

IN THE COURT OF APPEALS OF IOWA

No. 1-062 / 10-1336
Filed April 27, 2011

ABBIE FRY,
Plaintiff-Appellee,

vs.

ANDREW BLAUVELT,
d/b/a BLUEFIELD TRUST
CONSTRUCTION,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Joel D. Yates,
Judge.

Defendant, Andrew Blauvelt d/b/a Bluefield Trust Construction, appeals
the district court's denial of his motion for a new trial. **REVERSED AND**
REMANDED.

Michael J. Moreland and Heather M. Simplot of Harrison, Moreland &
Weber, P.C., Ottumwa, for appellant.

Larry J. Brock and Richard Bordwell, Washington, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Defendant, Andrew Blauvelt d/b/a Bluefield Trust Construction, appeals the district court's denial of his motion for a new trial. He contends the verdict rendered by the jury does not effectuate substantial justice between the parties and his rights were materially affected by mistakes in the court proceedings. We reverse and remand for a new trial.

I. BACKGROUND AND PROCEEDINGS. Plaintiff, Abbey Fry (Fry), entered into an oral contract with defendant, Andrew Blauvelt d/b/a Bluefield Trust Construction (Blauvelt), to construct an addition to her existing home. The scope of the project included extending the existing kitchen, adding a master bedroom with a bath and closet, adding a hallway, and adding a garage with an unfinished basement below. The addition more than doubled the size of the original house. Blauvelt prepared an initial bid totaling \$141,200 for the project, but Fry requested the bid be reduced to the amount of the home equity loan she obtained from her local bank. Blauvelt reduced his bid to \$101,250 and Fry agreed. The parties agreed the project would be completed in six months. There was no written contract between the parties with the exception of the bid and a rough drawing of the addition.

Work commenced on the project in September of 2008. During the project, Blauvelt encountered unanticipated site conditions in the excavation of the ground for the basement extension. In addition, Fry made changes to the plans as the work progressed. In January of 2009, Fry terminated the contract with Blauvelt because she felt the workers on site were not being properly

supervised and no progress was being made on the project. At the time of the termination of the project, \$15,000 remained in the home equity line of credit.

On April 17, 2009, Fry filed her petition at law against Blauvelt alleging he breached the oral contract. Blauvelt filed an answer on May 28, 2009, denying he breached the contract or that Fry incurred damages. Blauvelt subsequently sought and was granted leave to amend his answer to alleged affirmative defenses and added a counterclaim against Fry. He asserted Fry breached the terms of the contract by requesting numerous changes to the project, and failing to disclose or misrepresenting the defects in the land and house. Blauvelt sought the remaining amount due under the original contract, the amount of overages or contract changes incurred, delay damages, and lost profits on jobs he had to turn down because of the delays caused by Fry.¹

On June 17, 2010, Blauvelt filed a motion in limine seeking to preclude Fry from mentioning or referring to a construction project Blauvelt worked on in Wellman, Iowa, and an investigation of home repair fraud in Mississippi. The court set the motion in limine for a hearing, which was to take place on June 25, 2010. There is no record of this hearing in the appendix or in the trial court record. Blauvelt asserts, and Fry does not dispute, the district court granted his motion in limine by stipulation of the parties. Blauvelt asserts the parties were to refrain from mentioning the Mississippi lawsuit and the Wellman project could only be mentioned if it dealt with materials used on Fry's project.

¹ Fry filed no reply to Blauvelt's counterclaim. Blauvelt moved for a default judgment on the counterclaim the morning of trial. However, the court deemed the counterclaim denied by the plaintiff. The trial court therefore denied Blauvelt's motion. Defendant does not appeal this ruling and we will not address it.

The day before trial, Fry filed an amended exhibit list, which included four exhibits entitled “Photograph – water leak on June 1, 2010” and four exhibits entitled “Photograph – millipede invasion on June 18, 2010.” Blauvelt first viewed these exhibits the morning of the first day of trial which included fifteen photographs of a water leak and millipede infestation in the basement of the home. Blauvelt objected to the photographs and asked the district court to restrain Fry from mentioning the water leak or the millipede infestation due the late disclosure and its likelihood to inflame the jury. He also asserted the photos were not relevant as Fry did not intend to offer expert testimony to show these two conditions were caused by his work.

Fry resisted Blauvelt’s objection asserting prior disclosure was impossible because the water leak and millipede infestation were recent occurrences. In addition, Fry maintained no expert testimony was needed as she was able to testify the house was not properly sealed by Blauvelt allowing the water and the millipedes to enter the basement. The court reserved ruling on the issue until such time as more background information could be developed through the course of trial.

Trial commenced on June 29, 2010. During Fry’s testimony on the first day of trial, the district court overruled Blauvelt’s request to exclude the photographs and testimony of the water leak and millipede infestation. The court held that while it believed Blauvelt’s concerns were to a certain extent legitimate, it believed the concerns could be adequately addressed through cross-examination and presentation of the defense’s evidence. Fry went on to testify

with the use of the photographs she noticed the water leak in and around the basement window on June 1, 2010, when she went to the basement during a tornado warning. She also testified she noticed a millipede infestation in the basement the week of June 18, 2010.

Later in Fry's testimony, on cross-examination, she asserted Blauvelt did not know how to manage money well because he had filed bankruptcy many times, was involved in a lawsuit down in Mississippi in regard to a house he constructed, and a homeowner in Wellman was unhappy with her job site Blauvelt worked on. Blauvelt moved to strike these answers from the record. The court struck the answers and directed the jury not to consider them.

After Fry was excused from the witness stand, Blauvelt made a motion for a mistrial based on Fry's testimony. Blauvelt contended Fry's answers were nonresponsive and in violation of the court's order on the motion in limine. Blauvelt contended the court's admonition to the jury to disregard the testimony was insufficient to remove the prejudice. Fry resisted the motion for a mistrial asserting the statements were made in response to repeated badgering and the court's admonition was sufficient to remove any prejudice.

After breaking for lunch to review the motion in limine and the trial transcript, the court overruled Blauvelt's motion for a mistrial. The court stated it based its ruling on the reasons given in Fry's resistance. It also specifically stated Fry's answers did not rise to the level of bad faith and were to a large extent in response to Blauvelt's questions.

Chad Evans testified as an expert for Fry. He asserted when he inspected the house, he believed it was fifty to sixty percent complete. He stated it looked like someone had been asked to leave the project and not come back. While he did not know the contents of the contract between Blauvelt and Fry, he testified the work was subpar and would have taken him no more than six weeks to reach that stage of completion. In addition, Evans testified the roof installed over the addition had structural integrity problems.

To prove damages, Fry offered an estimate completed by Evans to replace the roof at \$32,480. Evans also compiled an estimate to complete the unfinished addition totaling \$24,650. In addition, Fry testified she suffered delay damages because she was unable to convert her home equity line of credit to a conventional mortgage when the project was not completed on time.

At the conclusion of Fry's case-in-chief and again at the close of all evidence, Blauvelt moved for a directed verdict. Blauvelt asserted Fry failed to establish a breach of the contract. Specifically, Blauvelt pointed out Fry testified she fired Blauvelt three and a half months into the six month project which prevented him from completing the project on time. In addition, Blauvelt contended there was no evidence showing he could not have completed the project with the \$15,000 that remained in the line of credit had he been allowed to complete his work.

Fry resisted Blauvelt's motion for directed verdict asserting she presented sufficient evidence Blauvelt breached the oral contract. Fry contended she presented evidence to show Blauvelt breached the timeliness of the contract and

also breached the implied agreement the work would be done in a proper and workmanlike manner. In addition, at the close of all evidence, Fry moved on her own behalf for a directed verdict contending the uncontroverted evidence presented demonstrated the contract was breached by the faulty work of Blauvelt, there was no adequate showing of any defense by Blauvelt, and there was evidence the breach caused her damage. Fry also moved for a directed verdict on Blauvelt's counterclaim. She asserted Blauvelt failed to provide sufficient evidence she breached the contract or that he suffered damages as a result.

The court denied all motions for directed verdict and submitted the case to the jury.² On July 2, 2010, the jury returned a verdict in favor of Fry awarding her \$42,000 in costs to complete the project and \$9662.76 in costs for the delay caused by Blauvelt. The jury also found in favor of Fry on Blauvelt's counterclaim determining Fry did not breach the contract with Blauvelt. The court entered judgment in favor of Fry in the amount of \$51,662.76.

Blauvelt filed a motion for a new trial on July 14, 2010, asserting pursuant to Iowa Rules of Civil Procedure 1.1004(1)–(6), (8), and (9), he was denied a fair

² A review of the jury instructions by this court reveals the jury was instructed the burden of proof in this case was by the preponderance of the evidence. This instruction was proposed by the plaintiff and not objected to by the defense. The proper burden of proof in a breach of an oral contract case is by "clear, satisfactory and convincing evidence." *Ehlinger v. Ehlinger*, 253 Iowa 187, 192, 111 N.W.2d 656, 659 (1961). A mere preponderance of the evidence is not sufficient. *Id.* The party seeking to enforce the contract has the burden of proving the terms of the contract. *Advance Elevator Co., Inc. v. Four State Supply Co.*, 572 N.W.2d 186, 188 (Iowa Ct. App. 1997). While neither party raised this issue on appeal, we address it as we are reversing and remanding the case for a new trial. Thus, on remand, the jury should be instructed the party seeking to enforce the terms of the contract must offer proof which is clear, satisfactory, and convincing.

trial. Specifically, he asserted the district court erred in allowing testimony and evidence on issues not timely produced, not granting a mistrial when Fry violated the court's order on the motion in limine, denying his motions for directed verdict, and finding the damages awarded in the case were not excessive. Fry resisted and the court denied the motion on July 23, 2010. Blauvelt filed his notice of appeal August 8, 2010.

II. SCOPE OF REVIEW. “Our standard of review of a denial of a motion for a new trial depends on the ground for a new trial asserted in the motion and ruled on by the court.” *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). The ruling is reviewed for an abuse of discretion when the trial court's decision is based on discretionary grounds such as admission of evidence. *Id.*

III. MOTION FOR A NEW TRIAL. Blauvelt asserts the district court erred in failing to grant his motion for a new trial. Blauvelt claims he is entitled to a new trial pursuant to Iowa Rule of Civil Procedure 1.1004, which provides:

On motion, the aggrieved party may have an adverse verdict, decision, or report or some portion thereof vacated and a new trial granted if any of the following causes materially affected movants substantial rights:

1.1004(1) Irregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial.

1.1004(2) Misconduct of the jury or prevailing party.

1.1004(3) Accident or surprise which ordinary prudence could not have guarded against.

1.1004(4) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.

1.1004(5) Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for injury to or detention of property.

1.1004(6) That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.

.....
1.1004(8) Errors of law occurring in the proceedings, or mistakes of fact by the court.

1.1004(9) On any ground stated in rule 1.1003, the motion specifying the defect or cause giving rise thereto.

To support each of these grounds, Blauvelt claims four main errors in the trial court proceedings. First he asserts the court erred in allowing testimony and in admitting the photographs of the water leak and the millipede infestation. Next, he claims the court erred in overruling his motion for a mistrial which was based on Fry's misconduct in violating the motion in limine. Thirdly, he believes the court erred in failing to grant his motion for a direct verdict as there was insufficient evidence to support Fry's breach of contract claim. Finally, he asserts the damages awarded by the jury were excessive. Because we find the district court abused its discretion in allowing testimony and in admitting the photographs of the water leak and millipede infestation warranting a new trial, we need not address Blauvelt's other claims of error.

IV. ADMISSION OF PHOTOGRAPHS. Under Iowa Rule of Civil Procedure 1.1004(1) a party is entitled to a new trial when "any order of the court . . . prevented the movant from having a fair trial." In addition, a new trial can be granted when the movant's substantial rights are materially affected by "[a]ccident or surprise which ordinary prudence could not have guarded against." Iowa R. Civ. P. 1.1004(3).

Blauvelt asserts the court's order allowing testimony and the admission of the photographs of the water leak and millipede infestation inflamed the jury and prevented him from having a fair trial. He asserts the discovery received from

Fry made no mention of a claim for damages based on the water leak or the millipede infestation, so he was not put on notice of such evidence until he received the amended exhibit list the day before trial. He did not see the actual photographs until the morning of trial. He claims this late disclosure prevented him from investigating the incidents and obtaining expert testimony in order to combat the charge his work caused the problems.

Fry in response asserts the water leak and millipede infestation did not occur until June of 2010, and therefore, prior disclosure of the photographs was impossible. We note the water leak photographs were taken four weeks before trial and the millipede photographs were taken a little more than a week before trial. While the time between the taking of the photographs and the start of trial was short, there was certainly time for Fry to alert Blauvelt of her intention to offer testimony these conditions were caused by his work and time to provide the photographs before the morning of trial.

We recognize the decision to admit or exclude photographs rests largely with the trial court as it is in the position to examine the photographs and hear the testimony of the witness describing what they show. *Estate of Long v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 90 (Iowa 2002), *abrogated on other grounds by Thompson v. Kaczinski*, 774 N.W.2d 829, 836–39 (Iowa 2009). A ruling on the admissibility of photographs will not be interfered with on appeal except upon a showing of abuse of discretion. *Twyford v. Weber*, 220 N.W.2d 919, 924 (Iowa 1974). In addition, simply because the photographs “may be

gruesome or tend to create sympathy does not render them inadmissible if there is just reason for their admission.” *Id.* at 926.

However, in this case, the claims Blauvelt’s work caused a water leak and millipede infestation and the photographs supporting such claims, were not disclosed in the process of discovery and were sprung on Blauvelt the morning of trial. For this reason, we find the trial court abused its discretion in allowing the Fry to testify regarding the conditions and admitting the photographs to support the testimony.

“Discovery is designed to enable preparation for trial, as well as to aid in the development of proof.” *Barks v. White*, 365 N.W.2d 640, 643 (Iowa Ct. App. 1985). We acknowledge Blauvelt was given an opportunity on cross-examination to bring to light the seventeen-month gap and the intervening construction activity that occurred between Blauvelt’s firing and the occurrence of the water leak and millipede infestation. However, Blauvelt was denied the opportunity to investigate both occurrences. The late disclosure denied him the opportunity to develop evidence to refute the allegation his work caused the occurrences.

The photographs were not identified in the initial exhibit list exchanged between the parties seven days before trial, so there was no way Blauvelt could have been on notice of these claims. In fact, Fry’s first exhibit list only identified sixteen exhibits, but she sought the admission of 183 exhibits at trial. Although we do not intend to intimate all of the additional exhibits were photographs of the water leak and millipede infestation, the admission of such late disclosed evidence was clearly prejudicial to Blauvelt in this case.

We also note Fry did not seek damages as a result of the water leak or millipede infestation. The only claim of damages submitted to the jury was the cost to complete the project and the cost of any delay caused by Blauvelt. Because Fry sought no damages relating to the water leak or the millipede infestation, the photographs and testimony were irrelevant to the breach of contract claim. See *Estate of Long*, 656 N.W.2d at 90 (finding the trial court erred in admitting photographs of the decedent because damages for pre-death pain and suffering were not warranted in the case making the photographs not relevant to any issue properly before the jury).

The photographs and testimony regarding the water leak and millipede infestation should not have been admitted at trial. Because we find the court abused its discretion in admitting this evidence, and Blauvelt was prejudiced as a result, we reverse and remand for a new trial.

REVERSED AND REMANDED.