IN THE COURT OF APPEALS OF IOWA

No. 9-545 / 08-1874
Filed August 19, 2009

JEROME M. SIMON d/b/a
J.M. SIMON CONSTRUCTION CO.,
Plaintiff-Appellant,

vs.

RITCHIE AVENARIUS,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Margaret L. Lingreen, Judge.

Jerome Simon appeals from judgment entered in this contract action. **AFFIRMED.**

David L. Hammer, Angela C. Simon, and Susan M. Hess of Hammer, Simon & Jensen, Dubuque, for appellant.

Ritchie Avenarius, Dubuque, appellee pro se.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

Jerome Simon appeals from the judgment entered in this contract action following a bench trial. Because we conclude the district court committed no error of law and its factual findings are supported by substantial evidence, we affirm the judgment below.

I. Background Facts and Proceedings.

Ritchie Avenarius owns an undeveloped, eighty-five-acre parcel of real estate in Dubuque County that he uses for recreational purposes. The parcel has a creek running through it. Although the terrain is generally hilly, the area of the creek is flat, with hillsides on both sides of the creek. Avenarius was interested in constructing a pond on the property.

Jerome Simon d/b/a J.M. Simon Construction Company (Simon) is engaged in the business of earth moving. Simon and Avenarius discussed constructing a pond on Avenarius's property. Simon agreed to dig the pond for $10,000. They agreed that Avenarius would have two years to pay for the pond.

Simon began construction of the pond in December 2002 and completed the project in early January 2003. The pond was approximately 150 to 175 feet wide and 15 feet deep. Simon and Avenarius also agreed that Simon would install pipes at three separate locations in the roadway going to the pond for drainage purposes. The cost of installing the pipes was $250. In January 2003 Simon billed Avenarius the sum of $10,250 for the pond and pipes. Of that bill, Avenarius subsequently paid $2000.

While the pond was being constructed, Avenarius told Simon he had an opportunity to sell black dirt to another entity. Simon informed Avenarius that

there would not be enough black dirt available from where the pond was being excavated. According to Avenarius, the two met at the parcel in December 2002 to identify areas where black dirt could be excavated for sale. An area north of the pond was identified. Simon and Avenarius agreed that Simon would strip dirt from the area north of the pond and this site would become a second pond. Simon agreed to strip the dirt for eighty-five cents per yard. Simon would be paid after Avenarius sold the dirt.

In December 2003 the Iowa Department of Natural Resources stopped all excavation work on the property. Simon billed Avenarius for the excavation work done to that point. The bill was $18,000 for 21,000 cubic yards of dirt excavated. According to Avenarius, the amount of the bill surprised him, and he met with Simon on the property. Avenarius claims he was "shocked" and "outraged" to learn that most of the dirt, or approximately 16,000 cubic yards, had actually been removed from the southwest area of the property, away from the two ponds. Avenarius testified that Simon "never had permission to go back there and dig that or excavate that area."

According to Avenarius, he and a friend returned about 10,000 cubic yards of the black dirt that had been removed from the southwest area. They had to spend about 300 person-hours doing this restoration work. The friend did not charge Avenarius for his assistance. Avenarius also sold to third parties about 6000 cubic yards of the excavated dirt from the southwest area, receiving about $13,000. Any remaining dirt from that area is still in piles today.

Meanwhile, in 2003, a problem developed with the original pond not retaining water. Avenarius discussed the leak with Simon, who suggested using

bentonite (a clay-like substance that absorbs water) to stop the leak. Avenarius purchased and dumped five to six bags of bentonite where he believed the leakage was occurring. The pond continued to leak, and Avenarius again contacted Simon. Simon offered to fix the leak, but according to Avenarius, he made it clear that he would charge Avenarius for doing so. Later, the parties had an argument, and Avenarius asked Simon to leave the property.

In 2005 Avenarius determined the location of the leak in the pond. He poured an additional fifteen bags of bentonite into the pond and expended approximately twenty hours of his own labor with a backhoe to correct the problem.

On November 29, 2007, Simon filed this action alleging claims for breach of contract, unjust enrichment, and quantum meruit. Avenarius answered, asserting several defenses including defective workmanship and excavation without consent. Avenarius also counterclaimed for damage to his property caused by the excavation on the southwest portion of the parcel that occurred without his consent.

The matter proceeded to trial before the court. In its judgment order, the district court found the parties did have oral agreements for Simon to construct the first pond at the cost of $10,000, to install pipes under the roadway at a cost of $250, and to excavate the site north of the pond at a cost of eighty-five cents per cubic yard. The court found 5000 cubic yards of dirt were excavated from this northern site for a total cost to Avenarius of $4250. The court concluded the parties did not contract for any of the excavation that occurred on the southwest portion of the parcel. With respect to the first pond, the court concluded Simon

was entitled to recover the contract price for the first pond ($10,000), plus the piping expense ($250), less the repair costs to correct the pond's failure to hold water ($1800).[1] The court further concluded Simon was entitled to recover the contract price of $4250 for the second pond. The court credited Avenarius $2000 for monies previously paid to Simon. Thus, the district court found Simon was entitled to recover $10,700 on his petition ($10,000 plus $250 plus $4250 minus $1800 minus $2000).

On Avenarius's counterclaim, the court concluded Simon committed a trespass upon the southwest area of Avenarius's property. The court determined the cost to restore the property would be $13,600 (returning 16,000 cubic yards of excavated soil at eighty-five cents per yard). Because Avenarius had received $13,000 from the sale of dirt from this area, the court offset the dirt sales against the cost of restoration and concluded Simon owed Avenarius $600. Judgment was entered in favor of Simon for $10,700 and in favor of Avenarius for $600. Simon appeals.

II. Scope and Standard of Review.

Our scope of review is determined by how the case was tried in the district court. Simon claims our review is de novo. He asserts this case was tried in equity, but also asserts review is de novo on the theory that unjust enrichment is rooted solely in equitable principles. *See Iowa Waste Sys., Inc. v. Buchanan Co.*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000).

[1] Simon testified that rental of a backhoe costs eighty dollars per hour. Avenarius testified he spent twenty hours with a backhoe repairing the pond. In addition, Avenarius poured in approximately twenty bags of bentonite, which cost ten dollars per bag.

The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. *Harding v. Willie,* 458 N.W.2d 612, 613 (Iowa Ct. App.1990) (citing *Mosebach v. Blythe,* 282 N.W.2d 755, 758 (Iowa Ct. App.1979)). Generally, an action on a contract is treated as one at law. *Mosebach,* 282 N.W.2d at 758. If both legal and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue. *Id.*

This claim was filed as a law action for breach of contract, and primarily sought damages for the breach. In the alternative, Simon sought equitable relief. Thus, the essential character of his cause of action was at law. *See Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 448 (Iowa Ct. App. 1992) (finding action primarily brought on a breach of contract claim was reviewed for errors at law).

In addition, where there is uncertainty about the nature of a case, we often look to whether the trial court ruled on evidentiary objections. *Citizens Sav. Bank v. Sac City State Bank,* 315 N.W.2d 20, 24 (Iowa 1982). When a trial court does rule on objections, it is normally the hallmark of a law trial, not an equitable proceeding. *Sille v. Shaffer,* 297 N.W.2d 379, 381-82 (Iowa 1980). Here, the district court ruled on objections. The sustaining of some evidentiary objections precluded the admission of the evidence subject to the objection, and the record is thus not complete for a de novo review. *See Leo v. Leo,* 213 N.W.2d 495, 497-98 (Iowa 1973) (explaining that in equity proceedings all evidence offered

must be received, any objections will be noted and the answers thereafter given will be subject to the objection).[2]

We therefore conclude this action was tried at law and our review is for the correction of errors at law. Iowa R. App. P. 6.4. Findings of fact in a law action are binding upon an appellate court if they are supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*). Evidence is substantial if a reasonable person would accept it as adequate. *Chrysler Fin. Co. v. Bergstrom,* 703 N.W.2d 415, 418 (Iowa 2005). In determining whether substantial evidence exists, we view the evidence in the light most favorable to the district court's judgment. *Id.* We review evidentiary issues for an abuse of discretion. *McElroy v. State,* 637 N.W.2d 488, 493 (Iowa 2001).

III. Discussion.

On appeal Simon raises a series of arguments. He contends the district court erred: (1) in deducting $1800 from his recovery for the first pond because he was willing to fix the leak himself at no cost; (2) in excluding evidence of his "habit" of only doing excavation work as requested; (3) in not finding there was a contract to excavate dirt in the southwest area of the property; (4) in failing to award him damages in *quantum meruit* for the southwest area even assuming there was no contract; and (5) in making a damage award to Avenarius on his counterclaim that resulted in his being unjustly enriched.[3]

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[2] We note, too, that the district court entered a "judgment order," not a decree. "A 'decree' is generally considered a final order of an equity court." *Citizens Sav. Bank,* 315 N.W.2d at 24.

[3] Avenarius has failed to assist this court by filing an appellee's brief. Thus, we will not go beyond the ruling of the trial court in searching for a theory upon which to affirm its decision. *See Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 153 (Iowa 1979).

A. Deducting the Costs of Fixing the Leak in the First Pond.

Simon argues it was error for the court to reduce his award for the construction of the first pond by $1800 based on Avenarius's cost to repair the leak. Simon does not dispute that he bore the responsibility to correct the leak. However, he testified he would have fixed the problem for no charge and Avenarius refused to allow him to do so. Yet, Avenarius testified to the contrary—i.e., that Simon would not fix the problem unless Avenarius agreed to pay him. Thus, the record contains substantial support for the court's finding. We therefore reject Simon's first argument.[4]

B. Exclusion of "Habit" Evidence.

Simon argues that the district court erred in refusing to consider evidence of his "habit" of excavating only where instructed. The district court concluded the evidence, taken subject to Avenarius's objection, was inadmissible character evidence or, in the alternative, irrelevant to the question of whether there had been a meeting of the minds resulting in a contract for the excavation of the southwest area of Avenarius's property.

Simon argues that the evidence should have been admitted as "habit" evidence. *See* Iowa R. Evid. 5.406 ("Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice."). The degree of specificity distinguishes habit from character evidence. *See id*. cmt. (1983); *see also*

[4] Simon notes that he sent various bills to Avenarius for the work he had performed (including both the first pond and the dirt excavation) and Avenarius never objected to them or claimed he was entitled to any deduction therefrom. We agree these facts support Simon, but there remains substantial evidence in Avenarius's testimony to support the trial court's finding.

Gamerdinger v. Schaefer, 603 N.W.2d 590, 594 (Iowa 1999) ("A habit is a person's regular practice of responding to a particular kind of situation with a specific kind of conduct. Evidence of habit that comes within this definition has greater probative value than does evidence of general traits of character." (citation omitted)). We are inclined to agree with the district court that the proposed evidence as to Simon's asserted general business practice was character evidence, which is not ordinarily admissible in a civil action. *See* Iowa R. Evid. 5.404(*a*) ("Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except" in situations not applicable here); *accord Koonts v. Farmers Mut. Ins. Ass'n*, 235 Iowa 87, 94, 16 N.W.2d 20, 24 (1944).

Even if the evidence were not deemed "character" evidence, we would still question its admissibility. In effect, Simon wants to prove he did what he was told here because he did what he was told on other jobs. If this kind of evidence were determined to be generally admissible, construction litigation would become highly protracted, as parties would present evidence regarding various construction projects other than the one actually before the court.

In any event, the trial court has wide discretion in ruling on the admissibility of evidence. Only where there has been a clear and prejudicial abuse of discretion will we disturb the court's rulings. *See Blakely v. Bates*, 394 N.W.2d 320, 323-24 (Iowa 1986) (noting broad discretion granted to trial court with regard to admission of character evidence and emphasizing "that discretion in this matter must be exercised with special care and circumspection so that

time is not unduly wasted with opinion and reputation testimony concerning character"). We find no such clear and prejudicial abuse of discretion.

C. Failure to Find a Contract with Respect to the Removal of Dirt from the Southwest Area.

Simon disputes the district court's finding that the parties did not have a contract to excavate the southwest portion of Avenarius's land. Simon testified that Avenarius was on site during that excavation and was aware of what was going on, thereby establishing at least an implied-in-fact contract, if not an express contract. In *Iowa Waste Systems*, 617 N.W.2d at 29, this court noted the difference between an express contract and an implied-in-fact contract. With the latter, the manifestation of mutual assent may be inferred from conduct or silence, rather than from words. *Id*.; *see also* Restatement (Second) of Contracts §§ 19(1) & 22(2), 55, 66 (1981) (noting that a manifestation of assent may be made by acts or by failure to act, and that it may be made "even though neither offer nor acceptance can be identified and even though the moment of [contract] formation cannot be determined").

It is true Simon's testimony might support a finding of an implied-in-fact contract. However, Avenarius testified he did not consent to the excavation in that southwest portion, nor did he even know it was occurring. Moreover, according to his testimony, Avenarius expended considerable hours attempting to replace dirt Simon had excavated from the southwest site, which would seemingly undermine a claim that he had desired that excavation in the first instance. We conclude the finding that the parties did not come to an agreement—either express or implied—as to the southwest excavation is a

reasonable inference from Avenarius's testimony. Accordingly, we affirm the district court on this point as well.

D. Failure to Award *Quantum Meruit* Damages for the Southwest Area.

Simon next argues that even in the absence of an actual contract, he should have been awarded *quantum meruit* damages for the excavation work he performed in the southwest area of the parcel. *Quantum meruit*, as the term is used here by Simon, involves the next step down the continuum from express contract to non-contract theories of recovery.[5] Simon claims, in other words, that even if there was no contract, it would be unjust for Avenarius to retain the benefits of his excavation work without compensating him for it.

The theory of *quantum meruit*, when it is used to refer to a quasi-contractual theory of recovery, is premised on the idea that it is unfair to allow a person to benefit from another's services when the other expected compensation. *State Public Defender v. Iowa Dist. Court*, 731 N.W.2d 680, 684 (Iowa 2007). The district court did not expressly rule on Simon's *quantum meruit* claim, but impliedly rejected it in concluding Simon trespassed upon Avenarius's property, which resulted in damages to Avenarius. We believe that decision is supported by substantial evidence. A reasonable factfinder could determine the excavation of dirt from the southwest area was not, on the whole, a benefit to

[5] In *Iowa Waste Systems*, we characterized *quantum meruit* as "a particular subclass of implied-in-fact contracts," while noting that the term is "antiquated" and "breeds confusion." *Iowa Waste Systems*, 617 N.W.2d at 29 & n.4. Here, perhaps illustrating that confusion, Simon uses the term in a different way than we used it in *Iowa Waste Systems*. Thus, Simon employs *quantum meruit* terminology to refer to implied-in-law contracts or quasi-contracts that do not involve any manifestation of mutual assent and thus cannot be considered true contracts. Simon, in other words, uses *quantum meruit* as a synonym for what we described as the "unjust enrichment" theory of recovery in *Iowa Waste Systems*.

Avenarius, as evidenced by Avenarius's efforts to return much of the dirt to that site.

E. Asserted Unjust Enrichment of Avenarius Via Trespass Ruling.

Finally, Simon contends the district court's judgment order with respect to the finding of trespass "unjustly enriches" Avenarius. In effect, Simon appears to be making a damages argument, i.e., that the trespass award has resulted in a windfall to Avenarius.

The gist of a claim for trespass on land is the wrongful interference with one's possessory rights in property. *Ryan v. City of Emmetsburg,* 232 Iowa 600, 603, 4 N.W.2d 435, 438 (1942). "One is subject to liability to another for trespass irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . remains on the land." *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 301 (1994) (citation omitted), *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004). The general rule is that the measure of damages in trespass actions is such sum as will compensate the person injured for the loss sustained. 87 C.J.S. *Trespass* § 140, at 773 (2000); *see also Bangert v. Osceola Co.*, 456 N.W.2d 183, 190 (Iowa 1990) (noting that proper measure of damages for trespass would "place injured party in as favorable a position as though no wrong had been committed"); *Bethards v. Shivvers, Inc.* 355 N.W.2d 39, 45 (Iowa 1984) (noting a plaintiff in a trespass case may be entitled to both actual and punitive damages). The trial court concluded the proper measure of damages would be the cost of restoration, which it calculated to be $13,600 (the cost to return the excavated soil—16,000 cubic yards—to its former location using Simon's fee of eighty-five

cents per cubic yard). However, the court also concluded that Avenarius voluntarily accepted the proceeds from the sale of some of the excavated dirt ($13,000) and credited Simon with this amount. See 87 C.J.S. *Trespass* § 115, at 752 (noting a defendant in a trespass action may offer evidence in mitigation of damages). We find no error.

Avenarius did testify that he and a friend had returned approximately 10,000 of the 16,000 cubic yards of dirt at no cost to Avenarius other than his own time.[6] Thus, an argument might be made that it would be inappropriate to charge Simon for damages that have been rectified. However, Simon does not challenge the award on this ground. Simon's argument, rather, is that some dirt still remains available to be sold. It is unclear how much dirt is left and how much, if any, will be sold by Avenarius. Simon bore the burden of proof on this offset or mitigation defense. *See F.S. Credit Corp. v. Shear Elevator, Inc*., 377 N.W.2d 227, 233 (Iowa 1985). Taking all the facts and circumstances into account, we believe the $600 net award to Avenarius on his trespass counterclaim is supported by the evidence.

IV. Conclusion.

The district court committed no error of law, and its factual findings are supported by substantial evidence. We therefore affirm the judgment entered.

AFFIRMED.

[6] The trial court found Avenarius and a friend had restored "some" dirt, but did not determine how much had been restored.