IN THE COURT OF APPEALS OF IOWA

No. 8-425 / 07-1119
Filed November 13, 2008

JOSEPH TRUMM and SARA TRUMM,
Plaintiffs-Appellees,

vs.

ARNITA WESTPHAL,
Defendant-Appellant.

ARNITA WESTPHAL,
Counterclaimant,

vs.

JOSEPH TRUMM and SARA TRUMM,
Counterclaim Defendants.

Appeal from the Iowa District Court for Jones County, Nancy A. Baumgartner, Judge.

Arnita Westphal appeals from a jury trial award of damages to Joseph and Sara Trumm for breach of a farm lease. **AFFIRMED.**

Thomas Fiegen, Cedar Rapids, for appellant.

Angela Railsback, Cedar Rapids, for appellees.

Considered by Hutink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Arnita Westphal appeals from a jury trial award of damages in favor of Joseph and Sarah Trumm on their breach-of-contract claim. She argues: (1) the district court erred in allowing evidence of an oral lease agreement in violation of the statute of frauds; (2) the jury's finding that an oral lease existed was not supported by clear and convincing evidence; (3) the district court erred in allowing testimony of the Trumms' lost revenue; (4) the district court erred in denying her motion for a new trial; and (5) grid sampling and fertilizer damages awarded to the Trumms were unsupported by the evidence. We affirm.

I. Background Facts and Proceedings

Westphal owns approximately 290 acres of farmland, 175 acres of which she typically leases to another farmer. In early 2004, Westphal contacted Joe Trumm to inquire if he would be interested in renting the 175-acre portion of her farm. Westphal also needed someone to help with her chores while she was at work during the week. Trumm accepted Westphal's offer to rent a portion of the farm, and they also agreed to share a farm hand, Lukas Tracy.

Trumm and Westphal entered into a written lease dated March 14, 2004.[1] The term of the lease was March 14, 2004, through February 28, 2005, but Trumm testified he believed he and Westphal had an oral contract allowing him to lease the land for five years. In addition, Trumm asked for a letter of understanding which clarified or amended several issues that were detailed in the lease.

[1] Trumm testified that the lease was actually signed later, after he had planted crops, and then predated to March 14, 2004.

Trumm contacted an agronomist, Joshua Geistkemper, and surveyed Westphal's farm to determine what type of farming would be most appropriate for the ground Trumm had rented. Trumm told Geistkemper he would be renting the land for a term of five years, and Geistkemper recommended that Trumm employ an intensive soil sampling method called gridsampling.[2] Geistkemper and Trumm testified this process would not have been used if Trumm believed he was only going to use the farmland for one year. Geistkemper and Trumm developed a long-term program for the land and amortized the payment over four years.

In the fall of 2004, Westphal sent the Trumms a notice terminating the farm tenancy effective September 1, 2004, because she was unhappy with how her farm was being run. Westphal testified dead cattle were left on the farm for weeks at a time, water hydrants were left running full blast, which eroded her soil, the manhole cover on her silo roof was missing, her machine shed had been dented by a wagon, a corner post was broken in the fence line, her live animal trap had been smashed, and the PTO clutch on her tractor was burned out.

In spite of the damages that Westphal claimed Trumm had caused to her farm and property, she renegotiated a lease with the Trumms for 2005. In the 2005 written lease, the parties agreed that the Trumms would provide Westphal with all of the grid sampling data free of charge. The 2005 lease also stipulated

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[2] Gridsampling is a farming technique that is used over a period of years to determine in greater detail than the traditional methods where soil is lacking in certain nutrients. The farmer can then apply nutrients only where they are needed and save money by not applying fertilizer in nutrient-rich areas.

the Trumms were to "bring the soil fertility to the optimum levels established by Iowa State University" upon termination of the lease.

The 2005 lease states it was entered into on March 15, 2005, though the signature page on the Trumms' copy of the lease shows a written date of May 20, 2005.[3] Trumm testified he paid very little attention to the terms of the written lease because he believed he and Westphal were operating largely outside of the written agreement. He testified Westphal had made oral agreements regarding hay bales, corn stalk bales, fence line feeding bunks, and work done by Tracey, so he assumed the written leases were merely a formality and that he could rely on their oral agreements.

Westphal testified problems occurred in 2005 just as in 2004, so she sent the Trumms a notice of termination of farm tenancy effective September 1, 2005. On June 28, 2006, the Trumms filed a petition against Westphal, claiming she was in breach of contract for failing to pay monies owed on termination of the lease for several items. Westphal answered, denying any oral leases and affirmatively raising the stature of frauds as a defense. She also filed a counterclaim alleging she had been damaged by the Trumms in a number of respects. A jury returned a verdict in favor of Westphal in the amount of $2799 and a verdict in favor of the Trumms, based on a five-year lease, in the amount of $47,056. Westphal moved to set aside the verdict or for a new trial based solely on alleged error in allowing evidence of lost profits. The motion was overruled.

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[3] Again Trumm testified the lease was not signed in March, but after he had planted the crops for the year.

On appeal, Westphal claims that the district court erroneously admitted evidence of an oral five-year lease and evidence of the Trumms' lost revenue. She also contends the jury's finding that an oral lease existed is not supported by clear and convincing evidence. Next Westphal claims the district court erred in denying her motion for a new trial. Finally, she argues the grid sampling and fertilizer damages were not supported by the evidence.

II. Scope and Standard of Review

We review the district court's decision to admit evidence of an oral contract under an exception to the statute of frauds for error at law. *Kolkman v. Roth*, 656 N.W.2d 148, 151 (Iowa 2003).

We review the district court's ruling on the admission of evidence for an abuse of discretion. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). "An abuse of discretion occurs when the trial court 'exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.'" *Id*. (citations omitted).

We will uphold the jury's award of damages unless they are not supported by substantial evidence. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998).

III. Analysis

a. Oral Lease and Statute of Frauds

Westphal claims the district court erred in admitting evidence of an oral contract in violation of the statute of frauds when the Trumms did not meet their burden of establishing the elements of promissory estoppel. In order to have

preserved this issue for appeal, Westphal must have objected to such testimony at the time that it was presented during trial. *State v. Mulvany,* 603 N.W.2d 630, 632-33 (Iowa Ct. App. 1999). Westphal cannot "amplify or change" the objection that she raised at trial. *State v. LeCompte,* 327 N.W.2d 221, 223 (Iowa 1982). Thus, Westphal can claim error regarding only that testimony to which she objected at trial. She cites us to an exchange with the court during the testimony of Joseph Trumm as preserving this issue. The only issues discussed during that exchange, outside the jury's presence, was whether "promissory estoppel" had to be plead and we cannot find where Westphal objected to any of the evidence concerning an oral lease. In addition she made no objection to the jury instructions or special verdict given to the jury regarding an oral lease.

Trumm testified, without objection, that it was his understanding he was "renting that farm for five years." Trumm further testified he was "operating on good faith that [the] farm was going to be in [his] possession for five years" and his "investment was made thinking that [he] was going to be farming [the land] for five years." Trumm also stated that even after he received notice of termination in the fall of 2005, he still thought he would be able to farm long term because he "entered the whole thing based on a five-year lease."

Westphal also failed to object to Geistkemper's testimony stating "[Trumm] told me that he verbally had a five-year commitment, and we just went through the plan of what we need to do over that five years." Geistkemper also testified, without objection, that grid sampling is a long-term investment and that Trumm was "planning on farming [the land] for year three, four, and five." Geistkemper

testified further that when he was discussing the possibility of grid sampling with Trumm, he asked if Trumm had a long-term lease and Trumm responded, "Yes, we have a verbal five-year commitment."

Westphal failed to object to any testimony regarding this oral agreement, and she even testified herself that she had other "entirely separate" oral agreements with Trumm outside the 2004 or 2005 written leases. This testimony clearly established Trumm's belief that an oral five-year lease existed and that he had discussed the lease with Geistkemper. Because Westphal failed to object to this testimony, she has not preserved this issue for appeal. *See Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000) (holding "a failure to object to the admission of parol evidence at trial prevents a party from assigning the admission of such evidence as error on appeal").

b. Jury's Finding that Oral Agreement Existed

Westphal argues the jury's finding a five-year oral lease existed was not supported by clear and convincing evidence. Proof of an oral contract on land must be established by a preponderance of clear and convincing evidence. *Ehlinger v. Ehlinger*, 111 N.W.2d 656, 659 (Iowa 1961). Accordingly, we will consider whether existence of the five-year oral lease was supported by clear and convincing evidence. For evidence to be clear and convincing, it is necessary "that there be no serious or substantial doubt about the correctness of the conclusion drawn from it." *Raim v. Stancel*, 339 N.W.2d 621, 624 (Iowa Ct. App. 1983).

The jury found that an oral five-year lease existed, and we find that clear and convincing evidence existed to support this conclusion. Trumm and Geistkemper both testified extensively as to Trumm's belief he would farm Westphal's land for five years. Based on this belief, Trumm testified he invested in a long-term fertilizer program. The written leases between Trumm and Westphal were written for only one year at a time, however, the reliability of this evidence could have been reduced by the fact that Westphal admitted to making several oral contracts. The jury had the distinct advantage of being able to observe the witnesses and to determine their credibility in weighing the evidence. After a thorough reading of the record, we do not have serious or substantial doubt as to the correctness of the jury's finding.

c. Testimony Regarding Lost Revenue

Westphal next argues the district court erred in allowing the Trumms to testify regarding lost revenue because they did not include these expenses in an itemization in their discovery responses and as a result, Westphal was "ambushed" by this claim at trial. Trumm argues that Westphal has not preserved this issue for appeal. Westphal's failure to object to jury instructions regarding this issue does not preclude her from raising this issue on appeal. *James ex rel. James v. Burlington N., Inc.,* 587 N.W.2d 462, 464 (Iowa 1998). Westphal's objection during trial to the admission of evidence relating to lost revenue was sufficient to preserve the matter for appeal. While Geistkemper testified briefly, without objection from Westphal, regarding lost profits, his testimony alone would fall far short of establishing damages and further

testimony by Trumm was needed to establish the claim. Because Westphal objected to Trumm's testimony, she has preserved this issue for appeal.

Iowa Rule of Civil Procedure 1.503(4) requires a party to supplement or amend its response to discovery regarding any matter that bears materially upon a claim asserted by that party. In addition, Rule 1.503(4) requires a party to seasonably amend a prior response if the response is no longer correct. The purpose of Rule 1.503(4) is "to avoid surprise and to permit the issues to become both defined and refined before trial." *Hariri v. Morse Rubber Prods. Co.*, 465 N.W.2d 546, 550 (Iowa Ct. App. 1990).

We find the Trumms' conduct in responding to interrogatories did not frustrate the purpose of Rule 1.503(4). The Trumms submitted their responses to interrogatories on April 12, 2007. Their responses at that time did not include a claim for lost revenue. On May 8, 2007, the Trumms informed Westphal that if settlement could not be reached, they would also seek "additional damages for lost income as a result of not being able to farm the land in 2006 and 2007." Additionally, in the Trumms' itemized list of damages on the pretrial statement dated May 11, 2007, they sought reimbursement for lost revenue in the amount of $90,000.

Westphal was clearly informed of the Trumms' intent to seek recovery for lost revenue prior to trial, which began on May 21, 2007. Westphal did not, however, make any effort to investigate or to even acknowledge the claim until May 22, 2007, the second day of trial, at which point Westphal objected to the admission of evidence related to lost revenue. The district court overruled the

objection because the Trumms' pretrial statement included lost revenue and because of Westphal's failure to object to such evidence at pretrial or through a motion in limine. The Trumms notified Westphal of their intent to seek reimbursement for lost revenue on May 8 and May 11 and Westphal failed to respond to such notification by making further inquiries, requesting a continuance, or making a motion in limine to allow her to pursue the matter further.[4] Westphal had been adequately notified of the claim regarding lost revenue and was not "ambushed" by the introduction of such evidence at trial. The district court did not abuse its discretion in allowing evidence regarding the Trumms' lost revenue.

d. Motion for New Trial

Because we find that the district court's ruling regarding the admissibility of evidence relating to lost revenue was not erroneous, we find that the district court was correct in denying Westphal's motion for a new trial. In addition, Westphal did not preserve this issue for appeal. Westphal did not raise this issue in a motion for directed verdict; therefore, she is not allowed to raise the issue in a motion for judgment notwithstanding the verdict. *Field v. Palmer*, 592 N.W.2d 347, 351 (Iowa 1999).

e. Grid Sampling and Fertilizer Damages

Westphal claims the damages the jury awarded for grid sampling expenses and the cost of extra fertilizer are not supported by the evidence. We

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[4] The district court judge states in her order on Westphal's motion for judgment notwithstanding the verdict that when Westphal objected to lost revenue evidence, she was given the opportunity to continue the trial, but she chose to proceed to trial.

will not interfere with the jury's award of damages unless we find the damages are not supported by substantial evidence. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998).

The jury awarded the Trumms grid sampling expenses as well as damages for fertilizer, minerals, and lime that will benefit the land in future years. We find substantial evidence supporting the jury's award of grid sampling expenses and expenses for fertilizer, mineral, and lime. The jury found that a five-year oral contract existed between Trumm and Westphal. Trumm and Geistkemper testified Trumm applied four years' worth of fertilizer to the soil and developed a long-term grid sampling plan based on his belief he would be able to farm the land for five years. Because Trumm was unable to farm the land in 2006 and 2007, he asked to be reimbursed for the cost of fertilizer he had applied that would benefit those two years as well as for grid sampling expenses that would benefit future years. Trumm supplied bills substantiating the amount of his claim. Trumm did not argue that Westphal should pay for any grid sampling or fertilizer expenses for 2004 or 2005 when Trumm reaped the benefit of his expenses. Geistkemper testified it is common practice in the farming community for a tenant farmer to be reimbursed for the prorated amount of fertilizer applied to benefit future years when that farmer does not remain on the land. The jury could have reasonably concluded the Trumms' oral agreement with Westphal superseded the terms of the written lease. The jury's award of expenses for grid sampling, fertilizer, minerals, and lime was supported by the record.

IV. Conclusion

We conclude: (1) Westphal did not preserve error on the issue of the admission of evidence of an oral agreement between herself and the Trumms, (2) the jury's finding that an oral agreement existed was supported by clear and convincing evidence, (3) evidence of lost revenue was properly admitted, (4) Westphal did not preserve error to appeal the denial of her motion for judgment notwithstanding the verdict, and (5) the jury's award of expenses for grid sampling and fertilizer was supported by substantial evidence. Accordingly, we affirm.

AFFIRMED.