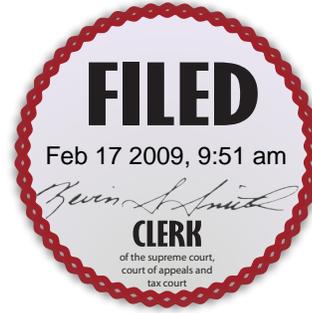


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**IN THE
COURT OF APPEALS OF INDIANA**

NORWOOD REGIONAL WATER and)
SEWER DISTRICT,)
)
Appellant-Defendant,)
)
vs.)
)
FAIR OAK FARM GOLF PROPERTIES, LLC,)
)
Appellee-Plaintiff.)

No. 35A02-0808-CV-729

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
The Honorable Jennifer E. Newton, Magistrate
Cause No. 35D01-0712-SC-1800

February 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Norwood Regional Water and Sewer District (“the District”) appeals the trial court’s order awarding damages to Fair Oak Farm Golf Properties, LLC (“Fair Oak”) for the repair of Fair Oak’s underground irrigation system.

We affirm.

ISSUES

1. Whether the trial court’s order must be reversed because the severed irrigation line lay in a county right of way.
2. Whether the trial court’s order is erroneous because the District’s repair of the irrigation line satisfied its contractual obligation pursuant to the easement.
3. Whether the trial court erred in awarding damages for indirect and consequential damages, which were expressly excepted from the easement.
4. Whether the trial court’s order is erroneous because the trial court failed to apply contributory negligence law.

FACTS

In 2005, the District was planning for water and sewer line installation. Toward that end, the District negotiated with Fair Oak for a utility easement over Fair Oak’s property, and Fair Oak agreed to provide the easement for \$18,900.00. The easement, executed on October 12, 2005, by Fair Oak’s president Lance Feighner included what the trial court found to be the District’s “covenant to make any repair for damages caused during construction.” (App. 45). Specifically, the relevant portion of the easement provided as follows:

[The District] covenants that it is willing to assume limited responsibility for claims resulting from damage to any land, cart path, shelter, other

improvement, or the environment within or outside the water main, sanitary sewer, drainage, and potable water easement granted herein, or to any land or improvements used for ingress and egress to such easement, caused by [the District] and/or it [sic] Contractors during construction, operation, maintenance, repair, or reconstruction of the sanitary sewers, storm sewers, or water lines and appurtenances, unless damages is caused by [Fair Oak]'s placement of any improvement or structure within the easement in violation of this easement all as is more set forth [sic] on the Joint Stipulation between the parties entered in Cause Number 35C01-0506-PL-254. Within its limited responsibility [the District] agrees only to restore said property to its original condition before its entry onto said property for the purposes set out herein. However, [the District] shall not be responsible for indirect or consequential damages caused by its or its contractor's actions pursuant to the purposes of this easement except as set for the on the Joint Stipulation.

(App. 102).

Meetings between Feighner for Fair Oak and the District's contractor led the parties to conclude that the utility's construction activity would intersect with the irrigation lines of Fair Oak's underground sprinkler system at three points. The construction activity took place during the winter period -- when Fair Oak's sprinkler system was not operational. On June 15, 2006, Fair Oak activated the sprinkler system and discovered water flowing to the surface in the area of one intersection. Feighner notified Dave Hacker, the District's manager, who visited the site and confirmed the problem. Feighner informed Hacker that future problems with the sprinkler system would likely ensue, as debris from the severance of the line continued to move through the system.

On the day Hacker saw water flowing from the ground at Fair Oak, he ordered a contractor to repair the damage, and the District paid the contractor for that work. However, subsequent to those repairs, Fair Oak's sprinkler system continued to suffer

breakdowns resulting from debris in the lines. Feighner directed Fair Oak's personnel to make multiple repairs and to install necessary replacement parts on the sprinkler system. He then sent invoices to the District demanding payment therefor, but the District refused to pay.

On December 19, 2007, Fair Oak filed its small claims action -- "based on written contract" against the District, seeking "\$3,349.85 in damages for breach of contract." (App. 4, 6). The District filed an answer of "general denial." (App. 18).

On April 23, 2008, the matter was tried to the bench. Fair Oak argued that its claim was a "breach of contract case," and the District responded that it had "no legal liability" and that the damages claimed were "excessive." (Tr. 11, 12). Feighner and Hacker were the only witnesses.

The trial court took the matter under advisement and, on July 18, 2008, issued its findings of fact and conclusions of law. The trial court found that Fair Oak's golf course sprinkler system was "comprised of underground piping and sprinkler heads," and that the parties had concluded "that there were three areas where the sprinkler system and the District construction project might cross paths." (App. 44, 45). It further found as follows:

7. The parties agreed that prior to boring holes for the new water and sewer lines at the three intersections, the District's contractor would first notify Fair Oak so that the parties could meet in an effort to avoid severing the irrigation lines.
8. Upon reaching the first intersection, a representative of [Fair Oak] and of [the District] met before the holes were bore[d]. The parties never met before the next two holes were bore[d].
9. In the first two areas of concern, the sprinkler system was located at a depth of about three (3) feet. Knowing that the prior two sprinkler system

lines were located at a depth of three feet, the contractor bore at a depth of seven (7) feet at the third intersection in an attempt to avoid contact with the golf course sprinkler system.

10. The District's construction work cut through the golf course sprinkler system.

11. The break was discovered in the Spring of 2006, when [Fair Oak] reintroduced water into the irrigation system and discovered a leak near the second intersection.

12. The District was notified by Feighner of the damage to the golf course sprinkler system.

13. The [District] authorized and paid for the initial repair to the irrigation system. However, the lines were not flushed out completely and debris remained in the lines.

14. Both parties were aware that additional repairs would be necessary and additional costs would be incurred. Fair Oak completed the additional repair process itself and submitted invoices to the District.

(App. 45-47). The trial court's findings also identified the specific components of damages claimed by Fair Oak in its invoices to the District.

The trial court then made the following conclusions of law:

1. The District's responsibility arises out of its knowledge that the sprinkler system lines may be located in the area and proceeding with the construction without certainty as to the location of the lines.

2. The Easement Certificate's plain and unambiguous terms are conclusive in this case. The District assumed liability for damage to "any land" or "other improvement" that was caused by the District or its contractors "during construction, operation, maintenance, repair, or reconstruction of the sanitary sewers, storm sewers, or water lines and appurtenances." The District had a duty to repair property damage by restoring Fair Oak's property to its "original condition."

3. The District can not enforce the Easement Certificate only when it benefits the District and then try to avoid it by stating that they are a government entity. The District's status as a government entity should not allow them to now not comply with the Easement. The Easement was an Agreement that they initiated with Fair Oak.

(App. 47-48). The trial court further concluded that only a certain portion of Fair Oak's claimed damages for labor was reasonable – specifically, "\$15.00 per hour for 94.25

hours in the amount of \$1413.75.” (App. 49-50). After concluding that Fair Oak “should also be reimbursed for their out of pocket expenses to replace the sprinkler heads in the amount of \$476.10,” the trial court entered final judgment for Fair Oak “in the amount of \$1889.85.” (App. 50).

DECISION

When the trial court has entered findings of fact and conclusions of law, neither the findings nor judgment are to be set aside unless clearly erroneous. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210 (Ind. 2000). First, our review considers whether the evidence supports the factual findings. *Id.* Findings are clearly erroneous only when the record contains no facts to support them, either directly or by inference. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). Moreover, we afford due regard to the trial court’s ability to assess the credibility of witnesses. *Menard*, 726 N.E.2d at 1210. Our review next considers whether the findings support the judgment. *Id.*

We also note that this was a small claims action. “Our standard of review “is particularly deferential in small claims actions, ‘where the trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.’” *Mayflower Transit, Inc. v. Davenport*, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999) (quoting Ind. Small Claims Rule 8(A)).

Finally, the meaning of an easement is a matter of contract interpretation. *Wendy’s of Fort Wayne, Inc. v. Fagan*, 644 N.E.2d 159, 161 (Ind. Ct. App. 1994). When one party “drafted the instrument creating the instrument” and the second party “had no part in its preparation,” the second party “is entitled to the benefit of any doubt in the

construction of the language of the easement.” *Id.* Further, where the terms of a contract are clear and unambiguous, the terms are conclusive. *In re South Haven Sewer Works, Inc.*, 880 N.E.2d 706, 710 (Ind. Ct. App. 2008).

Before we address the District’s arguments, we first note that it does not challenge any of the trial court’s findings of fact. Further, we find that the findings are supported by the evidence presented.

1. Location of the Severed Line

The District first notes that Hacker testified that the place where Fair Oak’s irrigation line was severed was in a county right of way,¹ and asserts that “the Easement does not reach to property not expressly encumbered by the Easement.” District’s Br. at 8. Therefore, it argues, Fair Oak’s claim for damages “sound[s] in tort, not in contract.” *Id.* We cannot agree.

The language of the easement, which the undisputed testimony indicated had been drafted by the District’s attorneys, provided that the District would be “responsib[le] for claims resulting from damage to any improvement” of Fair Oak “within or outside . . . the easement granted, . . . caused by [the District] or its Contractors during construction” (App. 102, emphasis added). The trial court found that the easement included “the District’s covenant to make any repairs for damages caused during construction.” (App.

¹ As Fair Oak correctly notes, Hacker’s testimony in this regard is far from clear. He testified that on Exhibit C, he had put “a small red dot . . . off the edge of the street [Fairway Court] . . . to indicate the location that the District did break or intersect the irrigation system.” (Tr. 99). However, in that area of Exhibit C there are several red markings.

The District’s counsel then asked Hacker as follows: “The damage to the system was done in a county right of way but was it within any easement granted to [the District] by [Fair Oak]? Hacker answered, “No.”

45). The trial court concluded that pursuant to the easement's "plain and unambiguous terms," the District had "assumed liability for damage to 'any land' or 'other improvement' that was caused by the District or its contractors "during construction, operation, maintenance, repair, or reconstruction of the sanitary sewers, storm sewers, or water lines and appurtenances.'" (App. 48). It further concluded, as a matter of law, that the District "had a duty to repair property damage by restoring Fair Oak's property to its "original condition." *Id.* The findings support the judgment, which is not clearly erroneous.

2. Contractual Obligation

The District next argues that the trial court erred when it awarded damages for Fair Oak's repair expenses because "the District had already satisfied any contractual obligations by restoring the property where the line was severed to its original condition." District's Br. at 8. It directs us to the language of the easement stating that it "agree[d] only to restore" damaged "property to its original condition before its entry onto said property for the purposes set out herein," (App. 102), and asserts that the repairs it authorized and paid a contractor to complete on or about June 15-16, 2006 "fixed the line." District's Br. at 9. Thus, its argument concludes, subsequent damage resulted from "Fair Oak's failure to flush its own line." *Id.*

As already discussed, the trial court found that the language in the easement included the District's "covenant to make any repairs for damages caused during construction." (App. 45). Other findings, supported by the evidence, found that the District had failed to communicate, as agreed, with Fair Oak before proceeding to bore

where it expected irrigation lines to lie, and that the District's contractor had severed the line. Further, evidence supported the trial court's factual finding that "both parties were aware that additional repairs would be necessary and additional costs would be incurred" following the District's initial repairs. (App. 46-47). These findings support the trial court's conclusion that the District "had a duty to repair property damage by restoring Fair Oak's property to its original condition," (App. 48), which in turn supports the judgment.

3. Indirect and Consequential Damages

The District's third argument is that the easement's terms "expressly exclude the District's responsibility for 'indirect or consequential damages caused by it or its contractor's actions pursuant to the purpose of the Easement . . . all as more set forth [sic] in the Joint Stipulation.'" District's Br. at 10. The District appears to assert that post-June 15-16, 2006 damages were caused by Fair Oak's failure by not "first removing the sprinkler heads to allow the line to be flushed" before the District's contractor completed the June 15-16, 2006 repairs, *i.e.*, that the subsequent damage "occurred as a result of Fair Oak's [sic] failure to flush its own line." *Id.* at 11. Citing the trial court's order awarding damages for "out of pocket expenses to replace sprinkler heads," the District argues that Fair Oak's "material and labor costs incurred to repair sprinkler heads were not a direct result of" the severance of the line. *Id.* (emphasis added). We are not persuaded.

Damages for breach of contract are those "as may fairly and reasonably be considered as arising naturally from the breach itself, or as may be reasonably supposed to have been within the contemplation of the parties at the time they entered into the

contract as a probable result of the breach.” *UFG, LLC v. Southwest Corp.*, 848 N.E.2d 353, 365 (Ind. Ct. App. 2006), *trans. denied*. The easement reflects that at the time it was entered into, the parties contemplated the possibility that the construction activity of the District’s contractors might damage improvements on Fair Oak’s land. Thus, in the easement, the District agreed to restore to original condition any of Fair Oak’s improvements that were damaged by the construction activity to install its water and sewer lines. An underground line of Fair Oak’s sprinkler system was severed by the District during that construction. To restore the sprinkler system to its original condition required a series of repairs, as debris dislodged by the severance worked its way through the system. Contrary to the terms of the easement, the District refused to pay for those repairs. The award of damages for the District’s breach of the parties’ contract in that regard was not erroneous.

4. Contributory Negligence

Finally, the District argues that its foregoing three arguments establish that “Fair Oak’s claim is one in tort, not contract, and the correct legal standard to be applied is contributory negligence.” District’s Br. at 11. We disagree.

When it filed its action, Fair Oak asserted that its claim was “based on written contract” and expressly sought “damages for breach of contract.” (App. 4, 6). At trial, Fair Oak argued its claim for “breach of contract,” its witness referred to the certificate of easement, and that document was admitted into evidence. (App. 18). The trial court concluded as a matter of law that the easement plainly and unambiguously provided that the District assumed liability to repair property, including improvements, of Fair Oak that

was damaged by its contractors during their construction to install the water and sewer lines. The evidence established that the District breached its contract when it refused to pay for the repairs necessary to restore Fair Oak's damaged improvements to their original condition. Accordingly, the evidence supports the trial court's findings, which support its judgment, and the trial court's judgment for damages in the amount of \$1889.85 is not clearly erroneous. *Menard*, 726 N.E.2d at 1210.

Affirmed.

RILEY, J., and VAIDIK, J., concur.