IN THE COURT OF APPEALS OF IOWA

No. 8-256 / 07-1643
Filed June 25, 2008

JOSEPH WENGER AND
LINDA M. WENGER,
Plaintiffs-Appellees,

vs.

CROOKED CREEK SHOOTING PRESERVE,
P & A FARMS, LTD., ANTHONY SCHWENDINGER,
AND KATHLEEN SCHWENDINGER,
Defendants-Appellants.

Appeal from the Iowa District Court for Washington County, James Q. Blomgren, Judge.

Defendants appeal the district court decision denying their counterclaim against plaintiffs for damages based on trespass. **AFFIRMED.**

James W. Thornton of Thornton & Coy Law Office, P.L.C., Ankeny, for appellants.

Douglas L. Tindal of Tindal & Kitchen, P.L.C., Washington, for appellees.

Considered by Huitink, P.J., and Zimmer, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.

I. Background Facts & Proceedings

In 2002, Wenger Construction performed some work for Anthony and Kathleen Schwendinger to help construct wetlands on their property. The Schwendinger property is adjacent to property owned by David and Deborah Simmering. While the construction project was proceeding, David Simmering asked Aaron Wenger to dig a hole where there was a spring, so his cattle would have a watering hole.[1] Aaron Wenger testified he dug a hole about three feet deep and five feet wide at a location indicated by David Simmering. The Simmerings paid twenty-five dollars to Wenger Construction for the work.

In 2004, Joseph and Linda Wenger, and Aaron Wenger entered into a lease agreement with P & A Farms, Ltd., doing business as Crooked Creek Shooting Preserve (Crooked Creek). On January 9, 2006, Joseph and Linda Wenger filed suit against Crooked Creek and the Schwendingers claiming the lease was voidable, and asked the court to cancel the lease.

Defendants filed a counterclaim, alleging Wengers "caused damage upon Defendants' real estate by excavating and digging holes and performing bulldozing which was not authorized by Defendants." Defendants claimed the hole dug by Aaron Wenger was actually on the Schwendingers' property. Defendants presented evidence to show they spent about $2838 on consulting work to determine how the hole could be fixed, and $11,050 having the hole refilled with a sealant so water could not seep out.

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[1] There was testimony that the Schwendinger construction project blocked the Simmerings' access to a creek, and the Simmerings needed a new means to water their cattle.

Testimony at the trial varied as to how big the hole had been before it was filled in. David Simmering testified he guessed it was around six to seven feet deep, and had quickly filled in with silt. John Townsend, who fixed the hole, testified he dug down about twelve feet before he hit some resistance, and he assumed that he was then down to original material. As noted above, Aaron Wenger testified the hole he dug was about three feet deep and five feet wide.

There was also differing testimony about whether the hole was on the Schwendingers' property or on the Simmerings' property. Michael Barker, of MMS Consulting, testified his company conducted a survey and the hole was on the Schwendingers' property. David Simmering testified that based on a fence that had been in place at least forty years, he believed the hole was on his property. Deborah Simmering, who had experience in real estate, testified the hole was on the Simmering side of the fence line.

The district court entered written findings of fact and conclusions of law. The court determined there had been a frustration of purpose concerning the lease, and declared the lease null and void. The defendants originally included in their counterclaim an assertion that the plaintiffs' actions caused the defendants' wetlands to dry up. During the hearing, Anthony Schwendinger testified they were no longer seeking damages on this ground. The district court addressed the issue, however, stating defendants had not obtained a study to show "if the hole caused water to seep from the wetlands." The court found, "Regarding the counterclaim from Schwendingers, there has been no substantial evidence they have sustained any injuries or loss as a result of the actions of the

Wengers." Defendants appealed the district court decision denying their counterclaim.

II. Standard of Review

The parties disagree as to whether this case was tried at equity or at law. The Wengers' action was filed in equity, and the counterclaim was filed under the same equity case number. The counterclaim raised a tort claim, however, which normally would be tried at law. During the hearing the district court ruled on objections.

On appeal, we review a case in the same manner it was tried in district court. *Stanley v. Fitzgerald*, 580 N.W.2d 742, 744 (Iowa 1998). "Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections." *Ernst v. Johnson County*, 522 N.W.2d 599, 602 (Iowa 1994). We determine this case was tried at law. When a case is tried at law, we review for the corrections of errors at law. *See Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 690 (Iowa 2005).

III. Merits

Defendants claim the district court should have awarded them damages based on the tort of trespass. They claim they were damaged by the hole dug on their property. Defendants state they spent $13,894 to repair the hole, and assert they are entitled to damages of this amount.

The district court's decision does not make clear the court's reasons for denying defendants' counterclaim. The court did not make any factual findings

regarding the claim of trespass. The court did not make any findings regarding whether the hole had been dug on the Simmerings' property or the Schwendingers' property. It is not even clear if the court's ruling refers to the defendants' claims for the tort of trespass, or whether the court's ruling refers only to the abandoned cause of action for damage to the wetlands. The court discussed the claim for damage to the wetlands, but not the claim of trespass.

In order to preserve error, a party seeking to appeal an issue presented to, but not decided by, the district court, must call the court's attention to the issue. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). The record must show the court was aware of the claim or issue, and decided it. *Id.* A party must file a post-trial motion, such as a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), to draw the court's attention to its failure to rule on an issue. *Id.* at 539.

Defendants did not file any post-trial motions in this case. We conclude defendants have failed to preserve error because they did not obtain a ruling by the district court on the claim of trespass.

We affirm the decision of the district court.

AFFIRMED.