretion in excluding expert witness testimony on diminution in value on the issue of damages. We affirm on this issue.

III. Repleading of Case.

The Clinefelters complain the trial court abused its discretion in allowing Jeanes to replead his case after his voluntary dismissal of his mechanic's lien with prejudice. In their final assignment of error, they argue the voluntary dismissal of the mechanic's lien was res judicata. We consider both assignments of error together.

We have reviewed the record on this issue. The trial court and the attorneys for both parties engaged in an extensive discussion on this issue. Both the method and the ramifications of the voluntary dismissal were clarified. All parties had full notice of the trial court's intent in allowing the voluntary dismissal.

Jeanes' counsel clearly indicated his intent to proceed as had been discussed. No objections were made to the trial court at the time of this discussion. We have repeatedly held ordinarily, matters not raised in the trial court cannot be effectively asserted for the first time on appeal. See State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974)

The Clinefelters, having acquiesced in the arrangements, may not later come in and charge error. We determine error has not been preserved. We affirm the trial court not this issue.

The trial court is affirmed on all issues.

Costs of this appeal are taxed to the appellants.

AFFIRMED.