

NO. A05-1837

State of Minnesota
In Court of Appeals

James J. Kellogg and Tari L. Kellogg,
Plaintiffs/ Respondents,

vs.

William B. Woods,
*Defendant and Third-Party Plaintiff
/ Appellant,*

vs.

Wayne Anderson, d/b/a Mariway Land Consultants,
Third-Party Defendant/ Respondent.

RESPONDENT ANDERSON'S BRIEF

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STATEMENT OF ISSUES

I. DID RESPONDENTS KELLOGGS MEET THEIR BURDEN OF PROVING THAT THE TANK WAS DEFECTIVE?

The trial court held: In the affirmative, making a factual finding that the tank was defective at the time the property changed hands.

II. IS RESPONDENT ANDERSON REQUIRED TO INDEMNIFY APPELLANT WOODS FOR WOODS' LIABILITY TO RESPONDENT KELLOGGS?

The trial court held: In the negative, making factual findings (a) that Woods knew or should have known of a defect in this system, regardless of Anderson not finding the defect; and (b) that Anderson's alleged negligent inspection did not cause Woods to suffer any damages.

STATEMENT OF THE CASE

Respondent Anderson will defer to the "Statement of the Case" submitted by Appellant Woods and by Respondent Kelloggs.

STATEMENT OF THE FACTS

Respondent Wayne Anderson owns Mariway Land Consultants. (T.131). He does septic inspections, septic designs, on sight analyses, soil borings, soil analyses, water testing, and survey work. (T.131 – T.132). Anderson is a licensed D-1, which is the highest ranking that Minnesota septic system inspectors can have. (T.156).

Anderson arrived at the property in question to inspect the septic system on 3/28/01. (Exhibit 2). When he checked the holding tank, he saw that it had not been pumped. He measured fluid in the tank, 24 inches in depth. (T.135 – T.136). This was not unusual, because it was not uncommon for

cabin owners to have their tanks pumped earlier in the Fall, and then let some fluid accumulate in the tanks for when the cabins are shut down for the Winter. (T.137 – T.138). Anderson's inspection included, but was not limited to, examining the inside of the tank with a flashlight, and also probing the bottom of the tank by running a ten-foot long piece of quarter-inch rebar along its bottom, to feel for cracks. (T.136 – T.137). Anderson's inspection did not reveal any cracks in the tank or other defects in the system, and to this day, he believes the tank was not cracked when he inspected it on 3/28/01. (T.137, T.149, T.163)

Anderson testified that these tanks can be inspected, and are inspected, at times when the tanks have not been pumped out. (T.154 – T.155). He did not have the authority to tell anyone to pump out Woods' tank before inspecting it on 3/28/01. (T.138, T.148).

When Anderson finished inspecting the tank, "Chad", a person from the septic tank pumping business arrived. (T.138). Chad asked Anderson how the tank looked, and Anderson responded, "it looked fine, and there's 24 inches of fluid in it." (T.138). Chad then decided, evidently on his own, to not pump the tank. (T.138, T.148, T.153).

After he issued his report dated 3/29/01 (Exh. 2), Anderson received a phone call from Kellogg on 4/27/01, and Anderson answered some questions Kellogg had. (T.139). After that call, Anderson made a mental note to himself, to go out and look at the site again. (T.139). Anderson did go to the site shortly after that phone call, and re-measured the fluid level in the tank. (T.139 – T.140). The fluid level was the same, and again, no problems were indicated. (T.139 – T.140, T.150 – T.152).

After this, Anderson heard nothing about this matter, until he received a Summons to appear in Conciliation Court in Cass County. (T.140).

STANDARD OF REVIEW

A trial court's findings of fact should not be set aside unless they are determined to have been clearly erroneous. Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999). A finding is "clearly erroneous" if the appellate court is left with the definite and firm conviction that a mistake has been made. Id. When determining whether findings are clearly erroneous, the appellate court view the record in the light most favorable to the trial court's findings. Lossing v. Lossing, 403 N.W.2d 688, 690 (Minn. App. 1987). Also, appellate courts defer to the trial court on credibility determinations. Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988).

ARGUMENT

I. IF RESPONDENTS KELLOGGS FAILED TO MEET THEIR BURDEN OF PROVING THAT THE TANK WAS DEFECTIVE, THEN ANDERSON WOULD HAVE NO LIABILITY.

Woods argues, in his Brief, that the trial judge erred in concluding that Kellogg met his burden of proving that the holding tank was defective at the time Kellogg acquired the property. Obviously, Anderson agrees with Woods on this issue, because Anderson believes the tank was not defective at the time he inspected it. (T.137, T.149, T.156, T.162-T.163).

That Anderson did not join Woods on appealing this issue, should not be taken as an indication that Anderson agrees with the trial judge's finding.

On this issue, Anderson will only say that, if this appellate court agrees that Kelloggs

did not meet their burden of proving that the tank was defective when they acquired the property, it would necessarily follow that the trial judge erred (a) in concluding that Anderson negligently failed to find a defect which was not proven to exist, and (b) in assessing even the \$150.00 judgment against Anderson

II. EVEN IF THE TRIAL COURT'S FINDING THAT THE TANK WAS DEFECTIVE IS UPHELD — ITS FINDING THAT ANDERSON NEGLIGENTLY FAILED TO DISCOVER THE DEFECT, DOES NOT MEAN ANDERSON MUST INDEMNIFY WOODS FOR WOODS' LIABILITY TO KELLOGGS.

For the sake of argument only, the following discussion is set out in the event that this appellate court does determine that the trial court did not err in finding that Kellogg met his burden of proving that the tank was defective.

If this appellate court upholds the trial judge's finding that the tank was defective when the property changed hands, Anderson would be hard-pressed to challenge, on appeal, the judge's finding that Anderson was negligent in performing his inspection. It is for that reason, that Anderson did not file a notice of review on this issue.¹

However, for several reasons, a finding that Anderson negligently failed to find the defect during his inspection, does not compel the follow-up conclusion that Anderson must

¹ During the trial, Anderson testified in detail regarding his inspection. (T.134 – T.140). His testimony included his opinion that compliance inspections can be done on tanks that have been pumped and tanks that have not been pumped. (T.154 – T.155). Anderson inspected the tank at a time when it was not pumped out clean, but that was because he did not have authority to tell anyone to pump out Woods' tank. (T.138). Evidently because Anderson did not require that the tank be pumped prior to his inspection, the trial judge made the finding that Anderson failed to exercise reasonable care in carrying out the inspection of the tank. (Appellant's Appendix, p. A14). While Anderson disagrees with the this finding by the trial judge, this was an issue of fact that was presented to the trial judge to decide.

indemnify Woods for any liability to Kellogg.

- A. Anderson's failure to find the defect was not a "proximate cause" of Woods being held liable to Kelloggs, because the trial court found that Woods knew or should have known of a defect in this system, regardless of Anderson not finding the defect.**

The trial judge made a factual finding that, regardless of Anderson's inspection, Woods knew or should have known that the system was not in compliance prior to the closing. (See, Appellant's Appendix, pp. A14 to A15, and pp. A35-A36). The trial court made the following comments in denying Woods' post-trial motions:

"Woods testified that he purchased the property in the fall of 1996. (T.62). He owned the property until the spring of 2001. (T.84). He used the property multiple times during this period. (T.89, T.92 – T.100, T.106-T.107). Despite the fact that he was using the property, he had the septic tank pumped on only one occasion, in 1997. (T.93, T.95, T.96). Woods also testified that he believed the septic tank had the capacity to hold 500 gallons. (T.68, T.69, T. 78, T.79). In actuality, the tank had the capacity to hold 1,250 gallons. Woods's belief about the relatively small size of the tank, plus his awareness of lack of pumping, should have alerted him to a problem. Woods himself admitted during cross-examination that he did not pay attention to the septic tank." (T.95, T.113).

(Citations to Transcript added by Respondent Anderson's counsel).

If the trial judge's finding that the tank was defective at the time the property changed hands is upheld,² the fact that Anderson did not discover a defect during his inspection, does not cut against the trial judge's finding that Woods knew or should have known there was a problem. While Woods had several years of experience with the system, Anderson's

² Again, Anderson is not in a position to appeal the trial court's finding that the tank was cracked at the time he inspected it (although, again, he should be the beneficiary of any successful appeal of that issue by Woods, as is discussed in footnote no. 1 above).

knowledge of the status of the system was limited to what he learned when he inspected it 3/28/01, and when he returned to the site to re-measure the fluid level on a subsequent date (after he had received the phone call from Kellogg). (T.134 – T.140 and Exh. 2).

The trial judge's decision reflects its finding that while the one-time inspection of Anderson did not turn up a problem, that did not erase years of knowledge and experience Woods had, nor did it not absolve Woods of responsibility for what he knew or should have known. *Cf.*, Baber v. Dill, 531 N.W.2d 493, 496 (Minn. 1995) (“no one needs notice of what he knows or reasonably may be expected to know”) (*quoting*, Sowles v. Urschel Lab., Inc., 595 F.2d 1361, 1365 (8th Cir. 1979).

B. Anderson's alleged negligent inspection did not cause Woods to suffer any damages.

Even if Anderson's inspection was found to excuse Wood from knowing his septic system had problems (and thus was a cause of Woods not disclosing information to Kelloggs), Woods did not suffer damages as a result. As the trial judge stated:

In this case, if Anderson had performed the contract as promised, he would have found the cracks in the septic tank. Anderson would then have informed Woods or the realtor of his discovery, and Woods would have either replaced the septic tank prior to the sale at his own expense or reduced the sale price because of the non-complying septic tank. Either choice would have cost Woods money. In other words, had Anderson properly performed his contract, Woods would still have lost around \$3,800, either in the form of a new septic tank or a reduced sale price.

(Appellant's Appendix, pp. A.31 – A.32).

Woods complains, on page 18, footnote 9, of his Brief, that it is “uncertain whether Woods' liability would have totaled approximately \$3,800.” However, Woods never presented

any testimony about what he would have done, if Anderson had discovered the crack and informed the parties of the same. For example, Woods did not testify that he would have held fast to the same asking price. Also, neither Woods nor anyone else presented evidence that putting in two 750 gallon tanks would have cost more than putting in one 1,250 gallon tank.

Thus, Woods did not meet his burden of proving his damages in his breach of contract claim against Anderson. As the trial judge noted:

“By trying to pass the cost of a new septic tank onto Anderson, Woods is attempting to place himself in a better position than he would have been if Anderson had not breached the contract. Such a move is not permitted. *See, e.g., Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 644 (8th Cir. 1957) (“A party recovering damages for breach of contract should not be better off because of the breach than he would have been had there been no breach.”).”

(See, Appellant’s Appendix, p. A32).

Here, the evidence allowed the trial judge to conclude that requiring Anderson to pay for all or part of the cost of getting a defect-free system in place would have put Woods in a better position than Woods would have been in had Anderson discovered the defect. (Id.) And, Woods did not present any evidence that would have allowed the trial judge to find otherwise.

C. Woods is not entitled to have Anderson indemnify him for the award of attorney’s fees and costs assessed against him and in favor of Kelloggs.

Finally, Woods makes the argument that “if the cracks were in existence at the time Anderson performed his inspection and if they [had been] discovered by Anderson, then Woods would have been spared the statutory attorney’s fees awarded to Kelloggs.” (Appellant Woods’ Brief, p. 18).

Attorney's fees and costs were assessed against Woods based on Minn. Stat. §115.55, subd. 6, which states:

(b) Unless the buyer or transferee agree to the contrary in writing before the closing of the sale, a seller or transferor who fails to disclose the . . . known status of an individual sewage treatment system at the time of the sale, and who knew or had reason to know of the . . . status of the system, is liable to the buyer or transferee for the costs relating to bringing the system into compliance with the individual sewage treatment system rules and for reasonable attorney fees for collection of costs from the seller or transferor.

(Underlining added). Clearly, the statute only provides for an award of attorney's fees against the seller, if the seller knew or should have known there was a problem with the system.

Woods' argument ignores the fact attorney's fees were awarded against Woods, based on the trial judge's finding that Woods knew or should have known there was problem with his septic system, regardless of the fact that Anderson's inspection failed to find the problem. The trial judge believed that Woods' experience with the system from 1997 to 2001 was such that he knew or should have known there was a problem, to such an extent, that Anderson's failure to find the problem during his inspection was not enough to allow Woods to push aside and ignore what he knew. The trial judge found that the fact that Anderson failed to discover the defect during his inspection, did not change the fact that Woods knew or should have known (again, based on his own experience) that there was a problem.

There may be some cases in which a septic system inspector's failure to find an existing defect (due to negligence or otherwise), combines with other circumstances, so as to lead a fact-finder to conclude that the seller neither knew nor had reason to know of the defect. In those cases, the court should not assess attorney's fees against the seller pursuant to Minn.

Stat. §115.55, subd. 6.

If this appellate court chooses to find that the trial judge erred in finding that Woods knew or should have known there was a defect in the tank, then what this court should do, is reverse the award of attorney's fees and costs. However, under no circumstances should Woods receive a judgment requiring Anderson to indemnify him for any attorney's fees / costs that are assessed against him.

CONCLUSION

In the event this court determines that the trial judge erred in finding that the tank was defective when the property changed hands, it must necessarily follow that the trial judge also erred in concluding that Anderson negligently failed to find a defect which was not proven to exist.

If this court upholds the trial judge's finding that the tank was defective, Woods' claim against Anderson for indemnity should fail for the reasons stated above.

Dated: March 13, 2006

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CERTIFICATE OF COMPLIANCE

I, Colleen M. Bauer, hereby certify that the foregoing document complies with the requirements set forth by Rule 132.01 of the Rules of Civil Appellate Procedure.

This Brief complies with the word count requirements of Rule 132.01, Subd. 3, as follows:

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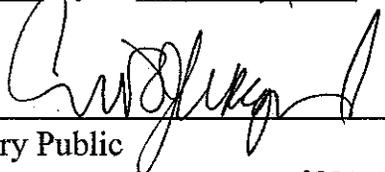
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Colleen M. Bauer

SUBSCRIBED AND SWORN to before me
this 13th day of March, 2006.



Notary Public

