IN THE COURT OF APPEALS OF IOWA

No. 0-648 / 90-402

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CLERK SUPPEME COURT

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JACQUELINE LEE BAKER,

Appellant/Cross-Appellee,

vs.

JOHN L. CHASE d/b/a AMERICAN PEST CONTROL,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Home purchaser appeals a judgment finding inspector had a duty and was negligent in performing termite inspection but denying damages. Inspector cross-appeals finding of a duty to home purchaser who allegedly was not foreseeable and finding of negligence. **AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**

Arvid D. Oliver, Des Moines, for appellant.

Timothy S. Eckley and Timothy J. Walker of Whitfield, Musgrave & Eddy, Des Moines, for appellee.

Considered en banc.

SCHLEGEL, J.

Plaintiff Jacqueline Baker appeals a judgment entered by the district court sitting without a jury finding defendant John Chase, doing business as American Pest Control, had been negligent in information supplied after an inspection for termites but finding insufficient evidence to prove damages incurred. Chase cross-appeals that portion of the district court's ruling finding that he had a duty to a home purchaser who allegedly was not foreseeable and finding him negligent. We find that Chase had a duty and was negligent and, therefore, affirm the trial court on the cross-appeal. We find that Baker did prove her damages and, therefore, reverse and remand.

(1)

Chase inspected a house for termites on June 25, 1985. Cameron-Brown Mortgage Company requested the inspection be done in accordance with a standard Veterans Administration and United States Department of Housing and Urban Development (VA-HUD) form. The form calls for a limited inspection of readily accessible areas of the structure. Chase returned the form specifying that there was no evidence of infestation of wood-destroying insects. Chase did not know Baker.

The owner sold the house to Baker for $26,600. Baker received a copy of the VA-HUD form from Cameron-Brown at closing in August 1985. Baker had demanded the inspection under her offer to purchase, and she relied on the

inspection results. In April 1986 Baker discovered termites. She testified that part of the roof had been destroyed, the bathroom window casement eaten away, and tunnels made in baseboards, walls, and foundation.

Baker alleged that Chase had been negligent in his inspection and in providing false information. The district court held that Chase had a duty to Baker pursuant to Larsen v. United Federal Savings & Loan Association, 300 N.W.2d 281, 286-87 (Iowa 1981), and Restatement (Second) of Torts section 552 (1977). The court found Chase negligent in his inspection and in providing false information. The court, however, found Baker's evidence lacking and denied recovery. Both parties appeal.

The case was heard in law, and our review is for errors of law. Iowa R. App. P. 4. We are bound by the trial court's findings of fact supported by substantial evidence. Iowa R. App. P. 14(f)(1). We first address issues raised on cross-appeal as they may be dispositive.

(2)

Chase argues that the trial court erred in finding that he had a duty to Baker. Restatement (Second) of Torts section 552, as adopted in Ryan v. Kanne, 170 N.W.2d 395, 403 (Iowa 1969), defines the tort of negligently supplied information:

> (1) One who, in the course of his business, profession or employment, . . . supplies false information for the guidance of others in their business transactions, is subject to liability for

> pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it . . . .

The issue here is whether Chase knew or, "taking into consideration the end and aim of the transaction," Beeck v. Kapalis, 302 N.W.2d 90, 97 (Iowa 1981), actually foresaw that Baker would rely on his information. Pahre v. Auditor of State, 422 N.W.2d 178, 180-81 (Iowa 1988); Beeck, 302 N.W.2d at 97; Restatement (Second) of Torts § 552(2)(a) & comment (h) (1977). Official comment (h) for section 552 is instructive:

> It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. . . . It is sufficient . . . that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated.

We are mindful that the Iowa Supreme Court in Eldred v. McGladrey, Hendrickson & Pullen recently reiterated its concern that persons who provide information "should not be exposed to 'a liability in an indeterminate amount for an

indeterminate time to an indeterminate class.'" 468 N.W.2d 218, 220 (Iowa 1991) (quoting Ultramares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931)); see Beeck, 302 N.W.2d at 97; see also Briggs v. Sterner, 529 F. Supp. 1155, 1177 (S.D. Iowa 1981).

Unlike Eldred, Baker is in a determinate class of persons whom defendant actually foresaw would be a user of the information. Chase was employed by a company engaged in the business of lending money on mortgages based on the soundness of the investment. Chase knew that a borrower of some kind would have access to the information; he said:

> [T]he end user could be someone refinancing his home. It could be someone . . . relocating. It could be for purposes of a life estate or a fee simple estate or they're just going to put their house into a trust and they want it inspected. . . .

The end user could be and was a purchaser. All of these persons were actually foreseen by defendant as the end users. The district court did not err in holding that defendant Chase was under a duty to Baker not to negligently supply false information.

(3)

Chase argues on cross-appeal that the district court erred in finding him negligent. The court clearly found Baker's evidence more credible, discounting the facts Chase urges for reversal. Findings of fact in jury-waived cases have the force of special verdict. Iowa R. App. P. 4.

Baker's expert entomologist testified that the termites were present in sufficient numbers to be discoverable in June 1985. Baker's expert inspectors testified that the damage was so extensive that damage would have been visible in June 1985. Chase's only rejoinder is that signs of termites could conceivably manifest themselves over a matter of days. Relying on this testimony, the court held "that defendant failed to perform a proper inspection."

In an analogous case against an engineering firm, the supreme court held, "[T]he correct standard by which [defendant's] actions are to be measured is that degree of skill, care and learning ordinarily possessed and exercised by members of that profession in good standing in similar circumstances." Schiltz v. Cullen-Schiltz & Assoc., 228 N.W.2d 10, 17 (Iowa 1975). We think this an appropriate standard here. Chase urges the mistaken proposition that because Baker's experts agree that Chase performed the correct actions in his inspection there can be no negligence. The trial court found, we think correctly, that the skill and care used in performing his actions was lacking, and therefore, negligent.

(4)

Baker argues that the trial court erred in refusing to allow damages against Chase. The court held, "In establishing damages, plaintiff is entitled to the cost of repairs proximately cause [sic] by defendant's negligence,

or the difference in value of the property between the home without termites and the home as actually received in June, 1985, whichever is less." Noting that Baker had offered little proof on the amount of repairs, the court allowed no recovery.

Both Chase and the trial court proceed on the faulty basis that this is an action for tortious injury to property. This ignores the theory of the case, which is that Chase's negligent information induced Baker to expend $26,600 on property that is now essentially valueless. Baker's expert testimony supports this theory and provides a definite amount of damages. See Larsen, 300 N.W.2d at 288. The trial court's conclusion rests on a lack of proof of repair costs and ignores plaintiff's expert testimony. We hold that this conclusion is not based upon substantial evidence. We reverse and remand for entry of judgment in the amount of $26,600 for plaintiff Baker.

(5)

We find that Chase owed Baker a duty to perform his inspection with the skill, care, and learning of members of his profession in similar circumstances, and we find that he was negligent. We therefore affirm the district court on both issues raised by cross-appeal. We further find that Baker proved her damages and is entitled on remand to entry of a judgment in the amount of $26,600. Costs are taxed to the defendant.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Oxberger, C.J., and Donielson and Hayden, JJ., concur; Habhab, J., concurs in part and dissents in part; Sackett, J., dissents.

HABHAB, J. (concurring in part and dissenting in part)

I concur with all parts of the majority opinion except that which reverses and remands with direction to the trial court to enter judgment in favor of the plaintiff in the amount of $26,600. Even assuming the trial court erred in not fixing damages, I would go no further than remanding with directions to determine damages. At least if that procedure is followed, the aggrieved party's right to appeal is preserved.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court in all respects.