IN THE COURT OF APPEALS OF IOWA

No. 3-651 / 93-0405

FILED
AUG 25 1994
CLERK SUPREME COURT

ROBERT L. OLIVER,

Appellee,

vs.

MENARD, INC.,

Appellant.

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

Menards appeals from a judgment entered against them in the amount of $16,388 plus interest and costs. **AFFIRMED.**

David T. Coriden, Eau Clair, Wisconsin, for appellant.

Joseph Barron and Timothy W. Wegman of Peddicord, Wharton, Thune & Spencer, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., Habhab, J., and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

The defendant, Menard, Inc. (Menards) entered into a contract with the plaintiff, Robert Oliver, for the sale of roof trusses. Menards did not have the correct trusses in stock and specially ordered them from the manufacturer. When the trusses arrived, Menards phoned Oliver. Oliver then removed the old roof on his home and came to Menards to pick up the new trusses.

Upon arrival at Menards, Oliver learned the trusses were not the proper specifications. Menards had given an incorrect measurement to the manufacturer when the manufacturer phoned to validate the order. Menards then reordered the trusses. In the interim, Oliver covered the roof of his home with plastic. However, the home incurred rain damage amounting to $27,130. Oliver brought an action against Menards sounding solely in negligence. The matter was tried to the court without a jury.

The trial court determined a cause of action in negligence arose from the contract between the parties and determined Menards was negligent for failing to properly order the trusses and in failing to inspect them upon receipt. It determined Menards' negligence was a proximate cause of the damage to Oliver's home. It also determined Oliver was negligent in failing to ensure the trusses were the proper specification before removing the old roof. The court apportioned sixty percent of the fault to Menards and forty percent to Oliver and entered judgment against

Menards for $16,338. The court found Oliver to be over fifty percent at fault for the damage to personal items he failed to remove from his home.

Menards appeals. They contend that the trial court erred when it applied a negligence theory instead of Article 2 of the Iowa Uniform Commercial Code. They further contend the court erred in finding that the negligence of Menards was a proximate cause of the claimed damage.

This was a law action tried to the court sitting without a jury and hence it is to be reviewed for corrections of errors of law. Iowa Rule of Appellate Procedure 4. Ordinarily, the trial court's findings of fact have the force of a special verdict and are binding upon us if supported by substantial evidence in the light most consistent with the judgment. Deference to the trial court's findings of fact, however, does not extend to its determination of law. R.E.T. Corp. v. Frank Paxton Co., Inc., 329 N.W.2d 416, 418-19 (Iowa 1983). However, in this situation the appellant specifically adopted the findings of fact set forth by the trial court. The appellee made no reference in his brief to the relevant facts and consequently we assume that he also adopted the findings of facts as determined by the trial court. We also note that the abstract does not contain any portions of the trial transcript.

The trial court found the following facts: The plaintiff, Robert L. Oliver, forty-nine years old, is a resident of Ankeny, Iowa. He purchased a home in 1980 and decided to remodel it in 1991. The remodeling called for removing the roof from the story and one-half frame home and converting the home to a full two-story home and putting on a new roof supported by new trusses. Oliver intended to remove the old roof and install the new one himself, with the help of his friend, Kim Campbell.

Oliver went to the retail store in Urbandale, Iowa, operated by the defendant Menard, Inc. Menard, Inc., or Menards, as the stores are more commonly called, operates what is described as a do-it-yourself warehouse discount store. In these stores, hardware and building materials are sold, among other things.

Oliver went to Menards on July 16, 1991, to discuss the materials needed for his project and to obtain an estimate. He spoke with the assistant manager of the building materials department, Bob Petty. Oliver told Petty about his project and obtained an estimate from Petty. In addition to ordinary building materials, the estimate called for thirteen trusses measuring twenty-six feet one inch, and two gabled ends of the same length. Attached to the estimate was a drawing prepared by Oliver of the type of roof he wanted. It shows "tails" at either end of the trusses and, at most, a minimal overhang beyond each load-bearing wall. Oliver told Petty he wanted

twenty-six foot one inch trusses, with a two-foot overhang, which would have made the length of the trusses, along what is referred to as the bottom cord, thirty feet one inch. The twenty six foot one inch measurement he gave Petty was from load-bearing wall to load-bearing wall.

On July 25, 1991, Oliver returned to Menards and a special order contract was written up by manager trainee Mark Karrmann. He wrote the order for thirteen twenty-six foot one inch trusses and two gable ends of the same length. Subsequently, a representative of the company which made the trusses for Menards contacted them to obtain further information concerning this order. As a result of that discussion, the measurement of the trusses was changed in the order to twenty-eight feet one inch, evidently to account for a one-foot overhang on each side. Oliver was not consulted before this change was made and had not ordered a one-foot overhang.

The trusses arrived on August 13, 1991. Bob Brelsford of Menards called Oliver and told him the trusses had arrived. Neither Brelsford nor, as far as the record shows, any other employee of Menards inspected the trusses prior to calling Oliver. Oliver did not tell Brelsford what he planned to do with the information that the trusses had arrived. Oliver, when informed the trusses were in, removed the old roof with the help of Campbell. He then went to Menards on August 14, 1991, to pick up the trusses.

When Oliver arrived at Menards he discovered the trusses were not as he had ordered. According to Petty, the trusses as delivered were twenty-eight feet from end-to-end, which would have allowed an approximate one-foot overhang on either side, not the two-foot overhang Oliver had told Petty he wanted. The trusses also lacked the "tails" at either end. Oliver also said the gabled ends were not received with the trusses; however, the record is disputed in this regard and the evidence was such that the trial court could not make a finding as to whether or not the gable ends were lacking. Consequently, we cannot make a finding either.

Oliver discussed this situation with Petty and the yard manager, Bruce Erickson. Petty and Erickson told Oliver the trusses could be used on Oliver's home and the tails could be added by bolting or nailing the requisite length of lumber onto the end of each truss. Oliver declined this suggestion that he, in his words, "scab on" the missing tails and he insisted that new trusses be obtained which conformed to the original order. Oliver mentioned to Petty that he had already removed the roof on his house. As requested by Oliver, a new special order contract was prepared and sent to the truss company, this time with a diagram clearly showing the desired tails. However, the bottom cord length was still shown as twenty-eight feet one inch. Oliver was told the second order, like the first, would take two to three weeks.

Erickson then wrote on the original order form that the trusses "came in without ordered overhang and will be reordered." This, together with the reorder of the trusses with a bottom cord of twenty-eight feet one inch, suggests a misunderstanding between Erickson and Petty on one hand and Oliver on the other. It can be inferred from the record Erickson thought the overhang was inadequate because of the lack of tails. Oliver's point which he attempted to express to Erickson and Petty was that the trusses were two feet too short because he wanted a two-foot overhang beyond the twenty-six foot one inch distance between the two exterior walls that the trusses were to span. At twenty-eight feet one inch, Oliver had only a one-foot overhang on each side.

Petty had a second conversation with Oliver on August 14, during which he explained again the trusses received on the original order could be conformed by adding the tails. Petty offered to discount the trusses and provide the materials necessary for the modification at no charge. Oliver maintained his insistence that new trusses be ordered.

The second set of trusses arrived on September 16, 1991. After the trusses had been reordered Oliver put polyethylene plastic over his home in an attempt to protect the inside from the elements. Unfortunately, a substantial amount of rain fell in the interim and the plastic did not keep out all of the water, with the result that the

interior of the home suffered substantial water damage. Larry Cairns, President of Ankeny Construction Co., testified the damage was extensive and estimated the costs of the repair at $27,200. In addition, Oliver suffered damage to furniture and other items of personal property inside the residence which he estimated to total approximately $2,625.

The appellant initially contends that the trial court erred as a matter of law in applying tort theories rather than Article 2 of the Iowa Uniform Commercial Code. The test to determine whether a mixed contract shall be covered by the Uniform Commercial Code is not whether the contract is mixed, but whether the predominant factor, that is its thrust or purpose, reasonably stated is a rendition of a service with the goods independently involved in the transaction. Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); Semler v. Knowling, 325 N.W.2d 395, 399 (Iowa 1982); M & W Farm Service Co. v. Callison, 285 N.W.2d 271, 274 (Iowa 1979).

The trial court concluded that the principle purpose of the order was to form a service, that is to order the correct trusses in accordance with the specifications given Menards by Oliver. The trial court concluded that Menards was in the business of selling construction materials to do-it-yourself customers and that they undertook to procure specially made goods that were essential for the construction effort to be undertaken by Oliver. The trial

court found that Menards performed a service in ordering these trusses which included a duty to accurately convey the specification to the maker of the goods and to inspect the finished goods before they were delivered to the purchaser. The trial court noted that the contract in question specifically provided that Menards will order the goods "according to customer specification."

We agree with the conclusions of the trial court. We further note that the service aspect of the contract is further supported by Menards' response to the manufacturer's inquiry concerning the specifications without contacting Oliver. This supports the conclusion that they were providing the expertise in securing the appropriate trusses in accordance with the specifications given them by Oliver.

Menards next contends that the trial court erred in determining the negligence of Menards was a proximate cause of the damage sustained by Oliver. The trial court found that Menards' negligence was not the proximate cause, but was a proximate cause of Oliver's damage. We agree.

The conduct of a party is a proximate cause of damage when it is a substantial factor in producing the damage and when the damage would not have happened except for the conduct. "Substantial" means the party's conduct has such an effect in producing the damage as to lead a reasonable person to regard it as a cause. Bokhoven v. Klinker, 474 N.W.2d 553, 556 (Iowa 1991). A cause is proximate if it is

a substantial factor in bringing about a result. Factual causation also requires a showing that but for the defendant's conduct, the harm or damage would not have occurred. Nachazel v. Miraco Mfg., 432 N.W.2d 158, 161 (Iowa 1988). In negligence cases, it is not necessary to a defendant's liability that the wrong doer shall have foreseen the extent of the harm or the manner in which it occurred, so long as the injuries are the natural, although not the inevitable, result of the wrong. Id. at 160. Where conduct or forces occur after the actor's conduct, however, the actor may be relieved of liability if a court finds that the later occurring event as such as to break the chain of events between the actor's negligence and the plaintiff's injury. Kelly v. Sinclair Oil Corp., 476 N.W.2d 341, 349 (Iowa 1991).

We believe that the error in ordering the trusses compounded by the subsequent error in responding to an inquiry from the truss manufacturer was a substantial factor in producing the damage to Oliver and that such damage was reasonably foreseeable by Menards. We recognize that Menards was not aware that Oliver intended to remove the roof before picking up the trusses, however, Oliver was aware that the trusses were in and assumed they were correct inasmuch as Menards did not tell him that they had not been built in accordance with his specifications.

We agree with the trial court that Oliver's negligence in removing the roof without checking to make sure the

trusses were in accordance with his specifications was a proximate cause of his damage and agree with his proration of the damages.

AFFIRMED.

Habhab, J., concurs; Sackett, P.J., dissents.

SACKETT, P.J.

I dissent. I would reverse and dismiss.