IN THE COURT OF APPEALS OF IOWA

No. 9-337 / 08-1324
Filed September 17, 2009

TERESA KEENE and
STEVEN LAMASTUS,
Plaintiffs-Appellants,

vs.

PATRICK BRENNAN and
J. CAROL BRENNAN,
Defendants-Appellees.

Appeal from the Iowa District Court for Bremer County, John S. Mackey, Judge.

Two expelled bar owners contend that a district court's award of damages in their favor inadequately represents their financial interest in the bar. **AFFIRMED.**

John Hofmeyer, Oelwein, for appellant.

Lana Luhring of Lair & Luhring, Waverly, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

The primary issue before us is whether the district court adequately compensated the plaintiffs for their interest in a bar.

I. Background Facts and Proceedings

Teresa Keene and Steve Lemastus entered into a joint venture with Carol and Pat Brennan to operate a bar known as the White Elephant. While Keene and Lemastus contributed to the purchase price, financed improvements, and generally ran the daily operations, only the Brennans were listed as owners.

Keene and Lemastus operated the White Elephant for approximately ten months. In their view, they turned the bar into a fun and profitable venture. In the view of the Brennans, the White Elephant lived up to its name.[1] As a result of what Carol perceived as a chaotic and unorthodox operation, she changed the locks and took over the bar.

Keene and Lemastus sued the Brennans for an accounting and a declaration of their interest in the bar. They also sought "full and fair compensation" for that interest. Following trial, the district court found that Keene contributed $52,000 to the total capital contribution of $123,306, (giving her a 42.17% interest), Lemastus contributed $32,500 (giving him a 26.36% interest), and the Brennans contributed $38,808 (giving them a 31.47% interest). The court also found that Keene and Lemastus received compensation for their services "in the form of the personal expenditures, withdrawals of cash, food and

[1] A "white elephant" is variously defined as "something costly to maintain," "something with a questionable or at least very limited value," or "a much publicized or eagerly anticipated venture that proves to be a spectacular flop." Encarta World English Dictionary (2009) (online http://encarta.msn.com).

alcohol consumed, and other unaccounted for cash." The court valued the real estate at $65,000 and found that Keene and Lemastus did not present any evidence "regarding the value of business assets, equipment, or the bar's going concern or 'goodwill.'" Based on these findings and a finding concerning outstanding debt, the court determined that the bar had net equity of $54,585.40. Judgment was entered for Keene in the amount of $23,018.66 and for Lemastus in the amount of $14,388.71. Keene and Lemastus appealed.

II. Analysis

A. Conversion

Keene and Lemastus's first argument is as follows:

> Defendants converted Plaintiffs' financial investment and other contributions to Defendants' own purposes so Plaintiffs are entitled to full reimbursement where defendants wrongfully took over the bar and received the sole benefit of plaintiffs' contributions.

The Brennans respond that this argument was not preserved for review, as the theory of conversion was neither presented to the district court nor addressed in the court's final ruling. We agree with the Brennans.

An appellate court may not decide a case on a ground not raised in the district court. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). As the conversion argument was not raised or decided, we conclude it was not preserved for review.

B. Valuation

Keene and Lemastus next argue:

> If not full reimbursement, plaintiffs are entitled to full compensation for their interest in the bar, and the court erred in not valuing fully the bar's improvements, personal property, and goodwill, at cost where the bar was taken less than one year after the property's

> improvement and personal property purchases where any depreciation was minimal.

Our review of this issue is de novo. Iowa R. App. P. 6.4.

"Ordinarily the burden of proof on an issue is upon the party who would suffer loss if the issue were not established." Iowa R. App. P. 6.14(6)(*e*). Therefore, the burden of establishing the bar's value was on Keene and Lemastus. As noted, the district court found that they did not present evidence of the bar's improvements, personal property, and goodwill. The plaintiffs take issue with this statement, pointing to two exhibits they proffered on improvements and repairs to the property.

These exhibits, titled "Improvements," list remodeling projects performed in the bar and the cost of each, but do not distinguish between the cost of labor and the cost of goods. A defense expert stated that "a lot of sorting" would have to be done to arrive at an accurate improvement figure. Keene and Lemastus did not call an expert to perform this sorting function. While they correctly assert that expert testimony was not necessary, they must live with the resulting record. The district court was free to find the unexplained exhibits less probative than the testimony of the expert who addressed the merits of those exhibits. *See Tiemeyer v. McIntosh*, 176 N.W.2d 819, 823 (Iowa 1970) (stating expert testimony may be used to aid the trier of fact, but may also be considered in conjunction with valuations by other witnesses and in conjunction with the other evidence). The court effectively found a lack of probative value by not discussing the substance of these exhibits or a related document detailing purchases from a restaurant supply store.

We turn to the services provided by Keene and Lemastus, a factor not raised in their statement of the issue above, but argued in their brief. As noted, the district court found that they received adequate compensation for these services through their use of bar funds for personal purposes. Keene and Lemastus take issue with this finding. They assert that, even if one accepts the defense expert's testimony concerning their cash expenditures, they were entitled to an additional $22,234.74 in compensation.

On our de novo review, we find conflicting testimony concerning the number of hours Keene and Lemastus worked at the bar, with Keene and Lemastus asserting they worked fifty hours per week and Lemastus's adult son testifying that they worked far less. The district court essentially found the plaintiffs less credible on this issue when it determined that they "received more than their fair share of return of capital." We accept the court's finding, as it is supported by the record, and we concur in its refusal to award damages for their services.

Keene and Lemastus also challenge the court's refusal to assign a value for "goodwill." They contend that Keene's winning personality and Lemastus's good cooking enhanced the bar's goodwill. They note that the bar had gross earnings of $15,000 per month for two months after they took over its operations and, although those earnings later declined, the decrease was seasonal.

Goodwill "is nothing more than the probability that the old customers will resort to the old place." *Norris v. Howard*, 41 Iowa 508, 511 (1875). We agree with the district court that the evidence cited by Keene and Lemastus was insufficient to permit the calculation of a value for this intangible asset. *See In re*

Marriage of Keener, 728 N.W.2d 188, 195 (Iowa 2007) ("This anecdotal evidence is simply an insufficient basis upon which to determine fair market value."). Accordingly, we affirm the district court's refusal to compensate them for this asset.

C. Defense Expert

Keene and Lemastus next contend that the district court should not have allowed the defense expert to testify because the Brennans did not timely disclose him. On this issue, the district court wrote:

> The court notes that the scheduling order filed January 4, 2008, did not provide a deadline for disclosure of either party's expert witnesses and further that the same was issued approximately one month after the scheduling conference held on December 7, 2007. . . .
>
> It really should come as no surprise and consequently no prejudice to plaintiffs that defendants would hire an accounting and appraisal expert to address the issues raised in this action. Further, plaintiffs have had the same opportunity to hire expert witnesses throughout the pendency of this proceeding given the issues presented for determination during the seven-month period following the date of the scheduling conference conducted herein.

Our review of this ruling is for an abuse of discretion. *Milks v. Iowa-Oto Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994).

Iowa Rule of Civil Procedure 1.508(3) requires supplementation of discovery responses concerning the identity or substance of expert testimony at least thirty days before trial. It is conceded that the Brennans did not meet this deadline. However, their noncompliance does not mandate exclusion of the expert testimony; the rule explicitly affords the court discretion to determine whether noncompliance should result in exclusion.

The district court explained its rationale for declining to exclude the testimony, noting that the plaintiffs should have expected an expert in this type of case. We discern no abuse of discretion in the court's ruling on this issue.

D. Weight Afforded Expert Testimony

Keene and Lemastus finally argue that the district court assigned too much weight to the defense expert's testimony. They suggest that he is not qualified and used only one approach to valuing the real estate.

The ability of a witness to testify as an expert depends upon the topic of the question being asked of him or her. *Hyler v. Garner*, 548 N.W.2d 864, 868 (Iowa 1996). "The witness must be qualified to answer the particular question propounded." *Id.* Although the defense expert was not a certified general appraiser, he testified that he was a licensed real estate broker with "the highest real estate sales license that you can receive" and he had been "a certified residential real estate appraiser" for seven years. He also stated that he assisted in over a billion dollars' worth of commercial real estate appraisals. These qualifications were more than sufficient to allow him to opine on the value of the real estate. *See Mensink v. Am. Grain*, 564 N.W.2d 376, 379 (Iowa 1997) (stating that a witness does not need to be a specialist in a particular area of testimony as long as the subject of the witness's testimony falls within that witness's general area of expertise).

As for the substance of this expert's testimony, it is well established that triers of fact may assign whatever weight they choose to expert testimony. *Johnson v. Knoxville Cmty. Sch. Dist.*, 570 N.W.2d 633, 640 (Iowa 1997).

The expert readily explained his reasons for only using a single valuation method and explained that he only valued the real estate rather than the entire bar operation because he was not allowed to enter the bar. The district court took these caveats into account in evaluating his testimony. We therefore affirm the court's acceptance of that testimony.

AFFIRMED.

Potterfield, J., concurs. Doyle, J., writes separately.

DOYLE, J. (writing separately)

I concur, but write separately to address two issues: the late expert witness designation and the appendix filed by the parties.

Keene and Lemastus propounded interrogatories to the Brennans on September 5, 2007. Interrogatory No. 3 requested, among other things, the identity of experts the Brennans expected to call as witnesses at trial. On October 17, 2007, Keene and Lemastus's counsel wrote the Brennans' first counsel requesting answers by a "set date." On December 21, 2007, Keene and Lemastus's counsel wrote the Brennans' new counsel requesting answers by January 10, 2008. On January 4, 2008, a scheduling order was entered setting a trial date of June 4, 2008. Inexplicably, although provided for on the form order, no deadline dates were established for disclosure of expert witnesses.

On January 8, 2008, the Brennans answered the interrogatories. Interrogatory No. 3 was answered: "None at this time Dr. Paul Magnall has been approached and asked to act in this capacity. His response is awaited anxiously." Keene and Lemastus's counsel followed up with a January 14 letter to the Brennans' counsel claiming many of the interrogatory answers were not complete. Interrogatory No. 3 was not mentioned in the letter.

The Brennans served supplemental answers on January 29, 2008. The answer to Interrogatory No. 3 was not supplemented. Not satisfied with the completeness of the supplemental answers, Keene and Lemastus filed a motion to compel discovery on February 15, 2008, requesting the court to order the Brennans to fully and completely answer the interrogatories. Hearing on the motion was set for May 12, 2008, but continued upon the request of Keene and

Lemastus's counsel. Apparently the Brennans' expert, Ben Neil, a certified real estate appraiser, was disclosed to Keene and Lemastus's counsel on May 27, 2008, by supplemental answer. The supplemental answer indicates that Neil examined the property on May 27.[2]

Hearing on the motion to compel was held May 28, 2008. The hearing was not reported. Although we are not required to divine what happened at the hearing, the court's ruling makes it apparent that Keene and Lemastus's counsel asked the court to exclude Neil's testimony because Neil's identity was disclosed less than thirty days from trial in violation of Iowa Rule of Civil Procedure 1.508(3). We do not know if Keene and Lemastus requested a continuance as an alternative to exclusion of Neil's testimony, nor do we know the reason for the late disclosure. In its May 29, 2008 order overruling and denying Keene and Lemastus's motion to compel, the district court remarked:

> It really should come as no surprise and consequently no prejudice to [Keene and Lemastus] that [the Brennans] would hire an accounting and appraisal expert to address the issues raised in this action. Further, [Keene and Lemastus] have had the same opportunity to hire expert witnesses throughout the pendency of this proceeding given the issues presented for determination during the seven-month period following the date of the scheduling conference conducted herein.

The court kept the trial date of June 4, 2008, and ordered that the Brennans "shall make their experts available to [Keene and Lemastus] for deposition prior to said date of trial, as well as copies of any experts' opinions and reports in preparation for said depositions." The order was faxed to all counsel sometime on Thursday, May 29, 2008.

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[2] On appeal, the Brennans assert Keene and Lemastus were notified when experts were retained via updates to the Brennans' interrogatory answers on May 21, 2008.

Ben Neil's deposition took place on Monday, June 2, 2008, commencing at 9:36 a.m. The record does not reflect when Neil's list of comparable sales and his May 30, 2008 report were provided to Keene and Lemastus's counsel, but they were marked as exhibits and referred to in the deposition. Two days later, Wednesday, June 4, 2008, trial to the court began. The court accepted Neil's deposition into evidence.

In its findings of fact, conclusions of law, decree, and judgment filed July 17, 2008, the district court found:

> The only evidence of the value of the real estate is a "broker price opinion" rendered by witness Ben Neil who opined that the market price would be $65,000 for the real estate only with no consideration being given for furniture, fixtures, or equipment, nor for the going concern or goodwill of the bar.

The court utilized Neil's $65,000 figure in calculating the amount to be returned to Keene and Lemastus for their capital contribution to the business.

Rule 1.508(3) provides that a party expecting to call an expert witness must supplement responses to an appropriate inquiry "as soon as practicable, *but in no event less than [thirty] days* prior to the beginning of trial except on leave of court." Iowa R. Civ. P. 1.508(3) (emphasis added). Noncompliance with the rule may result in exclusion or limitation of the expert's testimony. The purpose of the rule is to avoid surprise to the litigants and to allow parties to formulate their positions on as much evidence as is available. *Klein v. Chi. Cent. & Pac. R.R. Co.*, 596 N.W.2d 58, 61 (Iowa 1999). Our review of rulings on such matters is for abuse of discretion. *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994).

In my view, it seems patently unfair that a party, in the midst of last-minute trial preparations, should be required to bring those efforts to a screeching halt and switch gears to schedule and prepare for the deposition of an expert just disclosed on the eve of trial. This is precisely what the rule is intended to prevent.

I disagree with the district court's conclusion that it should have come as no surprise to Keene and Lemastus that the Brennans would hire an appraisal expert to address the issues raised in the action. To be sure, Keene and Lemastus could have anticipated that the Brennans might utilize the services of an expert. In fact, Keene and Lemastus did anticipate that the Brennans might call expert witnesses. That was the reason for their timely interrogatory. But, the Brennans' first answer was woefully inadequate and certainly gave no clue they intended on calling an appraiser. It was only on the very eve of trial, after all discovery deadlines had passed, that the Brennans finally made such a disclosure. Up until that time, Keene and Lemastus had no reason to expect the Brennans were going to offer testimony of an appraiser at trial.

Just because use of an expert can be anticipated does not mean opposing counsel is not entitled to timely disclosure of the expert and the expert's qualifications and opinion. Keene and Lemastus could have reasonably assumed the court would enforce the discovery rules, and that the Brennans would not be allowed to ambush them with a late-disclosed expert. Keene and Lemastus were justifiably surprised at the Brennans' tardy expert disclosure and no doubt had to scramble at the last minute to prepare for Neil's deposition. Nevertheless, based on the sparse record before us, and particularly the fact that

the hearing on Keene and Lemastus's motion was unreported, I cannot conclude the district court abused its discretion in allowing Neil's testimony.

Next, I feel compelled to comment on the 750-page appendix filed by the parties. An appendix that complies with the rules of appellate procedure is of valuable assistance to us. One that does not is, at best, a source of frustration.

Violations of the Iowa Rules of Appellate Procedure made it difficult to navigate the parties' appendix. Over 200 pages identified in the table of contents as "Various Pages from the transcript" do not identify the name of each witness whose testimony is included and the appendix page where each witness's testimony begins. *See* Iowa R. App. P. 6.15(4).[3] Except for the name of one witness, the names of witnesses whose testimony is included in the appendix are not indicated at the place in the appendix where the witness's testimony begins. *Id.* Adding to the unnecessary bulk of the appendix are duplicate copies of transcripts, as well as numerous materials not referenced in the parties' briefs.

Compliance with the rules is essential in promoting judicial efficiency. Noncompliance fosters frustration and foils any attempt on our part to achieve maximum productivity in deciding a high volume of cases. *See* Iowa Ct. R. 21.30(1).

[3] Since the notice of appeal was filed in August 2008, the revised rules of appellate procedure effective January 1, 2009, do not apply to this appeal.