IN THE COURT OF APPEALS OF IOWA

No. 0-565 / 10-0014
Filed September 22, 2010

MID-AMERICAN BIO AG, LTD.
and TIMOTHY J. MILLER,
Plaintiffs-Appellants,

vs.

WIELAND & SONS LUMBER
COMPANY, DEAN WIELAND,
JEFF WIELAND and TED WIELAND,
Defendants-Appellees.

Appeal from the Iowa District Court for Buchanan County, Jon C. Fister, Judge.

Appeal from adverse judgment in a breach-of-contract suit. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

Benjamin M. Lange of Eddy & Lange, P.C., Independence, and Kevin R. Rogers of Swisher & Cohrt, P.L.C., Waterloo, for appellees.

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

SACKETT, C.J.

Plaintiffs-appellants, Mid-American Bio Ag, Ltd. ("Mid-American") and Timothy Miller, appeal from an adverse judgment in their breach-of-contract, fraudulent misrepresentation, and unjust enrichment suit against defendants-appellees, Wieland & Sons Lumber Company and its owners (collectively "Wielands"). They contend the district judge erred in refusing to recuse himself. They further contend the court erred (1) in finding the statute of frauds barred the breach-of-contract claim, (2) in finding the "new business rule" barred evidence of lost profits, and (3) in allowing submission of the defendants' "conditional" counterclaim to the jury. We affirm.

Background and Proceedings. Because this case was tried to a jury, we have only the verdict form as a record of "findings." From the record before us, viewing the evidence in the light most favorable to the plaintiffs, a reasonable jury could find the following.

Miller grew mushrooms at his home. In 2004 defendant Jeff Wieland, a neighbor, expressed an interest in mushrooms and what was needed to grow them. Wieland said that Wieland & Sons generated sawdust and had excess steam from its operations. Later that year, defendants Jeff, Dean, and Ted Wieland visited with Miller about having their company, Wieland & Sons, become involved with Miller in growing mushrooms. The parties dispute what, if any, agreement was reached.

Miller claims Jeff, and later Dean, made proposals to him, and an agreement was entered into that the Wielands and their company would provide

a building on land owned by Wieland & Sons, Miller would fix the building and procure the equipment necessary to grow mushrooms, Wieland & Sons would pay for all materials, labor, and associated costs to equip the facility for full production, and pay Miller a weekly salary. In exchange, Miller would be entitled to the profit from the first year of full production, and after the first year full production, Wieland & Sons would be entitled to 49% of the stock of Mid-American, the corporate entity that would operate the mushroom growing business.

Wielands claim arrangements were made for Miller to grow mushrooms in an unused shed on the family farm. As part of their arrangement, Wieland & Sons would purchase equipment and supplies or reimburse Miller for equipment and supplies purchased for growing mushrooms. The company would own the items purchased. Miller would not be charged rent for the building.

In early 2006 Wieland & Sons provided a building and purchased equipment and supplies for growing mushrooms. They also made sawdust available from the lumber business. Miller prepared the shed for the mushroom-growing operation. A limited amount of mushrooms were grown, but none were ever sold. In 2007 disagreements arose between the parties. Wieland & Sons eventually refused to pay for any more equipment and supplies.

In August of 2007 plaintiffs filed suit against defendants, claiming breach of contract, fraudulent misrepresentation, conversion, and unjust enrichment. Defendants counterclaimed, raising claims of quantum meruit and defamation.

They also raised affirmative defenses of the statute of frauds and equitable estoppel.

On October 23, 2009, the defendants filed a motion in limine that sought to exclude evidence of the alleged oral agreement on statute of frauds grounds because it was not capable of being performed within one year. At the hearing on the motion the court, noting the parties disagreed whether the contract could be performed within one year, refused to exclude evidence of any oral agreement, stating, "I'm going to let him try and put in what evidence he has of an oral contract and if it fails, it won't go to the jury." The defendants also sought to exclude evidence of lost profits based on the "new business rule." The court reserved ruling pending an offer of proof.

On October 28, before the beginning of the trial, the plaintiffs made a motion for recusal. After hearing arguments, the court denied the motion on the record. The plaintiffs presented evidence concerning the oral agreement. At the close of that evidence, the court heard an offer of proof on the damages claimed for lost profits. Prior to cross-examining Miller in the offer of proof, the defendants renewed their motion in limine. After allowing the plaintiffs to respond, the court discussed the new business rule and how it had been applied. The court determined "this is one of those cases where the rule should apply" and refused to allow the evidence of damages.

After the plaintiffs rested, the defendants moved for a directed verdict. Following arguments of counsel, the court directed a verdict for the defendants on the contract and fraudulent misrepresentation claims. The court denied the

motion as to the conversion and unjust enrichment/quantum meruit claims. After the close of the defendants' evidence, but before rebuttal, the plaintiffs moved for a directed verdict on the defendants' counterclaims. Following arguments of counsel, the court overruled the motion. Defendants reurged their motion for directed verdict on the remaining conversion and unjust enrichment / quantum meruit claims. The court denied the motion, allowing the jury to consider the plaintiffs' conversion and quantum meruit claims and the defendants' quantum meruit counterclaim.

The jury found the plaintiffs had not proved their conversion or quantum meruit claims and the defendants' conduct did not constitute willful and wanton disregard for the rights or safety of another. The jury found Wieland & Sons proved its claim of quantum meruit against both Miller and Mid-American Bio Ag, Ltd., and found damages in the amount of $5000 as to both plaintiffs. On November 2, the court ordered judgment on the verdict.

On November 13 the plaintiffs moved for a new trial on several grounds. They alleged the defendants' quantum meruit counterclaim was conditioned on finding an agreement existed, so submitting it to the jury was error. They claimed the $5000 damage award shows the jury failed to respond to the evidence and the issues. They also claimed the court's rulings (1) denying the motion to recuse, (2) failing to allow evidence of an agreement because of an incorrect application of the statute of frauds, (3) failing to submit evidence of lost profits based on the new business rule, and (4) directing verdicts on the contract and fraudulent misrepresentation claims deprived the plaintiffs of a fair trial.

On November 25 the court issued its order denying motion for new trial both as untimely filed and on the merits. The plaintiffs appeal.

Scope of Review. Our review of actions at law is for correction of errors at law. Iowa R. App. P. 6.907 (2009). "We review a judge's recusal decision for an abuse of discretion." *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005). A trial court's ruling on a motion for directed verdict is reviewed for correction of errors of law. *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009). Our review of a trial court's evidentiary decisions is for an abuse of discretion. *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009). However, "to the extent a challenge to a trial court ruling on the admissibility of evidence implicates the interpretation of a rule of evidence, our review is for errors at law." *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003).

Discussion and Analysis.

Recusal. Plaintiffs contend the trial judge should have recused himself. Plaintiffs sought the judge's recusal based on conduct in two prior proceedings, one involving Miller, the other involving plaintiffs' counsel. Concerning Miller, the motion to recuse alleged that prior to the presentation of evidence in a postconviction proceeding the judge "announced his intention to deny it before having heard any evidence. Concerning counsel Peter Riley, the motion alleged the judge "did announce, on the record, prior to hearing evidence of arguments of counsel, his intention to rule against [Riley's] client in that action." It further alleged the judge "made statements which were injudicious both as to [Riley] and his client." In the record made on the motion, counsel summarized:

> [T]his is only the second time in twenty-nine years in the practice of law that I have sought to recuse a judge . . . . But I just believe, based on your predisposition in the case I handled, the Kerns case, and the fact that my client reports that you took a similar position in his case, I felt that there is a question as to your ability to be an impartial judge in a case that my client and I are both involved in.

The burden of showing grounds for recusal is on the party seeking recusal. *Campbell v. Quad City Times*, 547 N.W.2d 608, 611 (Iowa Ct. App. 1996). A judge is disqualified from acting in a proceeding if the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Iowa Code § 602.1606(1) (2009). Only personal bias or prejudice is a disqualifying factor, not judicial predilection. *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976). To be a disqualifying factor, the bias or prejudice must stem from an extrajudicial source and "result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 1710, 16 L. Ed. 2d 778, 793 (1966)).

The judge in the case before us, after reviewing the motion to recuse and the ruling in Miller's postconviction case stated:

> [Concerning the postconviction proceeding], [t]here was, in essence no hearing on this case, Mr. Riley. It was basically an argument based on the trial transcript, which I had had and had read thoroughly before the hearing. And so if I had announced my intention, it was to let counsel know I had reviewed the trial transcript and what he needed to address if he was going to get any relief. And so that's the basis for what I may have said, if I said anything like that, and I don't recall it. But you can look on that and you can see that the ruling is based exclusively on the trial transcript and what was in it, which I had had at my disposal and

> had been able to study before the hearing. So I'm not going to recuse myself on the basis of that.
>
> As to your complaint about the Kerns estate. You and I were both at that hearing, Mr. Riley, and there was basically no evidence presented in that hearing. It was basically an incorporation of the record that was made . . . at a prior hearing with very little testimony of any kind by anybody. And I don't have any recollection of announcing what my ruling was to be. It was likely that I indicated to counsel what it looked like the record had shown up-to-date so that counsel could focus on what they needed to address if they wanted to prevail at that hearing. So I don't think there's any evidence that I prejudged that case either and so I'm not going to recuse myself on the basis of that.

Counsel for both sides discussed the motion with the court. Mr. Riley pointed to certain statements from the court in the estate proceeding including: "Perhaps I wasn't clear to you. It's admitted. We're taking notice of it. You've won. You can go home now." He also alleged the judge made statements that were "injudicious including accusing my client of violating one of the ten commandments." The court stated:

> [A]pparently Mr. Riley's concern is prejudging a case. Well, I've just walked into this one, I've heard no evidence, I'm in no position to do it. In the Miller case I had a trial transcript. In the estate case there had already been a prior determination and an appeal and a factual record made on one of the issues that was pivotal in what I was rehearing. That's not the case here, so it's a blank slate. And so it's a little hard for me to be injudicious in prejudging a case where I've just seen the file for the first time. . . . And I can't see how anything that I do in this case would have anything to do with those cases. So once again, I'm not going to recuse myself.

Plaintiffs argue prejudice is evident in this case because the judge changed a ruling on a motion in limine and submitted a "conditional" claim to the jury even though the condition was not met. The claimed "change" in the ruling on the motion in limine does not demonstrate prejudice. The court initially denied the defendant's motion to exclude evidence of the oral agreement on statute of

frauds grounds, allowing the plaintiffs to present evidence of the contract, but noting if the evidence was not enough, it would not go to the jury. After hearing the evidence, the court concluded it was not enough. We conclude plaintiffs have not demonstrated actual prejudice or personal bias from an extrajudicial source that would "result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *See Smith*, 282 N.W.2d at 142. The judge carefully considered the concerns raised and exercised his discretion, but not "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *See State v. Haskins*, 573 N.W.2d 39, 44 (Iowa Ct. App. 1997). We affirm on this issue.

Statute of Frauds. Plaintiffs contend the court erred in finding the statute of frauds barred their breach of contract claim. In their petition, paragraph eleven alleged the existence of an oral agreement:

> Thereafter, Jeff, and later Dean, made proposals to Miller, and an agreement was entered into whereby Wielands and their company would provide a building on land owned by Wieland & Sons, Miller would fix the building and procure the equipment necessary to grow mushrooms, Wieland & Sons would pay for all materials, labor and associated costs to equip the facility for full production and pay Miller a weekly salary. In exchange, Miller would be entitled to the profit from the first year full production, and after the first year full production, Wieland & Sons would be entitled to 49% of the stock of Mid-American.

This issue arose in the context of the court granting the defendant's motion for directed verdict on the breach-of-contract claim. The defendants had made a motion in limine to exclude evidence of the alleged oral contract between the parties based on the statute of frauds because the contract terms alleged could not have been performed within a year. The court noted that the parties

disagreed "on whether the evidence is going to be that it could all be performed within one year or not." The court denied the motion in limine on that ground and stated, "I'm going to let him try and put in what evidence he has of an oral contract and if it fails, it won't go to the jury."

Miller testified to various terms of the alleged oral contract. It involved Miller preparing the buildings and the equipment provided or purchased by Wielands, then starting up a mushroom growing operation. In exchange for what Miller did, he would get the first year's production revenue. They had to produce mushrooms before Miller and Wielands would split any profit. He also testified that at some later point, Wielands wanted to change the agreement and become 49% stockholders in the company. He did not testify that he agreed to any change.

When it came to damages, Miller made an offer of proof. After hearing the offer of proof, the court concluded the evidence was inadequate and the new business rule applied in this case, so the evidence would not be allowed in. Consequently, without proof of damages, both the contract and fraudulent misrepresentation claims had problems.

When the parties were back on the record, but before the jury returned, the court stated:

> I want to say one more thing about my last ruling, and that is—and my recollection of the evidence may be incorrect, but it is my recollection, in addition to the other problems I had with lost profits, is that it's my memory that Mr. Miller testified when he was testifying that the Wielands wanted to change their—the agreement that they had, he testified that that was when they wanted 49 percent of his corporation. And there is no evidence in the record that he ever agreed to that, although he's testified twice that there's

> going to be some kind of profit sharing arrangements. So there is no evidence, as far as I can tell, in the record how any profits, if there were any, would have been divided. . . .
>
> The other thing I'm going to say is—and this may be completely gratuitous because we didn't get to that point . . . but Mr. Miller was very clear in his testimony that their agreement was that he was going to get the building up and running and equipped, although there's a dispute about whether he'd be paid for his own labor. But then after it was up and running, he'd get the first year of production—production year of profits and then this new arrangement would kick in. It would have been impossible to complete that contract in one year, as Mr. Rogers earlier raised on the statute of frauds defense, because even if you had a turnkey operation, which this was not, it took two or three months to grow the spawn or whatever to start growing the mushrooms. So even if the building hadn't needed any improvements, which it did and which would have taken considerable time, production could not have started immediately and profits for that next year complete that much of the contract. . . . I think that's what the evidence is and the evidence on the deal is in not because Mr. Miller has testified about that, and we aren't having any more testimony about it because it's out.

Mr. Riley responded:

> [T]o the extent that you're indicating that an independent ground is the statute of frauds, that as we talked about when we argued the motion in limine, it has to be under no circumstances could it be performable in less than an year and since—if they had been unable to grow mushrooms, it would not have gone forward and that could have taken place in less than a year; I don't think the statute of frauds applies.

At the close of the plaintiffs' case, the defendants moved for directed verdicts on all the plaintiffs' claims. Concerning the alleged oral contract, the court ruled: "I am directing the verdict on the contract claim both on the statute of frauds grounds and the lack of any way to prove lost profits."

Plaintiffs contend it was error to direct a verdict on the statute-of-frauds ground because "there are circumstances under which the contract might not have been performed within one year. The parties could have abandoned the

relationship, and in fact did." This contention shows a misunderstanding of the application of the statute of frauds to contracts "not to be performed within one year from the making thereof." *See* Iowa Code § 622.32(4). Plaintiffs cite to *Harriott v. Tronvold*, 671 N.W.2d 417, 423 (Iowa 2003), in support of their assertion that abandonment of the alleged contract would remove it from the application of the statute of frauds because upon abandonment, the contract would not have been performed within one year. In *Harriott*, the court agreed "that section 622.32(4) is narrowly applied to contracts that are not capable under any circumstances of being performed within one year." *Harriott*, 671 N.W.2d at 423. The contract at issue there provided for shareholders to contribute to the corporation to cover cash shortfalls in the operation of a ballpark. *Id.* The supreme court noted "the 'impossibility' requirement necessarily recognizes such performance might occur in less than a year." *Id.*

The alleged oral contract in the case before us differs in that it apparently required a year of production in addition to preparation of the facility and provision of equipment. As noted above, the district court stated:

> Mr. Miller was very clear in his testimony that their agreement was that he was going to get the building up and running and equipped, although there's a dispute about whether he'd be paid for his own labor. But then after it was up and running, he'd get the first year of production—production year of profits and then this new arrangement would kick in. It would have been impossible to complete that contract in one year, as Mr. Rogers earlier raised on the statute of frauds defense, because even if you had a turnkey operation, which this was not, it took two or three months to grow the spawn or whatever to start growing the mushrooms. So even if the building hadn't needed any improvements, which it did and which would have taken considerable time, production could not have started immediately and profits for that next year complete that much of the contract.

We agree with the district court's analysis of Miller's testimony and its application of the statutory language to the evidence before it. Without Miller's testimony concerning the alleged agreement between the parties, there was no proof of the terms of the agreement. Although the court stated its analysis of the statute-of-frauds defense "may be completely gratuitous because we didn't get to that point," the court expressly granted the motion for directed verdict on that ground in addition to the lack-of-proof-of-damages ground. The district court properly directed a verdict on the breach-of-contract claim on the statute-of-frauds ground. We affirm on this claim.

Proof of Damages. Plaintiffs contend the district court erred in applying the new business rule to bar evidence of lost profits. In their offer of proof, the plaintiffs presented testimony from Miller and offered Exhibit 6, a business plan prepared by a professor at the University of Northern Iowa in the spring of 2007 so that the plaintiffs could seek financing for a new mushroom-growing venture. The court determined the evidence offered was too speculative and excluded the evidence based on the new business rule. Plaintiffs argue the new business rule "is one honored in its breach. Few, if any, reported Iowa decisions have ever excluded evidence based on the new business rule." They contend evidence of damages should be allowed "so long as there is a reasonable basis from which they can be inferred or approximated."

Iowa has long recognized the new business rule that considers "[e]xpected profits from a new commercial enterprise . . . too remote and speculative to warrant judgment for their loss because there are no available

data of past business from which the fact of anticipated profits could have been established." *City of Corning v. Iowa-Nebraska Light & Power Co.*, 225 Iowa 1380, 1389, 282 N.W. 791, 796 (1938).

> The rationale underlying the rule is that there is no available data of past business from which anticipated profits could be established. The rule, however, is not absolute. If factual data furnishing a basis for probable loss of profits is presented evidence of future profits may be admitted and its weight should be left to the fact-finder. Thus, the question is whether a prospective loss of net profits has been shown with reasonable certainty.

Employee Benefits Plus, Inc. v. Des Moines General Hosp., 535 N.W.2d 149, 156 (Iowa Ct. App. 1995) (citations omitted).

> Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.

Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427, 430 (Iowa 1968).

In ruling on the offer of proof, the district court examined cases to determine exceptions to the application of the new business rule. It determined courts had refused to apply the rule if the business had a track record, if the business took over an existing business, if there were industry standards of profitability, or if there was evidence of another business that was similar enough to be comparable. The court succinctly set forth its concerns with the evidence in the offer of proof.

> I think, for instance, good evidence of the profitability of what—possibly good evidence of possible profitability might be that mushroom farm up in Wisconsin or Michigan or wherever it was that they visited a couple of times. I have no idea whether that business is profitable or if they're living on borrowed money or how

> they're doing. I see nothing in here about what—which particular spot markets—or whether the price would be the same at every spot market. I got from Mr. Miller's testimony that it would not be the same at every spot market. So your transportation costs would differ depending on location, and there is no evidence of what the cost of the distribution system would be or how it would work. And I just can't find that there is anything to show that this business would have been profitable or any reason—In fact, the very evidence about how supply and demand changes things, about how you can devote—you can mix up the variety as you're growing, even if you found that—that loss of profits was certain, *the jury would have no guidance* to pick a number. And that doesn't mean that the damages aren't being proved with sufficient accuracy. I'm not talking about that. I'm talking about there's not even a method to decide well maybe he will grow all medicinal mushrooms or maybe for a while he'll do that but then when the season comes around in spring they want morels, maybe he'll shift over to morels. *There's absolutely no way to get a number* even if you were to concede that profitability was certain. And so I really—I really can't say that I'm going to let this evidence in. I think that—And this is one of those cases where the rule should apply. And so we're not going to do that.

(Emphasis added.) Plaintiffs offered testimony about the types of mushrooms that could be grown and their values, but no evidence which type would be grown or when the business might change to a different type of mushroom. The proffered business plan is full of projections, but lacks any link to past experience or a comparable business. The evidence offered in the offer of proof does not provide the jury with any basis for determining what, if any, damages might have been suffered. There is "no available data of past business from which anticipated profits could be established." *Employee Benefits*, 535 N.W.2d at 136. It is speculative or uncertain whether damages were sustained. Even if damages are assumed, there is no "reasonable basis from which the amount can be inferred or approximated." *Orkin*, 160 N.W.2d at 430. We conclude the district court properly determined the new business rule applied under the

circumstances before it to exclude evidence of damages. We affirm on this claim.

Conditional Counterclaim. The plaintiffs contend the district court erred in not directing a verdict in their favor on the defendants' counterclaim for quantum meruit and in submitting the counterclaim to the jury because the counterclaim was conditioned on an agreement for the production of mushrooms being found, and the court had already directed a verdict against the plaintiffs on their breach-of-contract claim. They argue that even construing the pleadings liberally, they "could not have been placed on notice that they would have liability absent finding an agreement."

The defendants claimed:

> In the event that an agreement is found for the production of mushrooms, Defendants are entitled to be compensated for use of the building, equipment, supplies, and labor, which Plaintiffs have failed to do.

After the plaintiffs moved for a directed verdict, but before the defendants had an opportunity to respond, the court stated:

> Well I don't want to preempt Mr. Rogers's argument, but the way the counterclaim for quantum meruit is pleaded, it's the reverse side of your own client's claim, as far as I can tell. And it's actually consistent with the denial of a contract in the sense that it would be based on an implied promise for reimbursement for his free use of the building, his free use of the equipment they purchased, and so forth.

After the defendants responded, the court overruled the motion for directed verdict.

Iowa Rule of Civil Procedure 1.402(1) provides, "The form and sufficiency of all pleadings shall be determined by these rules, construed and enforced to

secure a just, speedy, and inexpensive determination of all controversies on their merits." In explaining notice pleading in Iowa, the supreme court has stated:

> A petition need not allege ultimate facts that support each element of the cause of action; however, a petition must contain factual allegations that give the defendant "fair notice" of the claim asserted so the defendant can adequately respond to the petition. The "fair notice" requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature.

U.S. Bank v. Barbour, 770 N.W.2d 350, 354 (Iowa 2009) (citations and internal quotation marks omitted). The counterclaim entitled "quantum meruit" alleged there was no agreement; improvements were made to the building; Miller used the building; Wielands contributed equipment, supplies, and labor; and Wielands were not compensated for the use of the building, equipment, supplies, or labor. Even though the claim for compensation for use of the building, equipment, supplies, and labor "in the event that an agreement is found" seems out of sync with the counterclaim allegations, we think the district court correctly applied principles of notice pleading in denying the plaintiffs' motion for directed verdict and submitting the counterclaim to the jury. The pleading clearly set forth "factual allegations that give the defendant fair notice of the claim asserted." *See id.* The court correctly viewed the counterclaim as the "reverse side" of the plaintiffs' claim for unjust enrichment. We affirm on this issue.

Having found no error of law or abuse of discretion, we affirm.

AFFIRMED.