

Judge Leachant

**STATE OF VERMONT
RUTLAND COUNTY, ss.**

**RUTLAND SUPERIOR COURT
DOCKET NO. S0478-98RcCa
(Appeal from S98-0142 RSsc)**

**FREDERICK A. HARRINGTON and
THERESE H. HARRINGTON,
Plaintiffs/Appellants,**

v.

**CITY OF RUTLAND,
Defendant/Appellee.**

**CONFORMED COPY
RUTLAND SUPERIOR COURT**

FEB - 3 1999

Hayd. Johnson
Clerk

OPINION AND ORDER

This matter is before the court on appeal from a small claims court decision and Order of August 6, 1998 pursuant to 12 V.S.A. § 5538 and V.R.C.P. 73. At the hearing before this court on November 12, 1998, the Plaintiffs/Appellants were represented by R. Joseph O'Rourke, Esq. The Defendant/Appellee was represented by Joseph A. Farnham, Esq.

Plaintiffs owned a home in Rutland for 28 years prior to the incident giving rise to this claim. In the fall of 1997, they began to have a problem with water not draining properly from their home. They called the A-1 service, which used a coil to attempt to clear the drain. This cleared the problem for a while, but it recurred. They called A-1 again, and the service returned. Using electronic equipment above ground along the line connecting the home to the Rutland City sewer main, they concluded that there must be a break in the line under the footage area of Plaintiff's home. There was, in that vicinity, a low area that had previously sunk in and been filled with substantial amounts of material. Plaintiffs hired a general contractor to dig up the line. The contractor dug up the line all the way from the house to the City sewer line. He testified at trial that he found no break in the line the whole way, and that when he got to the street, the line was 90% plugged with stones and material. A person from A-1 testified on behalf of the City that the contractor had telephoned him and said that he found two breaks in the line, and that it was full of dirt. Plaintiff had an expert who testified at trial. He testified that the stones found in the line, two of which are in evidence, were much larger than the peastone that is found around the footage of the house, and that in his opinion, the blockage of the sewer line was caused by the action of the City in flushing its sewer lines, which caused the stones to back up into Plaintiffs' line.

After hearing the evidence, the court concluded that it was equally likely that the stones came from the City line as from the sinkhole area near Plaintiffs' house, and that therefore the

evidence was inconclusive on the cause of the blockage and drainage problem that resulted in damages to the Plaintiffs. Since the evidence hung in a 50-50 balance, the court ruled that Plaintiffs had not proved their claim by a preponderance of the evidence. The claim was therefore dismissed.

At the hearing before this court on the appeal, Plaintiffs' attorney argued that the evidence presented by Plaintiff was conclusive that the only way the rocks could have entered the Plaintiffs' line was by the action of the City in flushing its system, since Plaintiff's contractor testified that he had dug up the line the entire way, and there were no breaks in the line. He also argued that there was no way that rocks the size of the ones in evidence could have entered the line from Plaintiffs' house. Therefore, he argued, the Plaintiffs' evidence made down weight such that the court could not have concluded that the evidence hung in a balance at 50-50. Defendant's attorney argued that the trial court's evaluation of the evidence was not in error, since there was evidence that the drain backed up again two more times after Plaintiffs' initial call and snaking service by A-1, and that there was no evidence that the City had taken any flushing action in its system during that period of recurrence of the problem.

The factual findings of the trier of fact shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses and the weight of the evidence. V.R.C.P. 52(a)(2). Where expert testimony has been given, it is not clearly erroneous for a trial court to find an expert opinion unpersuasive when the court has explained its reason for doing so. In re Wilson, 162 Vt. 281, 287 (1994). In this case, the court explained clearly how it weighed the evidence on both sides of the scale. The court explained that the evidence of the Plaintiffs was counterbalanced by the evidence of the Defendant that there had been a sinkhole near the footing of the house that had been filled in with quantities of material.

The explanations of the Plaintiff and the Defendant for the blockage in Plaintiffs' line are completely irreconcilable: Plaintiffs say it had to have been caused by the City because there was no break in the line; Defendant says there was a break in the line and a sinkhole near Plaintiffs' house and there is no evidence of the City flushing the sewer line throughout the relevant period.

In order for this court to override the trial court's evaluation of the evidence and conclusion that this evidence hung in equal balance, this court would have to exercise its own judgment as to which witnesses and which evidence was more persuasive. It is not the function of an appellate court to engage in such a process. It is only the function of this court to determine whether or not the trial court could have reached the conclusion it did without having committed a clear error, considering the body of evidence before it. In applying this standard, the evidence is viewed in the light most favorable to the prevailing party, which in this case is the Defendant. Cab-Tek, Inc. v. E.B.M., Inc., 153 Vt. 432, 433 (1990).

Having reviewed the record of the proceedings in small claims court, including the audiotape of the trial, this court cannot conclude that the court was clearly wrong in concluding

that the evidence hung in an even balance at 50-50. This court is satisfied that the court engaged in a thoughtful process of evaluating and weighing the evidence, and identifying the evidence that it placed on each side of the balance scale. Its conclusion that the scale hung in an even balance is a reasonable one based on the evidence before it and its analysis of the weight of the evidence. Therefore, there is no basis on which to overturn the judgment of the court.

The judgment is *affirmed*.

Dated this thirtieth day of January, 1999.



Mary Miles Teachout
Superior Judge