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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed April 27, 1982

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LEO SEMLER,

Plaintiff-Appellee,

vs.

BILL KNOWLING, d/b/a KNOWLING BROS. CONTRACTING CO.,

Defendant-appellant, Cross-petitioner,

vs.

FRANTZ CONSTRUCTION COMPANY, INC.,

Cross-Petition Defendant-appellee.

2-45
2-65975

Appeal from Johnson District Court, Ansel J. Chapman, Judge.

Defendant-contractor appeals from a judgment awarding plaintiff $7165.63 for costs incurred in removing and replacing a malfunctioning sewer line which defendant had installed for plaintiff's business property. REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

R. Scott Barker, Iowa City, for defendant-appellant/cross-petitioner.

Lawrence L. Lynch of Sladek & Lynch, Iowa City, for plaintiff-appellee.

Philip A. Leff of Leff, Leff, Leff, Haupert & Traw, Iowa City, for cross-petition Defendant-appellee.

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

Defendant-contractor appeals from a judgment awarding plaintiff $7165.63 for costs incurred in removing and replacing a malfunctioning sewer line which defendant had installed for plaintiff's business property. We reverse and remand with instructions to dismiss.

Defendant installed a cast iron sewer line connecting plaintiff's commercial building to a city sewer line in 1968. Cast iron pipe was used after it was determined that the sewer line would have to run under a newly-paved city street and the city refused permission to tear up the street to lay a clay tile sewer line. The cost of this initial work was $489.

The cast iron sewer line repeatedly backed up over the next ten years. In 1979 plaintiff hired a different contractor to remove the cast iron pipe and replace it with a new clay tile sewer line at a cost of $5550.80.

The trial court found that the original cast iron line was properly installed with nondefective materials, but for some "unknown" reason it did not work. The court decided that the sewer line carried an implied warranty of fitness of purpose and the risk of nonperformance rested on the defendant contractor. The court also concluded that res ipsa loquitur supported plaintiff's position and that the proper measure of damages included the cost of replacing the original cast iron sewer line with the clay tile line, the cost incurred in cleaning out the old line every time it backed up and damages caused by back-up of the old line.

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

I. Implied Warranty of Fitness of Purpose.

The trial court held that defendant was liable on the theory that the sewer he installed and his installation of the sewer, carried an implied warranty of fitness of purpose. The court placed the risk of nonperformance on defendant without proof of any defect in the sewer materials or in defendant's installation.

The trial court relied on two cases which held that that warranty exists where the sale of goods also involves a construction service. Insurance Company of North America v. Radiant Electric Co., 55 Mich. App. 410, 222 N.W.2d 323 (1974); Kopet v. Klein, 275 Minn. 525, 148 N.W.2d 385 (1967).

If defendant were to be held liable under breach of implied warranty, for the sale of the sewer line, there has to be proof of an act or an omission on his part, or a defect in the product. See C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169 (Iowa 1975); Busker v. Sokolowski, 203 N.W.2d 301 (Iowa 1972); Drager v. Carlson Hybrid Corn Co., Inc., 244 Iowa 78, 56 N.W.2d 18 (1952).

In this case there is no evidence of a defect or an act or omission by defendant. The trial court found no such evidence and the experts and witnesses all testified there was no defect. Under these circumstances, defendant cannot be liable under this theory unless we hold him strictly liable.

II. Res Ipsa Loquitur.

Under the doctrine of res ipsa loquitur, where (1) injury is caused by an agency or instrumentality under the exclusive control of defendant, and (2) the occurrence is such that in the ordinary course of things it would not happen if reasonable care had been used, the happening of the injury permits but does not compel an inference of defendant's negligence. Fosselman v. Waterloo Community School District, 229 N.W.2d 280, 283 (Iowa 1975); Palleson v. Jewell Cooperative Elevator, 219 N.W.2d 8, 13 (Iowa 1974).

The mere happening of an occurrence with resultant injuries does not allow us to infer negligence because that occurrence could happen in the absence of negligence too. Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 583 (Iowa 1973). The question in deciding whether res ipsa loquitur applies is not whether the occurrence and injury simply happened, but rather whether there is evidence to

show the cause, id. at 583, and whether it would not have happened if defendant had used reasonable care. Thompson v. Burke Engineering Sales Co., 252 Iowa 146, 106 N.W.2d 351, 353 (1960).

In the record below, no evidence is presented as to the cause of the sewer problems. The court attributed the problem to an "unknown" cause, and the experts testified that everything with the original cast iron sewer was done correctly. Without proof as to the cause of plaintiff's sewer problem, and thus no foundation upon which to base liability under res ipsa loquitur, the doctrine cannot be used to attach liability to the defendant-contractor.

III. Damages.

The trial court held defendant liable for $7165.63 in damages. Since we find that defendant is not liable on either of the two theories relied upon by the court below, we remand this case to the trial court with instructions to dismiss the cause of action against defendant.

Plaintiff is responsible for costs.

REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.