FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-232 / 89-1079

HOMESTEAD CONDOMINIUM OWNER'S ASSOCIATION, INC., an Iowa Corporation,

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Appellant,

vs.

URBAN DEVELOPMENT CORPORATION, an Iowa Corporation,

Appellee.

Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

Homestead Condominium Owner's Association sued the developer and builder of its condominium complex for breach of an implied warranty of workmanship for defective siding. The district court concluded that Homestead failed to prove its claim and Homestead appeals. **AFFIRMED.**

Thomas P. Schlapkohl, Des Moines, for appellant.

Michael M. Sellers of Dreher, Wilson, Simpson, Jensen, Sellers, Butters, Adams and Kaiser, P.C., Des Moines, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ., but decided by Oxberger, C.J., and Schlegel and Sackett, JJ. Donielson, P.J., takes no part.

SCHLEGEL, J. 332

Plaintiff-appellant Homestead Condominium Owner's Association (Homestead) is a homeowners' association for an eighteen-unit residential condominium complex. Defendant-appellee Urban Development Corporation (Urban) was the developer, builder, and vendor of the Homestead condominiums. The five buildings that composed the project were constructed between 1979 and 1981. Control of the buildings was transferred to the Homestead owners in 1981. Appellant brought this action for breach of implied warranty of workmanship. It assigns as error the trial court's application of the principles of Kirk v. Ridgeway, 373 N.W.2d 491 (Iowa 1985), and certain findings of fact. We affirm.

The trial court found that appellee installed natural-finished Ponderosa pine siding on the Homestead condominiums and that appellee recommended that the siding be restained every four years. In 1983, several residents complained that water was leaking into their units. Later, inspection would show that the siding had problems of "cupping," cracking, shrinking, and color changes. Appellant hired an individual to repair portions of the siding by renailing and caulking on all of the buildings and treating two buildings with preservative. The repairs were not effective. In 1986, a structural engineer recommended that the siding be removed and replaced.

The trial court found that the preservative had been misapplied to two buildings. Uncontroverted evidence showed that appellant had failed to care for the siding on the other buildings as directed.

Homestead sued Urban for breach of an implied warranty of workmanship. Much of the evidence centered on the question of whether appellee's selection of Ponderosa pine and its application of the siding was "workmanlike." Appellant's expert testified that the problems with the siding were caused by the shrinkage of the wood and that this was the result of a high moisture content. Appellant's expert also testified that Urban should have used a different type of nail to secure the siding and that Ponderosa pine was not a desirable material for Iowa's climate. Appellee's expert testified that, had it been properly treated and cared for, the siding would have been adequate. The trial court, which, by agreement of the parties, had viewed the siding, found appellee's expert more credible, particularly noting his testimony that siding that was generally unexposed to the elements had remained in good condition while exposed portions had not.

The Iowa Supreme Court recognized an action for breach of an implied warranty of workmanship in the sale of real estate in Kirk v. Ridgeway, 373 N.W.2d 491 (Iowa 1985). In Kirk, the court set out five specific elements for which we are to look in such cases:

> (1) That the house was constructed to be occupied by the warrantee as a home;

> (2) that the house was purchased from a builder-vendor, who had constructed it for the purpose of the sale;
> (3) that when sold, the house was not reasonably fit for its intended purpose or had not been constructed in a good and workmanlike manner;
> (4) that, at the time of the purchase, the buyer was unaware of the defect and had no reasonable means of discovering it; and
> (5) that by reason of the defective condition the buyer suffered damages.

Id. at 496 (citing Sims v. Lewis, 374 So. 2d 298, 303 (Ala. 1979); Theis v. Heuer, 264 Ind. 1, 7, 280 N.E.2d 300, 303 (1972)). The trial court first concluded that appellant failed to meet its burden of establishing any of the last three elements of the Kirk test by a preponderance of evidence. The trial court then stated:

> No evidence was offered demonstrating that the selection of the particular wood product used for the siding was in violation of any accepted construction industry standards or any other restrictions or requirements applicable to the project. [Appellant's] expert merely testified that he personally would not choose such a material. Nor is there sufficient evidence for the Court to find that the application of the siding failed to conform to accepted industry standards . . . .

Appellant contends that the trial court misapplied the principles of Kirk and that it erred in requiring appellant to prove a breach of a specific construction industry standard. Appellant argues it need only show that quality and fitness were not reasonable.

Appellant also assigns as error the trial court's conclusion that appellant failed to maintain the siding properly is contrary to the law and the evidence.

Homestead asserts that if this conclusion is a comparison of fault, it is improper because the court failed to identify the fault and to make percentage allocations of fault as required by Iowa Code chapter 668. Additionally, it argues, the conclusion is not supported by substantial evidence.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. When, as here, a law action is tried to the court, we are bound by the trial court's findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1); Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978). The trial court's findings of fact "have the effect of a special verdict and are equivalent to a jury verdict." Carson, 263 N.W.2d at 705. "[W]e must construe the evidence in the light most favorable to the trial court's judgment, whether contradicted or not, and this court will not pass on the credibility of the witnesses." Id. We are not, however, bound by the trial court's determinations of law. Id. at 706.

We hold that the trial court did not err in finding that appellant failed to maintain the siding properly. Construing the evidence in the light most favorable to the trial court's judgment, id., we believe there is ample evidence of record to support the trial court's finding. This case involved a large number of exhibits and extensive testimony from numerous witnesses, including experts. The trial court was well within it authority as a fact-finder

to evaluate such evidence and to choose which it believed to be more credible.

Appellant's contention that the trial court's conclusions are contrary to law insofar as they assign fault without complying with chapter 668 is a little more troublesome. We believe that appellant has misperceived the issue. The question it poses to us is whether the trial court properly may draw an inference from the evidence it believes shows that appellant caused the problem complained of to decide the ultimate issue of whether appellee breached the warranty of workmanship. One authority states:

> Inferences drawn from specific facts in establishing ultimate facts may for the purpose of appellate review be treated like conclusions of law . . . . However, if the appellate court finds support in the evidence for the finding of ultimate facts by the court below, this ends the inquiry on appeal as to whether those ultimate findings have been properly made . . . .

5 Am. Jur. 2d Appeal and Error § 842 (1962); accord 5A C.J.S. Appeal and Error § 1656(8) (1958) (noting also that appellate court's function is not to determine whether "it would have drawn the same conclusion . . . but simply to ascertain whether or not the conclusions . . . are so illogically drawn as to be wholly unjustifiable"); see Davis v. Knight, 239 Iowa 1338, 1350, 35 N.W.2d 23, 25 (1948); Home Ins. Co. v. Fidelity-Phenix Fire Ins. Co., 225 Iowa 36, 47-48, 279 N.W. 425, 432 (1938); see also Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978).

We note that throughout the case, each party contended that the true cause for the problems associated with the siding were attributable to the other. Each party also sought to show that it had not created the problem by some act or omission. Specifically, appellant contended that appellee had breached the implied warranty, and appellee sought to show that it had not. At the same time, appellee contended that appellant had failed to maintain the siding, and appellant sought to show that it had.

It is not error for the trial court, in its evaluative processes as a fact-finder, to attempt to identify the underlying reason for the existence of the problem complained of. Indeed, it would be remiss if it failed to do so. The very essence of this case--the proof at which most of the evidence was directed--was the cause of the cupping, cracking, and shrinking of the siding. In determining the ultimate fact of whether appellee caused the leaks by selecting poor materials or by inadequate application, the trial court was obligated to draw a conclusion about whom it believed was responsible. To reach its conclusion, the court had to draw inferences from the most credible evidence it had before it. Here, it appears to have inferred from the facts before it that problems with the siding were more likely caused by a failure to maintain the siding and, therefore, that appellee had not breached its implied warranty.

Thus, finding that the inference was properly made, we turn to whether it was supported by the evidence. As we have already pointed out, we believe that there was more than adequate evidence in the record upon which the trial court could base its conclusion that appellee had not committed a breach of implied warranty. Based on substantial evidence detailed in extensive findings of fact, the trial court concluded that the evidence simply was insufficient to show that the cause of the various problems was attributable to appellee. We agree and believe that the inquiry should end here.

Finally, we are unconvinced that the trial court misapplied Kirk or that it ingrafted a new standard not contemplated by the supreme court in Kirk. We agree with appellee's suggestion that the trial court weighed the absence of proof of construction standards along with other relevant evidence. Again, we believe that appellant has misperceived the issue. The question here is whether the trial court properly drew an inference from the evidence, or lack thereof, that the siding problem, the ultimate issue, was a result of a failure to construct "in a good and workmanlike manner."

Again, we treat the trial court's finding as though it were a conclusion of law, looking for substantial evidence to support the inference drawn and a logical conclusion therefrom, but not seeking to determine whether we necessarily would come to the same conclusion. See 5 Am.

Jur. 2d Appeal and Error § 842 (1962); 5A C.J.S. Appeal and Error § 1656(8) (1958); see also Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978); Davis v. Knight, 239 Iowa 1338, 1350, 35 N.W.2d 23, 25 (1948); Home Ins. Co. v. Fidelity-Phenix Fire Ins. Co., 225 Iowa 36, 47-48, 279 N.W. 425, 432 (1938).

As we have already noted, we find substantial evidence of record to support the trial court's conclusions. In determining whether the siding problems were caused by latent defects for which appellee should be held liable and given conflicting expert testimony, it was not illogical for the trial court to consider whether the siding met construction standards. In so doing, we do not believe the trial court established an additional test that eviscerates the Kirk elements. Rather, we believe the trial court properly considered this evidence as one of many factors in determining whether the materials or workmanship were reasonable. Accordingly, we hold that the trial court properly concluded that appellant had failed to present adequate evidence to carry its burden of proof. For the reasons set out in this opinion we affirm the trial court.

AFFIRMED.