IN THE COURT OF APPEALS OF IOWA

No. 1-733 / 10-1426
Filed November 23, 2011

T.J. MCGINNIS OF T.J. MCGINNIS AND ASSOCIATES, SOFTWARE SOLUTIONS, INC., JOHN DONALD, STEVEN JOSEPH SMITH, DEBORAH JEAN SMITH, and SMITH PROMOTIONAL ADVERTISING, INC.,
Plaintiffs-Appellants/Cross-Appellees,

vs.

VISCHERING, L.L.C.,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

The plaintiffs appeal the district court's denial of their motion for a new trial, and defendant cross-appeals the district court's denial of their motion for judgment notwithstanding the verdict. **AFFIRMED.**

Michael Sellers of Sellers, Haraldson, and Binford, An Association of Sole Practitioners, Des Moines, for appellants.

F. Richard Lyford and Megan J. Erickson of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

SACKETT, C.J.

The plaintiffs, former and current tenants of a commercial office building in West Des Moines, known as One Corporate Place, appeal the district court's denial of their motion for a new trial. The plaintiffs assert a new trial should be granted, as the jury reached an inconsistent verdict, which found the plaintiffs had proven each element of their claim for breach of contract against defendant, Vischering L.L.C, but awarded plaintiffs zero damages. Vischering cross-appeals, claiming the district court erred in denying its motion for judgment notwithstanding the verdict. Vischering claims judgment should be entered in its favor as there was no breach of contract as a matter of law. We affirm.

I. BACKGROUND AND PROCEEDINGS. On August 27, 2009, the plaintiffs filed suit against Vischering, and others not a part of this appeal, asserting claims of breach of contract and fraud arising from commercial leases for office space in One Corporate Place. The plaintiffs asserted they did not receive the number of square feet of office space identified in the leases. Instead, the plaintiffs claimed Vischering added a 13.8% load factor to the number of square feet actually contained within each unit and identified the figure as "rentable square feet" in the leases. The plaintiffs claim they were not aware of the load factor and believed "rentable square feet" referred to the actual number of square feet in their units. Thus, the plaintiffs claim they were overcharged rent for their units by the 13.8% load factor.

Vischering claims there was no breach of contract or fraud as the term "rentable square feet" is a commercial real estate term of art that is defined to be

the number of square feet within each unit plus a proportionate share of the common areas in a building. Vischering asserts when the term is properly interpreted in accordance with industry practice, the plaintiffs received exactly what the lease provided.

The case proceeded to a jury trial on April 20, 2010. During deliberations the jury sent a question to the court which asked, "If we find for the Plaintiff in breach of contract, are we constrained to a minimum amount of damages that we can award?" The court consulted with the attorneys for all parties via phone conference in order to obtain input on how to respond to the jury's question. The plaintiffs' counsel did not offer any opinion or object to the defendants' attorneys' suggestion that no minimum amount of damages should be required. The court informed the parties it intended to answer "No" to the jury's question. The plaintiffs' counsel offered no objection and the court responded to the jury stating, "The answer to your question is 'No.'" The jury returned its verdict finding in favor of all the defendants on the fraud claims, but finding in favor of the plaintiffs on the breach of contract claim against Vischering. The jury then awarded the plaintiffs zero damages.

The plaintiffs did not consent to a sealed verdict, so the verdict was read in open court. The plaintiffs' counsel declined the court's invitation to have the jury polled. When the plaintiffs made no objection to the verdict, the court discharged the jury.

On April 30, 2010, the court entered judgment for the plaintiffs on the jury verdict in the amount of $0.00 and taxed costs to the defendants. On May 5,

2010, the court entered an order nunc pro tunc amending the prior judgment entry and order. The amended order stated that the jury found the plaintiffs had proven a claim of breach of contract against Vischering, but found no damages. It thus ordered judgment be entered against the plaintiffs, rather than the defendants, for the cost of the matter.

On May 6, 2010, plaintiffs filed a motion for additur, conditional motion for a new trial on damages, and in the alternative a motion for a new trial on all issues. On the same day, Vischering filed its own motion for judgment notwithstanding the verdict. The district court denied both motions and both parties appealed.

II. SCOPE OF REVIEW. Our review of a trial court's decision on a motion for a new trial depends on the grounds raised in the motion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). When the motion for a new trial is based on an allegation of an inconsistent verdict, we review the court's decision on the verdict's inconsistency for correction of errors at law. *Id*. But we review the court's decision as to the remedy for an inconsistent verdict under an abuse of discretion standard as the court has discretion to choose one of three alternatives to correct an inconsistent verdict. *Id*.; *see also Dutcher v. Lewis*, 221 N.W.2d 755, 762 (Iowa 1974).

We review a trial court's decision on a motion for judgment notwithstanding the verdict for correction of errors at law. *Van Sickle Const. Co. v. Wachovia Commerical Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). In reviewing a motion for judgment notwithstanding the verdict, our role is to

determine whether there was sufficient evidence to justify submitting the case to the jury when the evidence is viewed in the light most favorable to the non-moving party. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). Substantial evidence must support each element of the plaintiff's claim, and evidence is substantial when reasonable minds would find the evidence adequate to support a finding. *Van Sickle Const.*, 783 N.W.2d at 687. We ask, "[W]as there sufficient evidence to generate a jury question?" *Id*.

III. INCONSISTENT VERDICT. The plaintiffs' sole claim on appeal is that a new trial is required in this case because the jury verdict is inconsistent. The plaintiffs point to the jury's verdict form wherein they were first asked, "Have [plaintiffs] proven each element of [their] claim for breach of contract against Defendant Vischering, L.L.C. by a preponderance of the evidence?" The jury responded affirmatively to this question. But later when asked to state the amount of damages the plaintiffs suffered for the breach of contract, the jury entered $0.00. The final verdict then stated, "We the jury, find in favor of [Plaintiffs], and we award damages in the amount of $0.00."

The potential inconsistency arises when the jury instruction listing the elements for breach of contract is analyzed. In order for the jury to find the plaintiffs proved each element of the breach of contract claim as required by the first question, they would have had to find, "[t]he amount of any damage Defendant Vischering has caused." *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 468 (Iowa 2010) ("An essential element of a breach of contract claim is that the breach caused a party to incur damages."). Thus, in order to

find the plaintiffs proved each element of the breach of contract claim, the jury would have had to find Vischering caused some amount of damage to the plaintiffs. The plaintiffs claim this finding is inconsistent with the jury later awarding them zero damages.

Iowa Rule of Civil Procedure 1.934 permits courts to submit special interrogatories to juries in addition to the general verdict form. The special interrogatories allow juries to render decisions on particular questions of fact and help the jury focus on important issues in the case. *Clinton Physical Therapy Servs., P.C.*, 714 N.W.2d at 610. If the answers to these special interrogatories are consistent with the general verdict, the court enters judgment consistent with the jury's verdict. Iowa R. Civ. P. 1.934. However, if the answers to interrogatories are inconsistent with the general verdict, the court can enter judgment according to the special interrogatories, send the jury back for additional deliberation, or grant a new trial. *Id.* If the interrogatory answers are inconsistent with each other and at least one is inconsistent with the general verdict, the court can either send the jury back for additional deliberation, or order a new trial. *Id*.

Vischering asserts the plaintiffs failed to preserve error on their claim of inconsistency two ways: (1) the plaintiffs failed to object to the additional instruction given by the court under which the inconsistency arose; and (2) the plaintiffs failed to timely object to the inconsistency after the verdict was read, but before the jury was discharged. First, Vischering claims the plaintiffs did not preserve error because they failed to object to the court's answer to the jury's

question about whether there was a minimum amount of damages that must be ordered if they were to find in favor of the plaintiffs on the breach of contract claim. Vischering argues the reason the jury awarded no damages was because the court's answer to their question permitted them to. The court allowed the attorneys for all parties to weigh in on the answer, but the plaintiffs' counsel failed to make his objection known. Vischering asserts the plaintiffs thereby waived their right to challenge the jury verdict, which directly arose from the unchallenged answer to the jury's question.

We disagree the plaintiffs waived their right to challenge the verdict as inconsistent by failing to object to the court's instructions. The answer to the jury's question was a correct statement of the law, and while it may have opened the door to a potential inconsistent verdict, neither the court nor the parties could have anticipated the inconsistency at the time the answer was given. *See Cowan v. Flannery*, 461 N.W.2d 155, 160 (Iowa 1990) (rejecting the defendant's waiver argument that plaintiffs cannot object to the inconsistent verdict when counsel failed to object to the jury instructions). It was not until the verdict was read that the alleged inconsistency came to light, and a party has an obligation to make an objection only after the grounds for such a challenge become apparent.

Next, Vischering claims the plaintiffs failed to preserve error because they failed to object to the inconsistent verdict before the jury was discharged. We agree. Under our error preservation rules a party must raise an objection "at the earliest opportunity in the progress of the case." *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997). This requirement is necessary to give the court and the

opposing party notice of the alleged error at a time when corrective action is still possible. *State v. Johnson*, 476 N.W.2d 330, 334 (Iowa 1991). In addition, the error preservation rules are designed to "preserve judicial resources by avoiding proceedings that would have been rendered unnecessary had an earlier ruling on the issue been made." *Top of Iowa Coop. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000). When a party raises a complaint about the consistency of a jury verdict for the first time in a motion for a new trial, that party robs the court of the most efficient and convenient corrective action: requesting the jury continue deliberation in order to correct any inconsistency. *Lockard v. Missouri Pacific R. Co.*, 894 F.2d 299, 304 (8th Cir. 1990) (stating the purpose of the rule requiring parties to object to an inconsistent verdict before the jury is discharged "is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury").

The plaintiffs assert that they have preserved error in this case because *Clinton Physical Therapy Services* holds that a party can challenge an inconsistent verdict by filing a motion for a new trial. 714 N.W.2d at 610. While the court in *Clinton Physical Therapy Services* held a party can challenge an inconsistent verdict by filing a motion for a new trial, there is one important difference between this case and *Clinton Physical Therapy Services.* In *Clinton Physical Therapy Services* the parties had consented to a sealed verdict, so the verdict was not read in open court. *Id.* The parties in this case did not consent to a sealed verdict, and the verdict was read in open court, which provided the plaintiffs an opportunity challenge the verdict before the jury was discharged.

The plaintiffs' earliest possible time to challenge the verdict as inconsistent was at the time the verdict was read. On the other hand the earliest possible time for the plaintiff in *Clinton Physical Therapy Services* to challenge the verdict as inconsistent was in a motion for a new trial because the jury was discharged before the parties were made aware of the verdict. *Id.* Thus the challenge in *Clinton Physical Therapy Services* was preserved where the plaintiffs' claim in this case has been waived.

In addition to preserving judicial resources, requiring a party to challenge an inconsistent verdict before the jury is discharged also prevents a dissatisfied party from withholding timely notice of problems, which could have been cured by the original jury, "as a pretext for seeking a second bite of the apple before a new jury that might be more receptive to its claims." *Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 954, 961 (D. Conn. 1992); *see also Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 618 (6th Cir. 2007) (stating the rule that an objection must be made before a jury is discharged, "prevents a dissatisfied party from misusing procedural rules and obtaining a new trial for an asserted inconsistent verdict"); *Coralluzzo v. Educ. Mgmt. Corp.*, 86 F.3d 185, 186 (11th Cir. 1996) (stating that to allow a party to seek a remedy for an inconsistent verdict after the jury is discharged allows for the possible misuse of procedural rules by "parties anxious to implant a ground for appeal should the jury's opinions prove distasteful to them"). Because the plaintiffs failed to raise an objection to the verdicts at the earliest possible time, robbing the court of the most efficient

and convenient corrective action, we find they have failed to preserve error on their claim that the verdict was inconsistent.

IV. BREACH OF CONTRACT. In its cross-appeal, Vischering claims the district court erred in denying its motion for judgment notwithstanding the verdict because it can be determined as a matter of law that it did not breach the terms of the lease agreements with the plaintiffs. Vischering claims the disputed term "rentable square feet" is in the introductory recital language of the lease agreement, and not in the binding terms of the contract; therefore, it cannot form the basis of the plaintiffs' breach of contract claim. Next, Vischering claims the term "rentable square feet" is not ambiguous, but can be properly interpreted using the rules of interpretation. Finally, Vischering claims the plaintiffs offered no evidence to support their contention that the term "rentable square feet" refers to the space within their suite.

First, Vischering claims there is no breach of contract because the provision the plaintiffs claim Vischering breached is not part of the binding terms of the contract, but instead is part of the non-binding introductory recitals of the agreement. In support of its position, Vischering cites *Wilson v. Wilson*, 577 N.E.2d 1323, 1329 (Ill. App. Ct. 1991), where the Illinois Appellate Court says, "[a] preliminary recital, which is an explanation of the circumstances surrounding the execution of the contract, does not become a binding obligation unless so referred to in the operative portion of the instrument." That proposition is not applicable in this case as the preliminary recital here was referred to in the

operative portion of the instrument making the recital language part of the binding terms of the contract.

The leases in this case all contain a similar witnesseth clause that states in part,

> LANDLORD, in consideration of the rents herein reserved, . . . leases to TENANT, and TENANT hereby rents and leases from LANDLORD, according to the terms and conditions herein, office space containing approximately ____ rentable square feet, hereinafter called the demised premises, . . .

This witnesseth clause defines the term "demised premises," which is used throughout the rest of the lease. By using the term "demised premises" in the operative portion of the lease agreement, the definition is referenced and incorporated into the binding terms of the agreement. It therefore cannot be said that this language defining an essential term of the contract is non-binding.

Next, Vischering claims the term "rentable square feet" is unambiguous when the rules of interpretation are applied. Vischering contends it offered uncontroverted expert testimony that established the term should be interpreted consistent with the industry standard guidelines contained in the Building Owners and Managers Association (BOMA) International's Standard Method for Measuring Floor Area in Office Buildings. In this publication, the term "rentable area" means "the usable area[1] of an office area[2] or store area[3] with its

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[1] Usable area is defined to mean "the measured area of an office area, store area or building common area on a floor."

[2] Office area is defined to mean "the area where a tenant normally houses personnel and/or furniture, for which a measurement is to be computed."

[3] Store area is defined to mean "the area of an office building suitable for retail occupancy."

associated share of floor common areas[4] and building common areas."[5] Bldg. Owners & Managers Ass'n Int'l Standard Method for Measuring Floor Area in Office Bldgs. ANSI/BOMA Z65.1-1996 (1996). Vischering claims the district court failed to follow rules of contract interpretation, and if it had, it should have granted their motion for judgment notwithstanding the verdict.

Interpretation of a contract involves ascertaining the meaning of contractual words. *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011). The goal of contract interpretation is to determine the intention of the parties at the time they executed the contract. *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001). The two-step process used in interpretation requires the court to (1) determine what meanings are reasonably possible from the words chosen by the parties, and (2) determine which of the possible meanings is proper if a term is found to be ambiguous. *Id*. We use the rules of interpretation to both determine the reasonably possible meanings of a disputed term, and also to choose among the reasonable meanings. *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). "When the interpretation of a contract depends on the credibility of extrinsic evidence or on a choice among reasonable inferences that can be

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[4] Floor common area is defined to mean "the areas on a floor such as washrooms, janitorial closets, electrical rooms, telephone rooms, mechanical rooms, elevator lobbies, and public corridors which are available primarily for the use of tenants on that floor."

[5] Building common area is defined to mean

> the areas of the building that provide services to building tenants but which are not included in the office area or store area of any specific tenant. These areas may include, but shall not be limited to, main and auxiliary lobbies, atrium spaces at the level of the finished floor, concierge areas or security desks, conference rooms, lounges or vending areas, food service facilities, health or fitness centers, daycare facilities, locker or shower facilities, mail rooms, fire control rooms, fully enclosed courtyards outside the exterior walls, and building core and service areas such as fully enclosed mechanical or equipment rooms.

drawn from the extrinsic evidence, the question of interpretation is determined by the finder of fact." *Peak*, 799 N.W.2d at 544.

Vischering points to the Restatement (Second) of Contracts § 202, at 86 (1981)[6] as providing the contract rules of interpretation. While Vischering appears to argue the term "rentable square feet" is not ambiguous under each rule outlined in section 202, its argument essentially boils down to subsection 3(b) which provides "unless a different intent is manifested, . . . (b) technical terms and words of art are to be given their technical meaning when used in a transaction within their technical field." Vischering contends the term "rentable square feet" is a technical term of art within the commercial real estate field, and the term should be interpreted consisted with the technical meaning as provided in the BOMA standard quoted above. If this term is interpreted consistent with

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[6] Restatement (Second) of Contracts § 202, at 86, provides,

> (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
> (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
> (3) Unless a different intention is manifested,
>
> > (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
> > (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.
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> (4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
> (5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

the BOMA standard, then Vischering claims it is entitled to judgment as a matter of law as there was no breach of the lease agreement.

Alternatively, the plaintiffs contend the term "rentable square feet" is defined in the lease itself. The sentences read in part, "Landlord, . . . leases to tenant, and tenant hereby rents and leases from landlord, . . . office space containing approximately ___ rentable square feet, hereinafter called the demised premises." The plaintiffs assert the number of "rentable square feet" describes the "office space" they are renting, which was the area within the four walls of their suite. In making this argument, the plaintiffs rely on the rule of contract interpretation that "[t]he most important evidence of the parties' intentions at the time of contracting is the words of the contract." *Peak*, 799 N.W.2d at 544. In addition, the plaintiffs attack Vischering's definition pointing out that nowhere is "rentable square feet" defined in the BOMA standard. The BOMA standard instead defines "rentable area," which is not a term used in the lease agreements.

Both parties have put forth reasonable interpretations of the term "rentable square feet." Because the resolution of the ambiguous language implicates the credibility of extrinsic evidence and what, if any, reasonable inferences can be drawn from this evidence, the issue is to be resolved by the finder of fact, in this case the jury. *Walsh*, 622 N.W.2d at 503; *see also Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999); *Schneider Leasing, Inc. v. U.S. Aviation Underwriters, Inc.*, 555 N.W.2d 838, 841 (Iowa 1996). It is therefore not possible to resolve this issue as a matter of law as Vischering contends.

Finally, Vischering asserts it is entitled to judgment as a matter of law because the plaintiffs failed to present evidence to support their claim that "rentable square feet" meant the area inside the four walls of their units. Vischering contends the plaintiffs' arguments about the definition of "rentable square feet" amount to an undisclosed secret intent because the plaintiffs never communicated their understanding of the term to Vischering when the lease agreements were executed. While it is true that a party's undisclosed secret intent does not impact contract interpretation, *Peak*, 799 N.W.2d at 544, we find the plaintiffs were not relying on their undisclosed secret definition of the term "rentable square feet" at the time they entered into the lease agreements. The plaintiffs alleged at trial, as stated above, "rentable square feet" was defined in the lease agreement itself. As the plaintiffs offered the leases into evidence at trial along with an explanation as to how they interpreted the term, they therefore offered sufficient evidence to support their claim. *Rick v. Sprague*, 706 N.W.2d 717, 723 (Iowa 2005) ("[T]he words of an integrated agreement remain the most important evidence of intention." (citation omitted)).

We find the district court was correct in denying Vischering's motion for judgment notwithstanding the verdict as the plaintiffs' claims cannot be determined as a matter of law. We therefore deny Vischering's cross-appeal.

Costs on appeal are taxed one-half to each party.

AFFIRMED.