

IN THE COURT OF APPEALS OF IOWA

No. 0-589 / 10-0338
Filed September 9, 2010

**IN THE MATTER OF THE ESTATE OF
JAMES D. STRONG, Deceased**

**ROGER MODLIN d/b/a R & M
CONSTRUCTION,**
Claimant-Appellee/Cross-Appellant,

vs.

**SAUNDRA STRONG, Fiduciary in
the ESTATE OF JAMES D. STRONG,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Ruth B. Klotz,
Associate Probate Judge.

An estate appeals from the probate court's decision on a claim made
against the estate. **AFFIRMED.**

James Monroe, Des Moines, for appellant.

Colby Lessmann, Sioux City, for appellee.

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

SACKETT, C.J.

Roger Modlin filed a claim in the estate of James D. Strong, deceased, for \$37,645.00. Sandra Strong, the executor of James's estate, denied the claim and it came on for hearing. An order was filed on June 23, 2009, establishing the estate's liability, and a subsequent order amending the original order and increasing the estate's liability was filed on February 8, 2010. The estate contends the latter order should be stricken. Modlin, on cross-appeal, contends the court erred in deducting certain amounts from his claim. We affirm.

SCOPE OF REVIEW. Probate claims are tried as law actions; our review is for correction of errors at law. *Stewart v. DeMoss*, 590 N.W.2d 545, 547 (Iowa 1999); *In re Estate of Voelker*, 252 N.W.2d 400, 402 (Iowa 1977).

BACKGROUND AND PROCEEDINGS. The initial claim was filed in June of 2008 for \$37,645. It was amended to \$42,282.06, and on the day of hearing was amended to \$52,824.51.

The matter came on for hearing on May 13, 2009. On June 9, 2009, the court filed an order on the claim in probate. The court noted, "It has been extremely difficult to determine the details of the claim in the manner presented." The court then made certain factual findings. The court determined that Modlin's amended claim of \$52,825.51 was reduced by disallowing \$1415.45 for equipment rental, \$10,650 for Sioux City work, and \$4295.21 for lack of sufficient evidence relating to a ten percent charge on steel products. The court also reduced the claim by payments that were not credited in the amount of \$24,553, decreasing the claim to \$11,911.85, which included \$6600 unpaid on a \$27,000

invoice for work not completed by Modlin. The court found if the work were completed that Modlin should receive \$11,911.85—if not, then the \$6600 is to be credited against the unpaid claim and the Modlin claim of \$5311.85 is allowed.

Modlin filed a motion to amend the June 23, 2009 order pursuant to Iowa Rule of Civil Procedure 1.904(2), asking the court to amend its findings and deny the estate a credit of \$24,533.00 against his claim. The court found Modlin's motion not timely and denied the motion. Modlin filed a motion to reconsider contending the motion was timely filed, and the court reversed itself and determined the motion was timely.¹ Then Modlin again filed a motion to amend the June 23, 2009 order, challenging Strong's alleged payments of \$24,553.00 and argued there was no evidence supporting them. The estate resisted Modlin's motion to amend stating that if certain amounts were subtracted from Modlin's claim it would be reduced further and asking that the motion be denied.

On September 21, 2009, the court ruled on Modlin's motion. The court found upon reconsideration that to enable it to make further ruling on items totaling \$20,750 previously shown as payments by the estate and disputed by Modlin and determine if they were for work other than the current claim, it needed additional information. The court then directed the parties to furnish certain information. The estate was directed to furnish a bank record for the period the amounts were deducted from its account, and cancelled check number 10719, and any invoices involved in the payments. Modlin was directed to furnish information from his bank as to whether or not these payments were deposited to

¹ The estate also recognized it was timely.

his account and any invoices issued that would have resulted in the payments. The parties were ordered to submit copies of the information to each other. The court also in this order amended its judgment to change the \$6600 balance remaining to \$9000, and changed the payments made by decedent from \$24,553 to \$22,153.

Following the September 2009 order, Modlin provided some documentation and made explanations for the documentation and other exhibits. The estate objected contending Modlin had the burden of proving his claim, which he failed to do, and the record was closed at the conclusion of the trial. The estate argued Modlin's records were confusing, inaccurate, contradictory, and not supported by his testimony. It further argued that for more than two years Modlin failed to send decedent invoices regarding the amount owed and waited until decedent's death to file the claim, prohibiting decedent from contesting it. The estate then filed a response to the request for additional information.

On February 8, 2010, the court entered an order on reconsideration of the claim, finding that decedent had made payments of \$20,750 to Modlin and they were received and deposited by him, but that the payments were for work on a project not a part of the claim made in the estate and Modlin properly credited that account. The court concluded three payments made by decedent were not reflected as credits by Modlin and reaffirmed the decision made on this issue noting that it had not requested additional documentation on these amounts. The estate appealed from this order.

AMENDMENT TO JUNE 23 ORDER. The estate claims that the court erred in amending its June 23, 2009 order based on evidence not introduced at the May 13, 2009 hearing. The estate argues that motions to amend or enlarge a trial court's findings of fact or conclusions of law are limited to the evidence submitted at a hearing and are not vehicles for the parties to retry issues based on new evidence. Modlin contends this issue was not preserved for review and that the estate made no objection until after he had filed additional documents and the estate acquiesced in the proceedings in submitting documentation after the hearing was closed. The estate did not provide a statement in its initial brief stating how error was preserved. In its reply brief it contended it preserved error in its February 3, 2010 reply to Modlin's response where it advanced that Modlin had the burden of proving his claim, which he failed to do except to the extent originally ordered by the court, and that the record was closed at the conclusion of trial. At the close of trial the court asked if the record could be closed and Modlin's attorney said he believed it could and he did not have anything further.

It is clear the court, in amending its June 23, 2009 order, made a decision based in part on documents that were not admitted in evidence and were supplied to the court at its request after the hearing was concluded and the record was closed. The estate correctly argues that motions under rule 1.904(2) are permitted so that courts may enlarge or modify findings based on evidence already in the record and they are not vehicles for parties to retry issues based on new facts. *In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995); see also *Osborne v. Iowa Natural Res. Council*, 336 N.W.2d 745, 747 (Iowa 1983).

The question is whether the estate preserved error on this claim. As to preservation of error the Iowa Supreme Court has said in *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002):

It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) (“issues must be presented to and passed upon by the district court”); *Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401 (Iowa 1992) (“issues must be raised and decided by the [district] court”). The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue “without the benefit of a full record or lower court determination[].” *Yee v. City of Escondido*, 503 U.S. 519, 538, 112 S. Ct. 1522, 1534, 118 L. Ed. 2d 153, 172 (1992) (quoting *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3, 110 S. Ct. 1331, 1336 n.3, 108 L. Ed. 2d 504, 515 n.3 (1990)). When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995); *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984).

The probate court did not rule on the issue, so we need not address it.

HEARSAY. The estate contends the district court erred in not allowing decedent’s wife to testify to the amount decedent told her he owed Modlin. There is no offer of proof on this issue and the record is not obvious as to what her testimony would have been. The Iowa Supreme Court has said in *State v. Lange*, 531 N.W.2d 108, 114 (Iowa 1995):

This court considers offers of proof so important that we require them to preserve error. *Id.* We will not presume prejudice when the answer to the question is not obvious and the proponent made no offer of proof. *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982) (citation omitted). Nor will we consider error preserved without such an offer unless the whole record makes apparent what is sought to be proven. *In re Estate of Herm*, 284 N.W.2d 191, 197 (Iowa 1979). To emphasize how important we think offers of proof are, we have held that a district court’s refusal to permit them is

usually error. *Harrington*, 349 N.W.2d at 760; see also L.S. Tellier, *Annotation, Ruling on Offer of Proof as Error*, 89 A.L.R.2d 279, 286 (1963).

There being no offer of proof we do not address this issue.

AMOUNT OF CLAIM. The estate contends that Modlin's claim should be reduced by \$18,333. While the record is far from clear we cannot say there is not substantial evidence, which if believed, would support the amount of the judgment.

CROSS APPEAL. We have considered Modlin's cross-appeal contending that the court erred in deducting \$16,360.66 from his claim and find no reason to disagree with the decision of the probate court.

AFFIRMED ON BOTH APPEALS.