IN THE COURT OF APPEALS OF IOWA

No. 6-168 / 05-1266
Filed April 26, 2006

LAKES GAS CO.,
Plaintiff-Appellant,

vs.

TERMINAL PROPERTIES, INC.,
Intervenor-Appellee,

HAMPTON PROPANE TERMINAL, L.C., and RAY ENERGY, INC.,
Defendants.

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

Substitute plaintiff appeals following a district court order granting intervenor's motion for a directed verdict and dismissing substitute plaintiff's petition. **REVERSED AND REMANDED.**

Jim D. DeKoster and Mark F. Conway of Swisher & Cohrt, P.L.C., Waterloo, for appellant.

Christopher P. Jannes and Thomas J. Houser of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Substitute plaintiff Lakes Gas Co. appeals following a district court order that granted a motion for directed verdict made by intervenor Terminal Properties, Inc. and dismissed Lakes Gas's petition. Lakes Gas contends the district court erred in allowing Terminal Properties to intervene, granting Terminal Properties's motion for directed verdict, and denying its own request to reopen the record. While we find no error in the district court's order allowing Terminal Properties to intervene in this matter, we reverse the order granting Terminal Properties's motion for a directed verdict and dismissing the action. We accordingly remand this matter to the district court for further proceedings not inconsistent with this opinion.

I. Background Facts and Proceedings.

At the times material to this appeal, Hampton Propane Company, L.C. (Hampton) was an Iowa limited liability company with four members: Ray Energy, which held a 42.95% interest; Ken Fencl, who held a 24.06% interest; Terminal Properties, which held a 24% interest; and Dennis Ribbentrop, who held an 8.99% interest. Hampton was initially in the business of buying and selling propane, which it did from a facility in Hampton, Iowa. It subsequently disengaged from that business, and leased the facility to Ray Energy. Ray Energy purchased propane from several suppliers, including Gulf Coast Petroleum, Inc. (Gulf Coast), a Texas corporation.

Ray Energy purchased propane from Gulf Coast pursuant to a line of credit. In addition, "on a rare, an occasional basis," Gulf Coast would make temporary cash advances to Ray Energy to enable Ray Energy to purchase

propane from another supplier. By October 2000, Ray Energy's debt to Gulf Coast was such that Gulf Coast required Ray Energy to execute a $1 million promissory note. By October 2001, Ray Energy's debt to Gulf Coast had increased to approximately $1.6 million. Gulf Coast informed Ray Energy that it would not extend the line of credit any further unless Ray Energy executed a second promissory note and provided collateral in the form of a security interest in Hampton's assets.

On October 21, 2001, Ray Energy, by its president David Stevenson, executed a second $1 million promissory note. As with the prior note, no transfer of cash was involved. Rather, the note memorialized Ray Energy's existing debt and extended its line of credit. The note provided, in relevant part:

> FOR VALUE RECEIVED, . . . RAY ENERGY, INC. . . . promises to pay . . . GULF COAST PETROLEUM, INC., . . . the principal sum of . . . [ ]$1,000,000[ ], or the principal amount advanced from time to time and remaining outstanding, without interest thereon.
>
> Maker and Payee hereby agree that Maker may borrow up to the maximum principal amount of this Note, repay all or a portion thereof and reborrow amounts hereunder so long as no "Default" . . . exists and this Note is not then due and payable in full.
>
> The principal due hereunder is payable <u>on demand</u>, but if no demand is made, all sums due and payable hereunder shall be paid in full on or before October 20, 2002.

That same date, October 21, 2001, Stevenson entered into a Commercial Security Agreement on behalf of Hampton. Under the agreement Hampton granted Gulf Coast a security interest in certain property. The agreement secured "punctual payment and performance" of the two, $1 million promissory notes executed by Ray Energy, as well as "any and all other indebtedness, liabilities and obligations whatsoever of [Hampton] or [Ray Energy] to [Gulf Coast] . . . whether now in existence of hereafter arising."

In October 2003 Gulf Coast filed suit against Ray Energy and Hampton. Gulf Coast alleged that as of October 3, 2003, the principal amount of $1 million was due, owing, and unpaid under the 2001 promissory note. It sought both a personal judgment against Ray Energy for $1 million, and a judgment in rem against the collateral secured by the Commercial Security Agreement. In its answer, Ray Energy admitted $1 million was due, owing, and unpaid under the 2001 promissory note. Hampton, however, denied that particular allegation.

In January 2004 Gulf Coast filed a motion for summary judgment. Among the undisputed facts it cited were that the 2001 promissory note was matured, due, and payable; that Ray Energy had failed to pay the note when due; that the note and security agreement were in default; that "there is now due, owing and unpaid as of October 3, 2003, the principal sum of $1,000,000.00"; and that Ray Energy had admitted $1 million was due, owing, and unpaid under the 2001 note.

In February 2004 Gulf Coast filed a notice that it had transferred its interest in the case to Lakes Gas. Lakes Gas filed a motion for substitution of plaintiff, which was apparently granted by the district court. Also in February 2004, Terminal Properties filed a motion to intervene in the litigation. Terminal Properties asserted that if intervention was denied, and Lakes Gas prevailed, membership shares in Hampton would be "ultimately extinguished through judgment and judicial sale without the payment of fair value" and Hampton's assets would be lost. Lakes Gas resisted intervention on the basis that Terminal Properties was a minority shareholder of Hampton, and that its proper recourse was a derivative action against Hampton under Iowa Code section 490A.1001 (2003).

The motion to intervene and Lakes Gas's summary judgment motion came on for a joint hearing in March 2004. Lakes Gas, Terminal Properties, and Hampton all appeared. Hampton, which had filed a resistance addressing only Lakes Gas's right to foreclose against Hampton's personal property and seeking an extension of time to supplement the record in support of its resistance, did not file a statement of undisputed facts or memorandum of authorities and conceded at the hearing that it had no basis to resist the summary judgment motion. Ray Energy, which had joined in Hampton's resistance and request for additional time, but had made no further filings, did not appear for hearing.

Following hearing, the district court entered a personal judgment against Ray Energy as prayed for in the petition. In an order filed about one month later it granted Terminal Properties's motion to intervene. In this later order Lakes Gas's request for summary judgment against Hampton, seeking foreclosure on personal property, was "held in abeyance until further order . . . ."

Lakes Gas filed a renewed motion for summary judgment against Hampton in February 2005. The motion asserted that, as Hampton no longer resisted summary judgment and consented to foreclosure, the court should enter a personal judgment against Hampton and an order foreclosing against the collateral under the security agreement. Terminal Properties resisted the motion on the basis that "[g]enunie issues of material fact exist as to the appropriate interpretation of the Security Agreement, and the presence of conflicts of interest among the member-managers of Hampton . . . ." The court denied summary judgment, concluding the record contained genuine issues of material fact

regarding the enforceability of the security agreement itself and the nature of the collateral in which the security agreement granted any interest.

The matter proceeded to trial in April 2005. At the close of Lakes Gas's evidence, Terminal Properties moved for a directed verdict on the grounds that Lakes Gas had failed to introduce evidence Ray Energy's promissory note was in default or the "precise amount of debt due or unpaid." Lakes Gas asserted there had never been a denial that the debt was due and owing, and pointed out that there was evidence in the record Gulf Coast had never been paid. It also asked to reopen the record to recall Dave Stevenson, who was still in the courtroom, so that he could "briefly" testify regarding the matter. The district court, noting that Hampton had denied the debt in its answer, and that the promissory notes "were lines of credit," concluded "[t]here is no evidence . . . as to what is the amount due." It accordingly granted Terminal Properties's motion for a directed verdict.

Lakes Gas filed a combined motion for a new trial pursuant to Iowa Rule of Civil Procedure 1.1004, and for an enlargement or amendment of the court's findings and conclusions pursuant to rule 1.904(2). The district court denied the motion. The court stated that "the evidence with respect to any amount due and owing under the line of credit was speculative and a specific amount could not be reduced to judgment." It further stated that, although it had not expressly ruled on Lakes Gas's motion to reopen the record, it "would have concluded that plaintiff's request to re-open should have been denied."

Lakes Gas filed an additional rule 1.904(2) motion, asserting the district court had failed to rule one assignment of error: that Terminal Properties lacked standing to contest the amount due and owing because they had not done so in

a pleading attached to their motion to intervene, as required by rule 1.407(3). The district court denied the motion. It concluded that, because Terminal Properties had been advancing Hampton's interests, rule 1.407(3)'s requirements were satisfied by Hampton's answer "disputing and denying the debt alleged by plaintiff."

Lakes Gas appeals. It contends the district court erred by allowing Terminal Properties to intervene. It also contends the court erred in granting Terminal Properties's motion for a directed verdict because (1) lack of evidence as to indebtedness under the promissory note had not previously been raised, (2) the issue of indebtedness had been decided by the summary judgment ruling against Ray Energy and could not be relitigated, and (3) there was evidence in the record sufficient to survive a directed verdict. Lakes Gas further contends that, even if there was not sufficient evidence in the record for its claim to survive a directed verdict, the court abused its discretion by denying its request to reopen the record. Lakes Gas additionally asserts that, should the court conclude the district court erred in directing a verdict in Terminal Properties's favor, judgment should be entered in its favor on appeal based on the existing record.

II. Scope of Review.

Our review is governed by the how the case was tried in district court. *Molo Oil Co. v. City Of Dubuque*, 692 N.W.2d 686, 690 (Iowa 2005). Lakes Gas asserts this matter was tried in equity, and thus our review is de novo. However, this matter was docketed as a law action. In addition, during trial the court ruled on evidentiary objections, the "hallmark" of a law trial. *Sille v. Shaffer*, 297

N.W.2d 379, 381 (Iowa 1980). We conclude this matter was tried at law. As such, our review is for the correction of errors at law. Iowa R. App. P. 6.4.

III. Intervention.

We first address Lakes Gas's contention that the district court erred when it granted Terminal Properties's motion for intervention. Intervention was granted under Iowa Rule of Civil Procedure 1.407(1)(*b*), which provides:

> (1) Intervention of right. Upon timely application, anyone shall be permitted to intervene in an action under any of the following circumstances:
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> . . . .
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> *b*. When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Because intervention is remedial in nature, it "is to be liberally construed to reduce litigation and expeditiously determine matters before the court . . . ." *Rick v. Boegel*, 205 N.W.2d 713, 717 (Iowa 1973). We review the court's grant of the motion to intervene for the correction of errors at law. *In re Estate of DeVoss*, 474 N.W.2d 539, 541 (Iowa 1991). However, the district court is afforded a certain amount of discretion in determining whether the intervenor is "interested" in the litigation. *Id*.

An interest will support intervention when it is "a legal right which will be directly affected" by the outcome of the litigation or "a legal liability which will be directly enlarged or diminished by the judgment or decree therein." *In re J.R.*, 315 N.W.2d 750, 752 (Iowa 1982) (quoting 59 Am. Jur. 2d *Parties* § 138, at 567 (1971)). However, an interest that is indirect, remote, or conjectural is generally

insufficient to support intervention. *In re Estate of DeVoss*, 474 N.W.2d 539, 542 (Iowa 1991).

The issue raised by Lakes Gas is whether Terminal Properties demonstrated an interest sufficient to support intervention that was not being otherwise adequately represented by Hampton. The right of a limited liability member to intervene in a proceeding in order to defend the interest of the limited liability company has not been previously decided in Iowa. However, rule 1.407(1)(*b*) does mirror the federal rule regarding intervention of right, Federal Rule of Civil Procedure 24(a). Thus, we draw guidance from the federal law in this area.

Federal courts have found a shareholder's interest insufficient to grant intervention when the interest was not one that could be separately and independently asserted by the shareholder, but rather a purely economic or financial interest that was derivative of the corporation's interest. *See, e.g., Rigco, Inc. v. Rauscher Pierce Refsnes, Inc*., 110 F.R.D. 180, 183-84 (N.D. Tex. 1986) (noting that "only a corporation and not its shareholders, not even sole shareholders, can complain of an injury sustained by, or a wrong done to, the corporation" (citation omitted)). However, federal courts have found intervention to be appropriate when a shareholder asserts non-economic interests—such as maintaining the continued viability of the corporation and insuring that the corporation acts within its charters and by-laws—and the corporation cannot adequately protect those interests. *See, e.g., Development Fin. Corp. v. Alpha Housing & Health Care, Inc*., 54 F.3d 156, 162 (3rd Cir. 1995).

The reasoning of the federal cases appears to be consistent with Iowa's law on derivative shareholder actions:

> As a matter of general corporate law, shareholders have no claim for injuries to their corporations by third parties unless within the context of a derivative action.
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> There is, however, a well-recognized exception to the general rule: a shareholder has an individual cause of action if the harm to the corporation also damaged the shareholder in his capacity as an individual rather than as a shareholder. . . .
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> . . . .
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> . . . [T]he test is best stated in the disjunctive: in order to bring an individual cause of action for direct injuries a shareholder must show that the third-party owed him a special duty or that he suffered an injury separate and distinct from that suffered by the other shareholders.

Cunningham v. Kartridg Pak Co., 332 N.W.2d 881, 883-84 (Iowa 1983). Thus, a mere economic loss to the value of a shareholder's stock is not a "separate and distinct" interest allowing intervention because it is a loss suffered by all shareholders, albeit to differing extents. *Id*. at 884.

Although this case involves a member of a limited liability company and not a corporate shareholder, and although it involves intervention to defend the company rather than an action to assert a claim for injury to the corporation, we find the underlying logic of the shareholder derivative cases applicable in the current context. As with corporate shareholders, the Iowa Code provides for derivative actions by limited liability company members. *Compare* Iowa Code §§ 490.741-.742 (corporations) *with* 490A.1001 (limited liability companies). Moreover, we find little distinction between a right to bring a claim on behalf of the company and a right to defend the company against the claim of another. With all the foregoing propositions in mind, we turn to the particular facts and circumstances of this case.

We first consider the nature of Terminal Properties's interest. The motion to intervene asserted that intervention was necessary to both preserve the value of member shares, and to preserve company assets which were being imperiled due to the conflict of interest and self dealing of other members. The motion set forth specific facts in support of these contentions, facts which we must presume to be true.[1] *Rick v. Boegel*, 205 N.W.2d 713, 717 (Iowa 1973) ("To test legal sufficiency of a petition of intervention, all allegations of that petition are assumed true."). These allegations address an economic injury common to all members, and an economic injury to the company that indirectly affects Terminal Properties. Thus, under the reasoning of federal intervention case law, and Iowa law regarding a shareholder's right to sue, it would appear Terminal Properties lacked standing to intervene in its individual capacity. However, we are convinced that, under the unique circumstances of this case, Terminal Properties is entitled to intervene in its own right.

We first note that this matter involves a closely-held company. In matters involving closely held corporations there is a split of authority as to whether a shareholder should be allowed to bring an individual action, even if the action belongs to the corporation. Some jurisdictions adhere staunchly to the proposition that a corporate claim can be brought only in the name of the corporation, while others allow shareholders to bring such claims individually if to

[1] In the motion Terminal Properties asserted that any alleged ratification of the security agreement by the members of Hampton was invalid, unenforceable, not in Hampton's best interest, and "constituted a conflict of interest, self dealing, and action oppressive and prejudicial to [its] membership interest . . . ." It further contended that two members were potentially indebted to Lakes Gas, and that two members had attempted to sell Hampton's assets to Lakes Gas but Terminal Properties had objected on the grounds the sale price was too low, the property should be appraised to determine fair market value, and should be marketed for sale to other prospective buyers.

do so will not unfairly create multiple actions, materially prejudice the interests of the corporation's creditors, or interfere with a fair distribution of any recovery. *See* 19 Am.Jur.2d *Corporations* § 1941, at 129 (2004).

In light of these competing theories, the American Law Institute (ALI) recommends a discretionary approach, allowing shareholders of closely held corporations to file suit in their individual capacity when the policy reasons for requiring a derivative action are absent:

> In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action . . . if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 701(d) (1994).

The ALI approach is largely consistent with the policy reasons underlying the Iowa rule that a shareholder should not sue for damage to the corporation:

> [T]he rule requiring that such a claim be pursued on behalf of the corporation and for its benefit prevents a multiplicity of suits by the various stockholders and assures that the corporation will be bound by the result of the litigation. Finally, by requiring the suit to be maintained for the corporation's benefit, any proceeds resulting from the litigation will be treated as corporate assets and available to satisfy both creditors' and other stockholders' claims.

Engstrand v. West Des Moines State Bank, 516 N.W.2d 797 (1994), 799-800 (Iowa 1994).

Allowing Terminal Properties to intervene in defense of Hampton actually advances the foregoing policy concerns. In this case intervention limits, rather than increases, the number of suits that will arise from this particular controversy. In addition, because this matter involves a defense of company assets there is

no danger that allowing intervention will cause an economic benefit to an individual member or members rather than to Hampton. Finally, there is no indication that allowing this defense will prejudice Hampton's creditors, as intervention will, if anything, serve to preserve corporate assets.

Under the circumstances, and consistent with the requirement that we construe rule 1.407 liberally to reduce litigation and expedite the matters before the court, we must conclude the district court did not err in determining that Terminal Properties had a sufficient interest to intervene in the action. Moreover, this case involves allegations that the remaining shareholders were working, either actively or passively, against Hampton's interests. Again, assuming as we must that the allegations in the motion to intervene are true, Terminal Properties is the only member who is attempting to preserve Hampton's assets. Thus, we find no error in the court's conclusion that Hampton was not adequately representing Terminal Properties's, and its own, interests.[2]

In addition, even if we assume, arguendo, that Terminal Properties could not intervene in its own right, we are convinced it had a right intervene on behalf of Hampton. Under section 490A.1001, a member may bring an action in the right of the limited liability company provided five requirements are met. The record indicates that, in this case, the requirements have been satisfied or have been obviated in light of the allegations of conflict of interest.[3] If Terminal

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[2] Although the district court did not expressly rule on each requirement for intervention, an affirmative determination of each is implicit in the ruling approving intervention.

[3] Terminal Properties was a member of Hampton at all relevant times. *See id*. § 490A.1001(4). Because Hampton was managed by its members, authority was to be exercised by all members, and action could be taken only by a majority of the members, Terminal Properties did not have the authority to sue in its own right. *See id*. § 490A.1001(1). In light of the allegations of conflict and self dealing by the other

Properties could have brought suit in the right of the company, then it stands to reason that it could intervene in the right of the company. Requiring it to instead bring a separate action works against the mandate that intervention should be allowed to reduce litigation and expedite matters before the court.

IV. Directed Verdict.

We therefore turn to the question of whether the district court erred when it granted Terminal Properties's motion for a directed verdict. Because this matter was tried to the court without a jury, Terminal Properties should have designated its motion as a motion to dismiss rather than as a motion for directed verdict. *Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 438 (Iowa 1996). "The misnomer is not material, however, because a motion to dismiss during trial is equivalent to a motion for directed verdict." *Id*.

The key question is whether, when the evidence is reviewed in the light most favorable to Lakes Gas, it is sufficient to generate a jury question. *Id*. Thus, the motion must be overruled if Lakes Gas "adduced substantial evidence in support of each element of [its] cause of action . . . ." *Wernimont v. State*, 312 N.W.2d 568, 570 (Iowa 1981) (citation omitted). In assessing whether the record contains substantial evidence in support of Lakes Gas's claim, we assume Terminal Properties admits to the truth of all of Lakes Gas's evidence as well as

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members, it is apparent no purpose would have been served by requiring Terminal Properties to demand that the other members cause the company to sue in its own right, or by requiring that the other members had failed to timely respond to the demand or wrongfully refused to bring the action. *See id*. § 490A.1001(2)-(3); *Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 523 (Iowa 1974) (obviating requirement to make a demand where "a demand would be a vain and useless thing"). Finally, Terminal Properties, which sought to preserve corporate assets and assure that relevant transactions were free of improper influence or motive, would fairly and adequately represent the interest of the members in enforcing the rights of the company. *See* Iowa Code § 490A.1001(5).

"every favorable inference which may fairly and reasonably be deduced from it." *Id*. Substantial evidence prevents dismissal, even when facts are undisputed, if "reasonable minds might draw different inferences from them . . . ." *Iowa Coal,* 555 N.W.2d at 438.

The district court dismissed Lakes Gas's claim because it concluded Lakes Gas failed to present any evidence of the specific amount due and owing under the 2001 promissory note. We agree with Lakes Gas that this conclusion was in error.

Lakes Gas points out that it presented evidence Ray Energy was unable to pay off its obligations under the promissory notes by March 2002 as planned, the 2001 promissory note came due in October 2002, Ray Energy went out of business in 2003, at the time Ray Energy went out of business it was indebted to Gulf Coast in the amount of $3.2 million, Ray Energy's obligations under the 2001 note were due and owing, and no amount due under the note had been paid. Terminal Properties counters the foregoing is inadequate to demonstrate the specific amount due under the 2001 promissory note. It contends Lakes Gas was required to present evidence affirmatively demonstrating the specific portion of Ray Energy's $3.2 debt to Gulf Coast, if any, that was due and owing under 2001 promissory note. Terminal Properties contends that, in the absence of such evidence it is mere speculation to conclude that any portion of the $3.2 million debt was incurred under the 2001 note, rather than pursuant to "some other debtor/creditor relationship in existence between and among Ray Energy and Gulf Coast." For a number of reasons, we cannot agree.

First, the note obligated Ray Energy to pay Gulf Cost the principal sum of $1 million, or "the principal amount advanced from time to time and remaining outstanding . . . ." The record reveals only two forms of financial transactions between Gulf Coast and Ray Energy: Ray Energy's purchase of propane from Gulf Coast, and the "rare" cash advance Gulf Coast would make to Ray Energy to enable Ray Energy to purchase propane from another vendor. It is reasonable to infer that the $3.2 due and owing from Ray Energy was for these two types of advances.

In addition, the summary judgment against Ray Energy, although not binding on Terminal Properties which was not even a party when the summary judgment was entered,[4] was nevertheless evidence that would support a finding Ray Energy was in default of its obligations under the 2001 promissory note, and that those unpaid obligations met or exceeded the principal sum of $1 million. The fact the amount due and owing from Ray Energy exceeded not only the principal sum of the 2001 promissory note, but the combined sum of the both the 2000 and 2001 notes, is further evidence from which a reasonable fact finder could conclude that at least $1 million of Ray Energy's $3.2 indebtedness was owed under the 2001 note.

Finally and perhaps most importantly, Ray Energy's debt to Gulf Coast grew from the approximately $1.6 million it owed prior to execution of the October 20, 2001 promissory note, to $3.2 million. Because Gulf Coast had refused to

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[4] *See McCullough v. Connelly*, 137 Iowa 682, 685-88, 114 N.W. 301, 302-03 (1907) (holding that intervenor, although a party to the action at the time a default judgment was entered in favor of plaintiff and against defendant, was not bound by the judgment as she had not been made a party to the default proceeding and the merits of her petition had not been considered).

extend any additional credit to Ray Energy unless it executed the 2001 note, it is reasonable to infer that a full $1 million of the additional $1.6 million of indebtedness was incurred under the 2001 note.

Contrary to the district court's conclusion, a reasonable fact finder could determine, after viewing the evidence in the light most favorable to Lakes Gas and drawing all reasonable inferences, that there was at least $1 million due and owing from Ray Energy under the 2001 promissory note. The court accordingly erred in granting Terminal Properties's motion for a directed verdict, and dismissing Lakes Gas's claim. Moreover, even if the record had not contained substantial evidence in support of Lakes Gas's claim, for the reasons discussed below we believe the district court abused its discretion when it refused to reopen the record and allow Lakes Gas to offer additional testimony that, of the $3.2 million due, owing, and unpaid from Ray Energy, at least $1 million was owing under the 2001 promissory note.

V. Motion to Reopen the Record.

The district court has broad discretion to re-open the record and consider additional testimony. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 634 (Iowa 1996). The court may in its discretion reopen the record at any stage of the proceeding, "if it appears 'necessary to the due administration of justice.'" *Bangs v. Maple Hills, Ltd*., 585 N.W.2d 262, 267 (Iowa 1998) (quoting 75 Am.Jur.2d *Trial* § 390, at 587 (1991)). A district court will be found to have abused its discretion when that discretion was exercised on clearly untenable grounds, or to an clearly unreasonable extent. *In re Estate of Warrington*, 686 N.W.2d 198, 205 (Iowa 2004).

In support of its decision that it "would have" denied Lakes Gas's request to reopen, the district court stated:

> [T]he parties and their trial counsel are experienced, seasoned veterans and know the rules of the game. An adversary seizing upon an opponent's blatant mistake in the course of proceedings is to be expected at trial, unless by mutual agreement rules are relaxed. In the exercise of the liberal discretion afforded to this court . . ., the court concludes that such a motion, made in direct response to the grounds urged by intervenor's counsel with respect to sufficiency of proof, comes, by its very nature, too late, even if made immediately thereafter.

Thus, it appears the court determined the record should not be reopened because experienced attorneys and parties must be held to their own mistakes, and a request to reopen the record prompted by the elucidation of a mistake by such attorneys and parties is by its very nature untimely. Lakes Gas contends this was an abuse of discretion. We must agree.

A number of factors are relevant to a determination of whether the record should be reopened, including

> (1) the reason for the failure to introduce the evidence; (2) the surprise or unfair prejudice inuring to the opponent that might be caused by introducing the evidence; (3) the diligence used by the proponent to secure the evidence in a timely fashion; (4) the admissibility and materiality of the evidence; (5) the stage of the trial when the motion is made; (6) the time and effort expended upon the trial; and (7) the inconvenience reopening the case would cause to the proceeding.

State v. Teeters, 487 N.W.2d 346, 348 (Iowa 1992) (citing 75 Am.Jur.2d *Trial §* 382, at 579 (1991)). As Lakes Gas points out, most of these factors weigh in favor of reopening the record in this case.

First, we note the reason for Lakes Gas's failure to introduce the proposed evidence weighs in favor of reopening the record. The only party to ever dispute or contest the allegation that $1 million was due, owing, and unpaid by Ray

Energy under the 2001 promissory note was Hampton. It did so only as a general denial in its answer to the petition, a denial it had abandoned by the time of the first summary judgment hearing. Although Terminal Properties now seeks to assert Hampton's general denial on its own behalf, at no time prior to moving for a directed verdict did Terminal Properties ever indicate that despite the summary judgment entry against Ray Energy it was contesting the amount due and owing under the 2001 promissory note, or that the amount due and owing under the note was an issue for trial.

In addition, Lakes Gas sought leave to reopen the record immediately after it rested its case. It sought to recall a witness who was still in the courtroom, and to question him briefly. Reopening the record at this stage of the proceeding, to this limited extent, would not have unfairly prejudiced Terminal Properties and would not have interfered with or significantly extended the trial. Moreover, the proposed testimony was admissible and highly relevant to Lakes Gas's claim. We conclude that, under the circumstances, the district court abused it discretion by not reopening the record. *Cf. Moser v. Stallings*, 387 N.W.2d 599, 603 (Iowa 1986) (determining refusal to reopen record was not an abuse of discretion when plaintiff was given opportunity to review his evidence before he rested, witness had left and returned to Florida, surrebuttal would have substantially extended trial, and proposed evidence was cumulative).

VI. Conclusion.

We have considered all the claims and arguments of each party, whether or not specifically discussed. We conclude the district court did not err in allowing Terminal Properties to intervene in this matter. However, the court did

err in granting Terminal Properties's motion for a directed verdict, denying Lakes Gas's request to reopen the record, and dismissing Lakes Gas's claim. We therefore reverse the judgment of the district court and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.