**IN THE COURT OF APPEALS OF IOWA**

No. 1-079 / 10-0483
Filed April 27, 2011

**LEANNE LOEHR and ED LOEHR,**
Plaintiffs-Appellees,

**vs.**

**CRAIG W. METTILLE, BROMO, INC. d/b/a FIRST GENERAL SERVICES OF EAST CENTRAL IOWA, and MOBRO, INC. d/b/a 380 SERVICE MASTER d/b/a SERVICEMASTER 380,**
Defendants-Appellants.

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Appeal from the Iowa District Court for Linn County, Thomas J. Koehler, Judge.

Appeal from adverse rulings at trial and the order granting a new trial. **REVERSED.**

Joe H. Harris, Cedar Rapids, for appellants.

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellees.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

**SACKETT, C.J.**

Defendants[1] appeal from certain adverse rulings at trial and the district court's grant of a new trial in this suit concerning collection practices, defamation, and a counterclaim for breach of contract. They contend the court abused its discretion in granting a new trial because error was not preserved, the court's finding concerning misconduct was not based on substantial evidence, the plaintiffs were not prejudiced, and the mixed verdict effectuated substantial justice. They also contend the court erred at trial in not finding defendant Mettille's communications with the bank were subject to a qualified privilege, and the court erred in not instructing the jury on actual malice. We reverse the grant of a new trial.

**I. Background.**

Plaintiffs hired defendants to deal with water damage in their home and to do reconstruction and repairs. Eventually plaintiffs contacted their insurance adjuster to express dissatisfaction with the progress of the work. There were contacts between the insurer, the defendants, the plaintiffs, and the bank that was holding the insurance proceeds pending the repairs.

Plaintiffs filed an action against defendants, claiming illegal collection practices and defamation and seeking punitive damages. They also sought declaratory judgment concerning their rights with defendants. Defendants ServiceMaster and First General counterclaimed for breach of contract.

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[1] Defendant Mettille owns Bromo, Inc. and Mobro, Inc., which do business as First General Services ["First General"] and ServiceMaster 380 ["ServiceMaster"] respectively.

During the trial, defendants offered Exhibit RR, which consisted of three pages from an eighty-one page phone bill of defendants. It was admitted without objection. Defendant Mettille testified concerning his recollection of phone calls he had with the insurance adjuster that he claims resulted in an agreement to continue working on plaintiffs' home, to receive a progress payment of $15,000, and to have plaintiffs sign off after each stage of the repairs to indicate their satisfaction with the work. Exhibit RR purported to show the dates and times of the phone contacts between Mettille and the insurance adjuster. Plaintiffs did not cross examine Mettille about Exhibit RR.

During closing arguments, plaintiffs' counsel argued that Exhibit RR actually showed phone calls from three separate employees, not just Mettille, that one of the calls Mettille claimed was from the insurance adjuster was in fact an outbound call lasting less than a minute, and that the exhibit was "obviously a fabrication."

Before discussing jury instructions, defendants requested a ruling from the court that defendant Mettille's statements to a bank employee, Stephanie Mai, that plaintiffs were liars, which were made during efforts to obtain payment from the insurance proceeds the bank was holding, were subject to a qualified privilege. After hearing arguments from both counsel, the court stated:

> I think anyone sitting in this courtroom this morning could detect visually that Mr. Mettille was extremely upset at the time and remains upset to this day.

> I think qualified privilege does not apply under *Knudsen vs. Chicago and North Western Transportation*[2] for the reasons stated by the court and the plaintiffs' counsel.

Defendants objected to several jury instructions. In objecting to the instruction on malice, defendants sought an instruction on actual malice. The objection to the court's chosen instruction on malice was that it instructed that Mettille made statements with actual malice if the statements were made with ill will or wrongful motive. Defendants contended ill will or wrongful motive are not considerations if the statements are subject to qualified privilege. The court overruled defendants' objections.

The jury found in favor of defendants on plaintiffs' claims of defamation and unfair collection practices. It found defendant ServiceMaster proved breach of contract and awarded the balance on its account from drying plaintiffs' home, but no interest. The jury found defendant First General did not prove breach of contract.

Plaintiffs moved for a new trial, claiming defendants fabricated Exhibit RR and Mettille gave false testimony. Defendants resisted, arguing the mixture of phone numbers in the exhibit was the result of inadvertence or mistake. They also argued plaintiffs waived any right to a new trial based on the exhibit and related testimony because they did not object to the exhibit's admission and they did not cross-examine Mettille on the exhibit or otherwise challenge it except in rebuttal closing argument. They further argued a new trial was not appropriate because the verdict effectuated substantial justice between the parties.

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[2] *See Knudsen v. Chicago & N.W. Transp. Co.*, 464 N.W.2d 439, 442 (Iowa 1990) (listing elements of qualified or conditional privilege).

Following a hearing on the motion and resistance, the court issued its ruling, granting plaintiffs a new trial on their claims. The court found, in relevant part:

> Contrary to the assertions of Mr. Mettille, the Court is convinced that he did deliberately attempt to mislead the jury, and his testimony with regard to other issues weighs heavily on his credibility. The Court agrees with the Plaintiffs that, rather than a "mistake," Mr. Mettille's "evidence" was clearly contrived and he was not acting in good faith. This misconduct was prejudicial to Plaintiffs. The Plaintiffs should be granted a new trial on their original causes of action.
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> Defendants appeal.

**II. Scope and Standards of Review.**

Our review of a trial court's ruling on a motion for new trial depends on the grounds for new trial asserted in the motion and ruled on by the court. *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007). "If the motion and ruling are based on a discretionary ground, the trial court's decision is reviewed on appeal for an abuse of discretion." *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996). A court has "broad but not unlimited discretion" to determine if the verdict effectuates substantial justice among the parties. Iowa R. App. P. 6.904(3)(*c*). An abuse of discretion occurs only when the court has exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Vaughan*, 542 N.W.2d at 543. Appellate courts are "slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.904(3)(*d*).

Ordinarily the availability of a qualified privilege is for the court rather than the jury to decide. *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984). The determination whether to instruct the jury on qualified

privilege is reviewed for correction of errors at law. *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 199 (Iowa Ct. App. 2006).

**III. Merits.**

***A. New Trial.*** Defendants make several arguments in support of his claim the court abused its discretion in granting a new trial "because it exercised its discretion to an extent clearly unreasonable."

*1. Plaintiffs failed to preserve error.* Defendants argue the plaintiffs failed to preserve error by not objecting to the admission of Exhibit RR. They raised this issue in their resistance to plaintiffs' motion for new trial. The court mentions this issue in its recitation of the factual and procedural background of the case, but does not mention it in its conclusions of law or in its ruling.

"A failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission." *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 806 (Iowa 1994) (citation omitted).

> [C]ounsel for a party cannot sit idly by and not attempt to direct the attention of the trial court to a possible limitation or restriction on the use of evidence and then, after an unfavorable verdict, take advantage of an error which he could and should but did not call to the court's attention.

*Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 660 (Iowa 1969) (citation omitted).

Plaintiffs argued in their brief the asserted problem with Exhibit RR was not discovered until after the close of evidence, but during the break before discussion of jury instructions. During oral argument, counsel acknowledged the problem with the exhibit was discovered when it could have been brought to the

court's attention, but he believed the rule that the court could allow a party to offer further testimony to correct an evident oversight or mistake applied to the party who had made the mistake or oversight, not to the opposing party. *See* Iowa R. Civ. P. 1.920 ("At any time before final submission, the court may allow any party to offer further testimony to correct an evident oversight or mistake, imposing such terms as it deems just.").

Before moving to a discussion of jury instructions, the judge asked each attorney individually if there was anything further they wanted to discuss or any further record they wanted to make. Plaintiffs' counsel responded, "No, your honor." Again after discussing the jury instructions, the court asked, "Anything else, [plaintiffs' counsel]?" Counsel replied. "No, your honor." Clearly counsel had more than one opportunity to raise the possible problems with the exhibit before the case was submitted to the jury, but did not do so.

Plaintiffs allowed the exhibit to be admitted without objection. Counsel should have brought the issue to the court's attention once he discovered the problem. *See Schmitt*, 170 N.W.2d at 660. The court has authority to allow any party to reopen the record and offer additional evidence. Iowa R. Civ. P. 1.920; *Moser v. Stallings*, 387 N.W.2d 599, 603 (Iowa 1986); *Niemann v. Butterfield*, 551 N.W.2d 652, 655 (Iowa Ct. App. 1996). The court was not given the opportunity to exercise its discretion because counsel did not raise the issue when he could have. "Such inaction on counsel's part weighs heavily in evaluating the right to a new trial." *Schmitt*, 170 N.W.2d at 660. A party is not permitted to withhold an objection on an error known to the party before the jury

reaches a verdict, gamble on a favorable verdict, and later raise the same issue as a ground for a new trial. *See State v. Wells*, 629 N.W.2d 346, 356-57 (Iowa 2001) (holding that when a defendant made a belated claim of juror misconduct that was observed before the verdict, the court would not reward him for making a losing bet on his own conviction by granting him a new trial).

The district court abused its discretion in granting a new trial. We reverse the grant of a new trial.

***B. Qualified Privilege.*** Defendants sought a ruling at trial and also in their motion to correct judgment that Mettille's statements to the bank employee, Mai, were subject to qualified privilege. The court denied defendants' request both times. Because of our resolution of defendants' claim the court should not have granted a new trial, we need not address this claim.

***C. Jury instruction on actual malice.*** Defendants contend Mettille's statements satisfy all the elements to receive a qualified privilege and if the court had determined the privilege applied, then they would be entitled to a jury instruction that plaintiffs needed to prove he acted with "actual malice" in order to prove their defamation claim. As with the preceding claim, our resolution of the new-trial issue obviates any need to address this claim.

**REVERSED.**