

STATE OF MICHIGAN
COURT OF APPEALS

BOUVIER BAY ASSOCIATES, INC.,

Plaintiff/Counter Defendant-Appellant,

v

ANDERSON, ECKSTEIN & WESTRICK, INC.,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED

June 25, 1999

No. 194215

Macomb Circuit Court

LC No. 91-004360 CK

Before: Smolenski, P.J., and Gribbs and O'Connell, JJ.

PER CURIAM.

Plaintiff, owner and operator of a marina, brought suit against defendant, an architectural engineering firm, over the failure of the marina's seawalls while initially under construction, alleging that defendant was responsible for misjudging the nature of the soil that the seawalls were to contain. The jury determined that defendant was neither negligent nor in breach of any contractual duty concerning plaintiff. The trial court entered an order reflecting the jury's verdict on March 11, 1996. Plaintiff appeals as of right, and we affirm.

The sole issue on appeal is the propriety of the trial court's decision to permit defense counsel, over objection, to elicit from defendant's employee testimony concerning some of the terms of a contract between plaintiff's general contractor for construction of the marina and one of its subcontractors. This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997). An abuse of discretion occurs where an unprejudiced person, considering the facts under which the trial court acted, would conclude that there was no justification for the court's decision. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997). We find no abuse of discretion.

On direct examination, defense counsel asked defendant's project manager to read from a contract, which had itself been admitted into evidence, between plaintiff's general contractor and one of its subcontractors. Defendant's purpose was to develop the defense that others had responsibility for accurately determining the nature of the soil that the seawalls were to contain. Plaintiff objected, articulating as grounds lack of foundation, that "[i]t's inappropriate to have a witness who's not involved in a contract to read from the contract document," that the witness was stating a legal conclusion, and

that the witness was misreading the document. However, the basis asserted on appeal is that the jury was confused, this argument being characterized as an issue of relevance under MRE 402, and unfair prejudice under MRE 403. Plaintiff did not in this regard specifically mention relevance or prejudice, MRE 402 or 403, or jury confusion at trial; plaintiff does not assert on appeal that there is a rule against a witness reading from a contract to which the witness was not a party, or that the witness improperly stated a legal conclusion, or that the witness in fact misread the document. An issue is preserved for appellate review only to the extent that it was raised in the proceedings below. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). In this instance, we will regard plaintiff's relevance argument as having been minimally preserved by the objection concerning foundation.¹

Nonetheless, plaintiff's argument that the testimony in question was irrelevant is without merit. Defendant was offering evidence in defense of not only a contract claim, but of a negligence claim, and defendant has raised the prospect of comparative negligence. Thus, the extent to which others shared in responsibility for damages resulting from the initial failure of the seawalls was material to the case. Further, given that the contract between plaintiff's contractor and its subcontractor was itself admitted into evidence, plaintiff could hardly have suffered any undue prejudice from defendant's choosing to emphasize certain of its terms through defendant's employee's testimony.

For these reasons, we conclude that the trial court properly overruled plaintiff's objection at trial and admitted the testimony.

Affirmed.

/s/ Michael R. Smolenski

/s/ Roman S. Gribbs

/s/ Peter D. O'Connell

¹ "Foundation" for the presentation of evidence "is established by testimony which identified the evidence sought to be admitted and connects it with the issue in question." Black's Law Dictionary (6th ed, 1990), p 656.