IN THE COURT OF APPEALS OF IOWA

No. 0-179 / 09-1151
Filed May 26, 2010

QUAD CITY BANK & TRUST,
Plaintiff-Appellant,

vs.

JIM KIRCHER & ASSOCIATES, P.C.,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Quad City Bank & Trust appeals from a defense verdict on its accounting negligence claim contending the district court improperly excluded its expert witness. **REVERSED AND REMANDED.**

Robert V.P. Waterman Jr. and Thomas D. Waterman of Lane & Waterman, L.L.P., Davenport, for appellant.

Les V. Reddick of Kane, Norby & Reddick, P.C., Dubuque, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

This appeal requires us to determine the qualifications required for plaintiff Bank's expert witness in a professional negligence claim against an accounting firm upon whose report the Bank may have relied. We conclude the witness was improperly excluded and therefore reverse and remand for a new trial.

I. Background Facts and Proceedings.

On April 27, 2006, Quad City Bank (Bank) filed this accounting malpractice action against Jim Kircher & Associates, P.C. (Kircher), asserting Kircher negligently performed an audit of Chapman Lumber for the fiscal year 2003. The evidence presented at trial tended to establish the following.

In December 2002, the Bank's loan committee met and discussed a potential Bank customer, Chapman Lumber. Keith Chapman owned 98.5 percent of Chapman Lumber, a family-owned lumber business of five decades located in Hopkinton, Iowa. The committee learned that Chapman Lumber had been in foreclosure in 1999 for not paying its bills. The Bank understood that in 1999 Chapman Lumber faced severe financial difficulties and two employees had been terminated for embezzlement.

In February 2003, the Bank provided a line of credit of "about half a million dollars" to Chapman Lumber. In July 2003, the Bank loaned Chapman Lumber $1,935,000 and, in September 2003, it increased the line of credit to $750,000. Chapman Lumber was almost immediately in default on the loans to the Bank. The Bank could have exercised its right to foreclose in October 2003, but informally determined to forebear foreclosure. Chapman Lumber retained Kircher in a written agreement dated October 1, 2003, to prepare a general audit

for its fiscal year ending June 30, 2003. Kircher agreed to perform the audit in accordance with generally accepted auditing standards. The agreement expressly stated that the assurances in the audit were not absolute and that there was a risk that material misstatements could exist and not be detected. The audit done by Kircher was an opinion of the financial condition of the company as of June 30, 2003.

The 2003 audit was available to the Bank at the end of January 2004. The Bank forwarded the audit to the United States Department of Agriculture (a guarantor of the $1.9 million loan). According to the Kircher audit, on June 30, 2003, Chapman Lumber had overdrafts of $59,474 and a deficit cash flow of $85,306.

In that same month, January 2004, Mitch McElree (a commercial lender at Quad City Bank's sister bank, Cedar Rapids Bank & Trust) e-mailed the Bank regarding Chapman Lumber, recommending Quad City Bank give Chapman Lumber notice of intent to call the loans within a certain—short—amount of time. McElree warned the Bank that Chapman Lumber's inventory and accounts receivable were at a high level of risk. As of January 31, 2004, the Bank's internal records showed the net liquidated value of Chapman Lumber was $1,545,843.

Quad City Bank did not give Chapman Lumber notice of intent to call the loans in January 2004. Rather, to ensure the "best chance of full repayment," the Bank took steps to keep Chapman Lumber a going concern. In February 2004, Chapman Lumber's need for an infusion of equity was urgent. On March 3, 2004, the Bank was informed of a potential million dollar investor. On March 8,

2004, the Bank entered into a forbearance agreement with Chapman Lumber, agreeing not to foreclose. The forbearance agreement did not mention the Kircher audit and states that it was entered in anticipation of Chapman Lumber getting venture capital.

In May 2004, a fire in its kilns destroyed much of Chapman Lumber's ability to continue to operate.[1] As a co-insured entitled to insurance proceeds due to the fire, the Bank allowed Chapman to re-invest those insurance proceeds in new kilns for the company.

Chapman Lumber filed for bankruptcy protection in February 2005. In a March 2005 tour of Chapman Lumber, the Bank became aware that Keith "Chapman had been defrauding us. We found inventory on the facility but it was inventory not owned by Mr. Chapman."

Chapman Lumber was liquidated in 2005; the Bank netted $1,289,213 in the sale.

The Bank sued Kircher, asserting that the Bank would have foreclosed earlier if the 2003 audit had accurately depicted the financial condition of Chapman Lumber.[2] The Bank claimed its losses as a result of the allegedly negligent audit were in excess of $912,000.

On December 5, 2006, Quad City Bank identified Kerry Bolt as an intended expert witness to carry its burden of proof in its professional negligence

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[1]Chapman Lumber cut lumber, provided wet lumber sales, dried lumber, and had a mill shop for cabinetry, chairs, etc. Its main source of revenue was kiln-dried lumber.

[2] The petition contained two counts: professional negligence and negligent misrepresentation. Although the record is not entirely clear, it appears that the Bank's allegation of negligent misrepresentation of information by the auditor was not submitted to the jury.

action against Kircher. Mr. Bolt is a certified fraud examiner operating a forensic accounting business. He is not an accountant. For twenty-eight years, Mr. Bolt conducted field audits of income tax returns for the Internal Revenue Service, including two to three hundred business audits. During these audits, he examined business records regarding inventory, accounts receivable and accounts payable, and examined source documentation to match to the records to determine the accuracy of the numbers used for inventory, receivables, income, and expenses. According to Mr. Bolt's answer to the expert interrogatory signed on May 5, 2007, Mr. Bolt would testify that Kircher's employee, Certified Public Accountant (CPA) Brian Feltes, "was negligent in the performance of an audit of Chapman Lumber Company" and that "the audit report by auditor Brian Feltes is inaccurate, incomplete and misleading and would not give a reader an accurate picture of the company's financial condition."

On May 20, 2009, thirteen days before trial, Kircher filed a document captioned "motion in limine" seeking to prohibit Mr. Bolt's testimony with respect to the standard of care applicable to certified public accountants and whether that standard was breached in Division I, and seeking to prohibit Mr. Bolt's testimony with respect to the work papers generated as part of the audit and deficiencies in the work actually done in Division II. The Bank resisted on May 28. On June 2nd, the morning of trial, a hearing took place on Kircher's motion. The Bank argued that

> Mr. Bolt is not coming in as a typical expert to say that standard of care for a certified public accountant doing an audit is the following [Generally Accepted Accounting Procedures] GAAP and [Generally Accepted Auditing Standards] GAAS standard was violated. He's coming in to say, I'm assuming that you have to do what your work

> papers told you to do and here's why that can't have been the case, and he is qualified to do that because he's a certified fraud examiner and he's been running down situations somewhat similar to this for a long time.

The court summarized the argument as follows:

> So [counsel], am I understanding you correctly to say that under probably usual circumstances, Mr. Bolt would not be able to testify as to whether or not an audit was performed negligently but that under these circumstances with the admission of Mr. Feltes that the work papers are a necessary part of the auditing process and that he didn't do what he was supposed to do in regard to the work papers, that that then makes Mr. Bolt a sufficient expert witness to testify as to whether or not in his opinion the audit was performed negligently? [Quad City Bank counsel]: Yes. And I would not ask him the precise question, "In your opinion was the audit performed negligently?" I would ask him, "Based on your review of the work papers and the other materials, does it appear that the auditors did what their work papers required them to do?"

After noting statutory requirements relating to the professional regulation of public accountants, *see generally* Iowa Code ch. 542 (2003) and *Kemin Industries, Inc. v. KPMG Peat Marwick, LLP*, 578 N.W.2d 212 (Iowa 1998), the district court ruled:

> And—so [the statute] keeps talking about in accordance with the statements on auditing standards, and then we have the *Kemin* case that says that a violation of a particular professional standard is only evidence of negligence, but it seems to me that even if that's the case, that [Quad City Bank] must still prove a violation of some generally accepted auditing standard, and from what I'm able to read from what has been given to me thus far in deposition of Mr. Bolt, he is not an expert who can determine whether or not an audit has been performed pursuant to some generally accepted auditing standard because he's not a CPA . . . . So I don't think that you can take a statement that was made by a CPA and then bring Mr. Bolt into the picture and say, well, based upon what he told me and then based upon other investigations that I made, I'm of the opinion that the—that this audit was not [[3]] performed negligently. Now, you tell me that you're not going to, in fact, ask that specific

[3] It would appear the district court meant to say Mr. Bolt could not testify that the audit *was* performed negligently.

> question, but I think that's really, in essence, the question that you're going to ask of Mr. Bolt.
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> . . . I don't know if you're planning on calling Mr. Feltes, but I assume that you can attempt through his testimony to establish your case, and I'm not saying right off the top of my head, I guess, that Mr. Bolt cannot testify period, but I'm just saying that he can't testify to this ultimate fact.

Counsel for Kircher asked the court for clarification of its ruling, whether its motion was granted or denied. The court clarified, "Your motion is granted as to Bolt." The Bank then presented its truncated case to the jury.

Jay Johnson a commercial lender for the Bank testified that he originated the loan to Chapman Lumber, which had been referred from a sister bank. Johnson testified that prior to the lending committee's approval of the loan he reviewed Chapman Lumber's projected income and balance sheets and Keith Chapman's personal credit history. Johnson also visited Chapman Lumber, which appeared to be a "fully operational saw mill with inventory stored throughout the property" that was "undergoing significant sales growth." That growth created financing and cash needs.

Johnson testified that Quad City Bank provided a line of credit to Chapman Lumber in February 2003 and closed on a $1.9 million term loan in July 2003. The U.S. Department of Agriculture provided an eighty percent guarantee of the July loan, and required an audit of Chapman Lumber to "validate the performance of the company."

Johnson testified that the Bank had compiled financial statements prepared by Kimberly Sauser, Chapman Lumber's certified public accountant, and audits from prior years (2000, 2001, and 2002). Johnson testified the difference between a compiled statement and an audited statement was that

"[a]n audited statement has testing performed on the validity and reasonableness of the numbers. There's monitoring, there's observing of inventory, all things that you won't get with a compiled statement." Johnson testified it was his understanding that an auditor "would follow the generally-accepted accounting principles and the minimum requirements to issue an audit."

> Q. Did you think they would examine internal controls or not? A. Yes, most definitely.
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> Q. Did you think an auditor, if they're going to make a representation regarding the value of inventory, would do something to check inventory? A. Certainly.
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> Q. And did you think that an auditor, if they make representations regarding receivables, would be doing something to check the internal controls regarding those receivables? A. Definitely.
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> Q. Did you believe that an auditor would be doing something to look for potential fraud? A. Yes, sir.

Johnson testified that had the 2003 audit included concerns regarding potential fraud or inadequate internal controls, Quad City Bank would have called its notes with Chapman Lumber, sold the business as a going concern, liquidating its collateral prior to the April fire, and taken the insurance proceeds and applied them to the debt. He testified that if the Bank had liquidated Chapman in 2004, the Bank would have received $912,270.10 more against its loans.

The bankruptcy trustee for Chapman Lumber testified that in the course of his duties as trustee, he learned of a bank account not listed in the bankruptcy inventory through which Keith Chapman, since 1999, had funneled about one million dollars. The bulk of that money had been paid to Chapman Lumber, but not included in the company's books. About $600,000 was withdrawn for Keith

Chapman's personal use and expenses; the remainder had eventually reached Chapman Lumber.

Kircher accountant, Brian Feltes, testified he performed the 2003 audit. Mr. Feltes had performed audits of Chapman Lumber in 2000, 2001, and 2002 while employed by another accounting firm. Mr. Feltes understood the audit he prepared was a condition of the U.S. Department of Agriculture's guarantee of Quad City Bank's loan to Chapman Lumber. Mr. Feltes testified that he performed a general audit, which differs from a fraud audit. He testified as to generally accepted auditing standards with respect to a general audit, which standards are outlined in checklists used throughout the audit process. The Bank cross-examined Mr. Feltes as to his use of and compliance with the audit checklist included in his work papers.

At the close of the Bank's case, Kerry Bolt testified in an offer of proof. His testimony was that he had examined Mr. Feltes's work papers and was prepared to testify about his investigation of the auditor's 1100 pages of work papers, whether the individual tasks had actually been completed, and inadequacies of Mr. Feltes's inquiries and conclusions. The record contains no additional discussion between counsel and the court regarding Mr. Bolt's offered testimony.

Kircher moved for a directed verdict, contending Quad City Bank could not prevail without expert testimony as to accounting standards. The Bank resisted:

> [W]e have read into the record admissions from the Defendant's own expert and we have cross-examined the auditor who did the work both on the stand and we've read in excerpts from his deposition. The evidence would allow a reasonable jury to conclude that Mr. Feltes was required to do the tasks set forth in his

> work papers, his work papers are in evidence. The jury could conclude that one of those tasks was interviewing Jane Gast, the office manager, regarding the issue of internal controls and the issue of fraud. The jury could conclude that the interview never occurred because Ms. Gast has testified that it never occurred. Mr. Feltes actually testified that he believed he discussed with her how the checks would be processed and in his deposition, the transcript or the excerpt we read in, he thought that he had to have discussed with her what would happen with the checks after they left her hands. Had he had that discussion with her, we know that he would have discovered Mr. Chapman's Wells Fargo account and that the checks ultimately were not being appropriately applied and that he would have had to either disengage according to his testimony or he would have had to somehow disclose that fraud depending on what his firm decided to do when it obtained the information. A reasonable jury could conclude, therefore, that Mr. Feltes was negligent in not doing the audit in accordance with his own work papers and with what he has admitted the standard applicable to what he was supposed to do. As a result we do not need a retained expert to prove our case because the own auditor's admissions as well as their expert's admissions have given us sufficient evidence to present this case to the jury.

The court overruled the motion for directed verdict.

The jury returned a defense verdict, finding no negligence by Kircher. The Bank filed a motion for new trial, arguing the district court erred in excluding its expert witness. The court denied the motion. The Bank now appeals, contending the district court abused its discretion in excluding the expert testimony of Kerry Bolt.

II. Scope and Standard of Review.

The trial court has broad discretion in ruling on whether a witness may testify as an expert with reference to a particular topic. *Heinz v. Heinz*, 653 N.W.2d 334, 341 (Iowa 2002). The court may abuse its discretion if it rejects relevant evidence based on an erroneous application of the law, *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000), or if it unreasonably refuses to permit

relevant testimony from a qualified expert. *Schlader v. Interstate Power, Co.*, 591 N.W.2d 10, 11 (Iowa 1999).

> We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. Thus, we will reverse a decision by the district court concerning the admissibility of expert opinions only when the record shows "the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." This standard applies the same to rulings admitting and rulings denying the testimony.

Ranes v. Adams Labs., Inc., 778 N.W.2d 677, 685 (Iowa 2010) (citations omitted).

III. Preservation of Error.

Kircher argues that the Bank failed to preserve error on its claim by failing to re-offer Mr. Bolt's testimony at trial on the allegations of negligence that did not involve the GAAS or GAAP.

In granting Kircher's motion in limine regarding Mr. Bolt's expert testimony, the court appeared to leave an opening for the Bank to call its expert witness for some narrower purpose. The court said:

> I don't know if you're planning on calling Mr. Feltes, but I assume that you can attempt through his testimony to establish your case, and I'm not saying right off the top of my head, I guess, that Mr. Bolt cannot testify period, but I'm just saying that he can't testify to this ultimate fact [that the audit was performed negligently].

When pressed by Kircher's counsel, the court went on to say that Kircher's motion in limine was granted as to Mr. Bolt's testimony.

The Bank presented Mr. Bolt's testimony as an offer of proof during the trial for purposes of this appeal, but the record does not reflect a formal renewed request to present that testimony. Kircher argues that the Bank thereby waived

its issue, citing *Simkins v. City of Davenport*, 232 N.W.2d 561, 565 (Iowa 1975) ("A ruling on a motion in limine in and of itself does not serve as a basis for reversal on appeal."). Kircher contends that the Bank should have offered Mr. Bolt as a fact witness, characterizing the non-standards testimony Mr. Bolt was prepared to give as facts rather than expert testimony. Kircher claims that the Bank's failure to call Mr. Bolt as a witness at trial constituted a waiver of the issue. The Bank responds that the scope of the district court's exclusionary order closed the door to any meaningful testimony by Mr. Bolt, since Mr. Bolt was not a fact witness, but an expert retained for litigation. We agree.

The function of a motion in limine is *not* to secure a ruling on the admissibility of evidence. *Twyford v. Weber*, 220 N.W.2d 919, 922–23 (Iowa 1974). Rather, its primary purpose is to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on admissibility at an appropriate time. *Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa Ct. App. 1997). Issues of admissibility of expert testimony should be raised prior to trial to allow the court adequate time to assess the challenge—not so close to that trial there is little time to resist and even less time for the district court to consider the matter. *See* Iowa R. Evid. 5.104(*a*) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court."); *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 534 (1999) ("We do not resolve the expert-testimony objection on the basis of timeliness, but we do note that rule of evidence [5.104(*a*)] and its comment suggest that issues of admissibility of expert testimony will be raised prior to trial."); *cf. Twyford*, 220 N.W.2d at 922 (defining a

motion in limine as a term used to secure a protective order against prejudicial questions and statements).

Here, however, the motion, captioned "motion in limine," was Kircher's challenge to the qualifications of the Bank's proposed expert, and the trial court addressed and ruled on the ultimate issue of admissibility. *See, e.g.*, *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa Ct. App. 1997). "The key to our analysis is to determine what the trial court ruling purported to do." *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006). A ruling that simply grants or denies "protection from prejudicial references to challenged evidence cannot preserve the inadmissibility issue for appellate review." *Id.* "But if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial." *State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979); *accord State v. Daly*, 623 N.W.2d 799, 800 (Iowa 2001); *Edgerly*, 571 N.W.2d at 29.

It appears that the trial court ruled on the ultimate issue of admissibility, finding that Mr. Bolt's testimony was inadmissible as to whether the auditor was negligent in his conduct and investigation associated with the audit. Where a ruling on a motion in limine reaches the ultimate issue and declares the evidence inadmissible, it is ordinarily a final ruling and need not be questioned during trial.[4]

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[4] In *Edgerly*, 571 N.W.2d at 29, we said:

> Ordinarily, any error resulting from the court's ruling on a motion in limine is not preserved unless a timely objection is made when the evidence which was the subject of the motion in limine is offered at trial. If, however, the ruling on the motion in limine reaches the ultimate issue of admissibility, it is a final ruling and the objection need not be renewed at trial.

(Citations omitted.)

See Carson v. Webb, 486 N.W.2d 278, 280 (Iowa 1992) (finding that where the plaintiff made the collateral source rule the subject of a motion in limine, the court's denial of the motion was a ruling that the evidence was allowed as a matter of law and "nothing was left for later determination with respect to receipt of this evidence").

While the court appeared to leave an opening for the Bank to call its expert witness for some narrower purpose, the court unequivocally stated:

> I don't know if you're planning on calling Mr. Feltes, but I assume that you can attempt through his testimony to establish your case, and I'm not saying right off the top of my head, I guess, that Mr. Bolt cannot testify period, but I'm just saying that *he can't testify to this ultimate fact*. . . .
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> . . . .
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> [Counsel for Kircher]: What's your ruling? My motion is granted?
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> The Court: *Your motion is granted as to Bolt.*

The ruling was definitive and the Bank was not required to again raise the issue at trial.

To the extent the court left open a window of opportunity for the Bank with regard to Mr. Bolt's testimony, the offer of proof sufficiently put the court on notice of the proposed expert testimony. The Bank was not required to offer its witness in the presence of the jury to preserve error. Therefore, we conclude the Bank preserved error on this issue.

IV. Discussion.

We generally adhere to a liberal view on the admissibility of expert testimony. *Id.*; *see also Leaf*, 590 N.W.2d at 532 (citing court's history of maintaining liberal view on admissibility). The broad test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be

considered before admitting expert testimony. *See* Iowa R. Evid. 5.702. The court must first determine if the testimony "will assist the trier of fact" in understanding "the evidence or to determine a fact in issue." *Id.* Then the court must determine if the witness is qualified to testify "as an expert by knowledge, skill, experience, training, or education." *Id.* "An expert's qualification 'should always relate to his or her background, education, and experience, rather than to a label which may be applied to a profession or trade.'" *Ranes*, 778 N.W.2d at 689 (quoting 31A Am. Jur. 2d *Expert & Opinion Evidence* § 41, at 66-67 (2002)).

In all circumstances involving expert testimony, the proponent of the evidence has the burden of demonstrating to the court as a preliminary question of law the witness's qualifications and the reliability of the witness's opinion. Iowa R. Evid. 5.104(*a*).

The Bank contends the district court abused its discretion in excluding the expert testimony of Kerry Bolt. At trial, the Bank attempted to offer Mr. Bolt's testimony "to guide the jury through the voluminous work papers" prepared by auditor Kircher in the course of its audit "that contained the red flags that should have led to Kircher's discovery of Chapman Lumber's financial peril." The Bank argued to the district court that Mr. Bolt's testimony would not and need not include information about the accounting standards, about which Mr. Bolt admitted he was not qualified. Rather, Mr. Bolt was prepared to inform the jury of the inadequacies and omissions of the audit processes, such as a failure to interview a key witness about internal controls of inventory and income.

However, the district court ruled that Mr. Bolt's testimony would not be helpful to the jury since Mr. Bolt was not a CPA and therefore unqualified to

discuss the appropriate accounting standards.[5] That is, the "red flags" are only evident if the accounting standards would raise them.

In effect, Mr. Bolt found fault with Mr. Feltes's audit because it did not go deeper into the operating procedures of Chapman Lumber and did not disclose problem areas, such as debt-to-equity ratio. The Bank did not intend to ask Mr. Bolt his opinion on the question to be answered by the jury: whether the audit had been performed negligently. The Bank's offer of Mr. Bolt's testimony is presented in the offer of proof, which did not contain an explicit question or answer regarding the issue to be submitted to the jury.

Mr. Bolt had no knowledge of accounting standards under which the audit was performed, but he *was* qualified to testify "as an expert by knowledge, skill, experience, training, or education" that the accountant failed to follow his checklists and to perform all of the interviews and inventory checks required. Iowa R. Evid. 5.702. As our supreme court ruled in *Kemin Industries*, compliance with generally accepted auditing standards and generally accepted accounting standards are not "the only measure of professional negligence with respect to auditing activities." 598 N.W.2d at 217.

The district court ruled

> [Quad City Bank] must still prove a violation of some generally accepted auditing standard, and from what I'm able to read from what has been given to me thus far in deposition of Mr. Bolt, he is not an expert who can determine whether or not an audit has been performed pursuant to some generally accepted auditing standard because he's not a CPA.

[5] The American Institute of Certified Public Accountants has established auditing standards, which prescribe the process an auditor is to use to obtain the required information, and accounting principles, which prescribe the format in which to present the information. *See Kemin Indus.*, 578 N.W.2d at 217.

We agree with the Bank that its offer of its expert witness did not relate to the issue of accounting standards, and that it was not necessary for Mr. Bolt to be a CPA to testify to other perceived deficiencies in Mr. Feltes's audit. While an expert need not be a specialist in a particular area of testimony, the testimony must fall within the witness's general area of expertise. *Hunter v. Bd. of Trs. of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 520 (Iowa 1992).

Neither Iowa Code chapter 542, nor Iowa Code section 147.39 requires an expert witness in an accounting negligence action to be a CPA. *See Hutchinson v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 887 (Iowa 1994) (rejecting contention that the statutory and regulatory restrictions of the practice of psychology "pose limits on the competence of psychologists to testify as experts beyond the limits in the rules of evidence").

Here, the jury was instructed in part :

> INSTRUCTION NO. 11
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> "Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.
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> . . . .
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> INSTRUCTION NO. 15
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> To prove a claim of accounting negligence, a plaintiff must prove all of the following propositions:
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> 1. Defendant was negligent in one or more of the following ways:
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> a. By failing to detect or warn about problems in Chapman Lumber Company's inventory recording system.
>
> b. By failing to detect or warn about Keith Chapman's fraudulent misapplication of funds received.
>
> 2. Defendant's negligence was a proximate cause of damage to Plaintiff.
>
> 3. The amount of damage.

> If the Plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages on its claim of negligence. . . .
>
> INSTRUCTION NO. 16
>
> You have received evidence of provisions of certain accounting procedures and standards of that profession called Generally Accepted Accounting Procedures (GAAP) and Generally Accepted Auditing Standards (GAAS). Conformity with an applicable procedure or standard is evidence that Jim Kircher & Associates, P.C. was not negligent and non-conformity is evidence that [Kircher] was negligent. Such evidence is relevant and you should consider it, but it is not conclusive proof.
>
> INSTRUCTION NO. 17
>
> In performing an audit, an accountant is under a duty to use the skill, judgment and learning ordinarily possessed and exercised by other accountants under similar circumstances.

The district court did not err in ruling Mr. Bolt was not qualified to testify with respect to generally accepted accounting procedures or auditing standards. However, whether the audit was performed negligently involves matters beyond compliance with GAAP and GAAS. *Kemin Indus.*, 598 N.W.2d at 217. Mr. Bolt was qualified to testify to other perceived deficiencies in Mr. Feltes's audit that may be considered by the jury to determine if a breach of a professional duty has occurred. *Id*.

Any weaknesses in Mr. Bolt's opinion and expertise go to the weight to be given his testimony, not its admissibility. *See Hutchinson*, 514 N.W.2d at 888 (noting "the trial court in its discretion and the jury in its deliberation provide the most effective determination" of the admissibility and weight of expert testimony); *see also Garnac Grain Co., Inc. v. Blackley*, 932 F.2d 1563, 1567 (8th Cir. 1991) (noting weaknesses in proposed expert's methodology and qualifications go to weight rather than admissibility). Kircher's criticisms of Mr. Bolt's testimony may

be explored through cross-examination. It is for the jury to determine the value of his opinion.

The Bank moved for a new trial based on the improper exclusion of its expert, contending Mr. Bolt's exclusion deprived the Bank of a fair trial. *See* Iowa R. Civ. P. 1.1004(1). We conclude the exclusion of the Bank's sole expert materially affected the Bank's ability to establish Feltes's audit was performed inadequately. The district court's exclusion of this testimony was an abuse of discretion denying the Bank a fair trial. The district court therefore abused its discretion in denying the Bank a new trial. *See Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 485 (Iowa 2004); *see also Williams v. Hedican*, 561 N.W.2d 817, 832 (Iowa 1997); *Osborn v. Massey-Ferguson, Inc.*, 290 N.W.2d 893, 902 (Iowa 1980).

V. Conclusion.

The district court abused its discretion in not allowing Quad City Bank's fraud examiner to testify on the issue of whether there were deficiencies in the audit apart from the generally accepted auditing standards and accounting principles. We therefore reverse and remand for new trial.

REVERSED AND REMANDED.

Vogel, P.J., concurs. Danilson, J., dissents.

DANILSON, J. (dissenting)

I respectfully dissent, as I believe that error has not been preserved.

At the conclusion of the hearing on the motion in limine, the district court stated:

> [B]ut I assume that you can attempt through his testimony to establish your case, and I'm not saying right off the top of my head, I guess, that Mr. Bolt cannot testify period, but I'm just saying that he can't testify to this ultimate fact. And I really can't say what I—you know, at this state what my opinion would be in that regard because I just—with the fluidity of the trial process, it's very hard for me to try to figure out how this is all going to come out.

I believe the court's announcement of this ruling unequivocally establishes that the Bank's expert could not testify to the ultimate issue whether Kircher's employee, Brian Feltes, had breached the standard of care owed by a certified public accountant in performing an audit. However, it is equally clear that the court was equivocal in ruling upon whether the Bank's expert could testify to other facts.

Although I agree that error was preserved in respect to the testimony of the Bank's expert on the ultimate issue(s), at the hearing on the motion in limine, the Bank's attorney and the court had the following exchange:

> THE COURT: Well, Mr. Bruns, let me ask you this: Are you saying that you expect Mr. Bolt to testify that the audit in question was, in fact, performed negligently?
> MR. BRUNS: No, I'm not going to ask him that precise question. I agree he's not qualified.

Thus, the Bank had no intention, at least on the day of the hearing on the motion in limine and trial, to use its expert to testify to the ultimate issue. The Bank's reply brief also acknowledges that its expert could not testify "to the legal conclusion that the audit was performed 'negligently.'" Unfortunately, the record

reveals that the Bank never offered its expert as a witness at the trial, and instead solely presented the expert's testimony in an offer of proof. The testimony presented in the offer of proof pertained to facts unrelated to the ultimate issue.

The problem here is that because the Bank never offered its expert as a witness during the trial, error was not preserved. A ruling on a motion in limine is generally recognized to not preserve error until the matter is presented at trial unless the court's ruling on the motion is an unequivocal determination of the issue. *State v. Delaney*, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994). Our supreme court has stated:

> Ordinarily, the granting or rejecting of a motion in limine is not reversible error; the error comes, if at all, when the matter is presented at trial and the evidence is then admitted or refused, as the case may be.

State v. Langley, 265 N.W.2d 713, 721 (Iowa 1978).

The facts in this case reflect that although the motion in limine was granted, the ruling was equivocal concerning all testimony but the ultimate issue. The Bank made an offer of proof but for some unexplainable reason never offered its expert as a witness or sought a final ruling from the court after presentation of its offer of proof. As a result, the general rule that a ruling on a motion in limine is not reviewable applies. I would affirm.