IN THE COURT OF APPEALS OF IOWA

No. 9-083 / 07-0959
Filed April 22, 2009

MERRILL WISECUP, Individually, and as the Next Best Friend of Kyle Wisecup, a Minor, CHERYL WISECUP, Individually and as the Next Best Friend of Kyle Wisecup, a Minor, and KENT WISECUP,
Plaintiffs-Appellants,

vs.

STATE FARM INSURANCE FIRE AND CASUALTY COMPANY, AMI ENVIRONMENTAL & ENGINEERING, INC., a/k/a AMI, and AIM CONSTRUCTION, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Homeowners appeal jury verdict in favor of insurance company on their claims of negligence, contract breach, and bad faith concerning mold remediation. **AFFIRMED**.

Jacqueline K. Samuelson and Megan M. Antenucci of Whitfield & Eddy, P.L.C., Des Moines, for appellants.

Michael J. Coyle and Danita L. Grant of Fuerste, Carew, Coyle, Juergens & Studmeier, P.C., Dubuque, and David Jones of Jones, Andrews & Ortiz, P.C., San Antonio, Texas, for appellees.

AMI Environmental & Engineering, West Des Moines, pro se.

Heard by Vaitheswaran, P.J., and Eisenhauer, and Mansfield, JJ.

EISENHAUER, J.

Plaintiffs Merrill and Cheryl Wisecup appeal the district court's denial of their motion for new trial following an adverse jury verdict in favor of State Farm Insurance Company and AMI Environmental & Engineering, Inc. They claim the jury's verdict is contrary to the weight of the evidence. Because the trial court did not abuse its discretion in denying the new trial motion, we affirm.

I. Background Facts and Proceedings.

The major events leading to this litigation occurred in a four-month time frame. In February 2002, the Wisecups remodeled a bathroom and installed a new bathtub/shower. When they returned from a vacation on March 23, 2002, the house had a bad odor and on Sunday April 14, they discovered wet carpet in an unused basement bedroom and water dripping from the closet ceiling directly under the newly-remodeled bathroom. The following morning the remodeling company repaired a leaking pipe leading to the remodeled shower.

Also on April 15, in the morning, Cheryl called SeviceMaster who sent Pat Fusaro out immediately. Fusaro suggested Cheryl obtain a mold spore count and recommended Mark David, an engineer with Brown Engineering. Cheryl contacted David, who arrived in the afternoon and started taking samples. David testified when he arrived a fan was on, drywall had been removed, and mold had been disturbed and put into the air. Further, the mold colonies he found were "both small in size and young in maturity."

Cheryl also made numerous phone calls to her homeowner's insurance company, State Farm, resulting in Cindy Garr-White arriving while David was

taking samples. Garr-White told David State Farm had not authorized his work and would not pay for it because it was too early to determine if mold testing was necessary. Cheryl told David to continue his work and she would pay if State Farm did not. David continued to take mold samples.

Prior to her arrival, Garr-White had made calls to contractors to assist the Wisecups. Russell Onnen of Onnen Services arrived and he had called Pro Team in as a subcontractor. Cheryl signed Onnen's emergency repair authorization form authorizing State Farm to pay Onnen for necessary emergency repairs of water damage. Onnen testified Pro Team informed him there was mold on the building materials above the ceiling and below the bathtub. Onnen observed the situation to be a small, minor water loss with very little mold. Onnen stated Cheryl was agitated and wanted the wet carpet and wet drywall ripped out and Pro Team did that work after Garr-White approved. Pro Team also sprayed an antimicrobial on the visible mold and set up fans. David testified the killing of the young and small colonies was appropriate.

Cheryl told Garr-White her family had experienced recent health problems and she wanted to utilize the alternative living expenses provided in the policy. Garr-White originally believed the house was livable, but later in the afternoon Cheryl told her Merrill was having an asthma attack in response to the chemical solution Pro Team was spraying on the mold. Garr-White then arranged for the Wisecups to go to the Chase Suites. Garr-White's contemporaneous log states she advised the Wisecups to let her know if they needed more nights at the Chase Suites. The Wisecups returned home the following day, April 16.

On April 19, the Wisecups signed an authorization for Onnen to begin repairing their home. Cheryl started doing internet research and making phone calls to learn about mold. She became concerned it was not safe for her family to stay in the home and contacted State Farm requesting to move out and to have David's samples tested. On April 22, Cheryl wrote to State Farm: "The engineer has strongly advised us to move our family out of our house until it is safe to return." David testified he had advised Cheryl she would need a remediation company but "as far as the steps beyond testing of the mold, I don't believe we discussed it at the first meeting." Further, he testified he did not tell Cheryl to get out of the house, or that everything in the house would have to be destroyed, or that the house could not be remediated.

On April 25, State Farm supervisor Rory Hansen's log notes of a phone call with Cheryl state: "we had a very nice conversation about her concerns with possible mold toxins in her home." Hansen explained he had talked with the engineer (David), "and it was our understanding that the area of mold found and the quantity was small, and it was not necessary to do testing." However, because Cheryl was concerned, "I agreed to pay for testing the mold samples for toxins." Hansen testified Cheryl did not ask to leave the home. Hansen's April 26 confirming letter stated State Farm would pay: (1) to test David's samples; (2) for additional air quality testing if the test results showed toxins–"so we can compare the level of mold both inside your home and outside your home"; (3) for the remedies necessary to clean the mold; and (4) for temporary housing.

On May 3, 2002, the test results on David's samples showed toxins. David testified he told both Hansen of State Farm and Cheryl the house could be cleaned. State Farm arranged for the Wisecups and their two teenagers to move into a two-bedroom apartment within the same school district and started paying alternative living expenses.

State Farm hired Denny Carlson of AMI Environmental and Engineering to test the home and provide a remediation plan. On May 4, Carlson investigated, found mold under the tub/shower, and conducted tests. Carlson's first testing showed toxins, "a small amount of *Stachybotrys sp*. in the air." Carlson's May 9 remediation project work plan stated: "The visible and airborne mold found was identified as *Stachybotrys sp*." The plan detailed the extensive remediation cleaning needed for the Wisecup residence. On May 15, Cheryl wrote to State Farm: "Based on the advice we received from [David] and other experts, it is our understanding that this problem can't be resolved by 'cleaning.'"

Onnen contracted with Kintze ServiceMaster to conduct the mold remediation cleaning proposed by Carlson. On June 4, the Wisecups paid what became their last mortgage payment on their home. On the same date, Onnen informed State Farm about a June 3 conversation with Cheryl regarding the carpet. Cheryl stated she wasn't sure that there was a need to pick out any replacement carpet.

On June 7, the Wisecups' attorney wrote to State Farm stating health risks "underlie the Wisecups' position that the house and its contents cannot be adequately cleaned, but must be replaced." Also on June 7, Carlson retested the

home to determine whether mold toxins remained. Carlson's report stated: "These samples indicated the continued presence of a small amount of *Stachybotrys sp*. in the air and the contractor [Onnen and Kintze] was directed to reclean all interior surfaces and furnishings." On June 10, David issued a written report stating: "Fungi of this type are good candidates for cleanup, particularly when caught early (as in this case) before the contamination had spread very much. The spores grow in a gelantinous mass and are not readily released into the air."

Two months after discovering the wet basement, June 15, 2002, the Wisecups signed a one-year lease on a larger apartment. They also began purchasing new furnishings because they believed the furnishings provided by State Farm were poor quality.

On June 20, State Farm offered to have the Wisecups select their own environmental engineer to conduct testing and offered "to pay for this additional testing because of indications that your clients do not trust the firm retained for their benefit, [Carlson]." If the Wisecups' testing report did not agree with Carlson's results, State Farm would have Carlson meet with the Wisecup-selected engineer "to determine the differences, the reasons for the differences, and the appropriate additional remediation to be undertaken." Further, once both engineers concur on a remediation procedure, "State Farm will pay for that procedure . . . and for the retesting by both engineers . . . until the results conform with the industry standards for habitability." State Farm would continue

to pay the alternative living expenses "until three days after both experts concur on the cleanliness of the premises."

On June 27, the Wisecups wrote their mortgage company asking for a payment deferral due to toxic mold. On July 1, the Wisecups stated they would respond to State Farm's dual-expert proposal "very shortly."

On July 8, Carlson again tested the home and reported: "The interior mold concentrations were low, but one *Stachybotrys sp*. spore was found and the contractor was directed to reclean all surfaces and to review the operation of his HEPA equipped air filtration devices." David, the original engineer hired by the Wisecups, testified repeated mold testing followed by repeated remediation is not uncommon. Dr. Finn, a Wisecup expert, also testified it is sometimes necessary to go back and reclean.

On July 24, the Wisecups wrote to Iowa's insurance commissioner stating: "We have been told by several experts that we will never be able to return to our home." Cheryl testified she talked to many people on the phone when she was gathering information about mold, but she could not provide the names of the experts she called.

Carlson returned to do additional testing on July 30, 2002. Based on this test, on August 2, Carlson reported: "airborne fungal contamination does not appear to be a significant concern. The organisms identified indoors closely compared to those identified in the outdoor control sample." Carlson cleared the Wisecup home for habitation and State Farm terminated the Wisecup additional living expenses payments. The final check for living expenses was sent on

August 9. Also, State Farm paid Onnen and Kintze over $37,000 and paid Carlson $10,600.

On August 6, the Wisecup expert, Slade Smith, conducted tests. On September 7, the Wisecups wrote their mortgage company: "[E]xperts have told us from the beginning of this nightmare that the house cannot be cleaned—that it will always be poisonous. . . . We left everything behind and had to start rebuilding our lives from zero." A second mortgage company letter in early October stated: "We have told State Farm from the beginning that we believe that the house will never be safe to inhabit."

On October 15, Smith reported the results of his testing. The key portions of his report stated: (1) the air sampling results show "normal" indoor conditions with the organisms identified indoors closely compared to those outdoors and "airborne fungal contamination does not appear to be a significant concern"; (2) carpet sampling results indicate "the sampled carpet is not actively contaminated with fungal growth," the carpet organisms were also identified in the indoor air samples, "which is an indication of 'normal' indoor conditions," and the identified fungal organisms are likely from deposited dirt/soil; (3) contact sampling in the areas of recent abatement shows a high level of contamination on "a wood stud" inside a wall cavity due to "poor overall decontamination and cleaning after fungal abatement and prior to" wall reconstruction; and (4) after visual evaluation, "there is little evidence of recent moisture infiltration and the fungal contaminated material that was removed was completely abated."

Smith concluded: "Occupancy of the home is at the owner's discretion and physician consultation may be warranted." Smith recommended a thorough recleaning of all vertical and horizontal surfaces and removing the newly-repaired wall materials to reclean the wall studs or coat them with an antimicrobial paint, followed by follow-up or "clearance" sampling to ensure removal to an acceptable level.

In response to Smith's report, State Farm wrote the "sampling procedure used and the standards against which they were measured do not have industry recognition nor established levels for compliance." Nevertheless, to resolve all outstanding issues, State Farm first offered to paint the stud surfaces after cleaning and later offered to remove and replace the contaminated stud. State Farm did not agree to other, additional cleaning. State Farm also stated, in light of the Smith report, "some negotiations into additional living expenses may be in order."

On December 6, 2002, the Wisecups' attorney wrote to State Farm: "From the outset, the Wisecups have advised State Farm that they do not believe that it is safe to return to the house OR to be exposed to any of its contents." Also in December 2002 or the beginning of 2003, the Wisecup mortgage company filed for foreclosure. In February 2003, the Wisecups requested State Farm pay for the replacement of their home and all possessions.

The Wisecup suit for breach of contract, negligence, and bad faith against State Farm and AMI was tried to a jury over three weeks in November and December 2006. The jury found in favor of the defendants and declined to award

damages. The trial court denied the Wisecup motion for new trial and this appeal followed.

II. Scope of Review.

The Wisecups argue the trial court abused its discretion in failing to grant a new trial because the breach of contract, negligence, and bad faith verdicts were inconsistent with the weight of the record evidence. *See* Iowa R. Civ. P. 1.1004(5) (error in amount of recovery in contract action); Iowa R. Civ. P. 1.1004(6) (verdict not sustained by sufficient evidence). The Wisecups also claim the trial court "abused its discretion in failing to grant a new trial . . . based on the court's pretrial rulings limiting discovery of other State Farm insurance bad faith claims in mold contamination matters." *See id*.

"The scope of review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion." *Clinton Physical Therapy Serv., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). If the motion is based on a discretionary ground, we review for abuse of discretion. *Id*. "A ruling on a motion for new trial following a jury verdict is a matter for the trial court's discretion." *Condon Auto Sales & Serv., Inc., v. Crick*, 604 N.W.2d 587, 595 (Iowa 1999). Therefore, we review the court's denial of the Wisecup motion for new trial for abuse of discretion.

III. New Trial: Breach of Contract, Negligence, Bad Faith.

The Wisecups argue the jury verdict on their contract, negligence, and bad faith claims is contrary to the record evidence because State Farm halted their alternative living expenses even though their home did not meet Carlson's own

clearance criteria and because the evidence showed State Farm supervised and controlled a "botched" cleaning process. Because we have conducted an extensive record review to resolve the contract and bad faith issues, we also resolve the negligence issue while assuming error is preserved.

In ruling on a new trial motion, the district court "has a broad, but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." *Condon Auto Sales*, 604 N.W.2d at 594. Iowa courts are generally "reluctant to interfere with a jury verdict and give considerable deference to a trial court's decision not to grant a new trial." *Id*.

The district court ruled:

> The evidence presented at trial supported the final conclusions of the jury that State Farm was not negligent and did not breach its contract with the Wisecups thus relieving State Farm of any requirement that it pay damages to the Wisecups. Sufficient evidence was also presented for the jury to conclude that the Wisecups' own actions, in failing to cooperate with State Farm's remediation efforts and in interfering with State Farm's efforts to provide them with alternative living expenses, including selecting their own alternative housing, relieved State Farm of whatever duties it had pursuant to the contract or otherwise to pay the Wisecups' alternative living expenses.

The Wisecups assert a fact-driven argument on appeal. The jury, however, as fact-finder, was free to disbelieve the Wisecups' testimony and the Wisecup experts' testimony about the remediation events. Additionally, the Wisecups' experts did not confirm many of the statements made by the Wisecups during the key four months. David, the expert brought in by the Wisecups on April 16, contradicted Cheryl's assertions about what he allegedly told her. Smith, another Wisecup expert, found airborne contamination not to be

a significant concern, issued a report suggesting additional cleaning would be successful, and in no way confirmed the Wisecups' assertions their house would never be habitable. In fact, later in the trial, Cheryl testified she was abandoning "any claims for physical health," which is directly contrary to her claims in her extensive correspondence with State Farm.

Further, the State Farm expert, Carlson, who declared the house habitable, was a professional engineer and had personally conducted hundreds of indoor air quality investigations. His final report concluded:

> We expected this project would be completed rather quickly. The damage and mold growth area was small and limited to the area under the tub/shower unit and the ceiling located in the basement NE bedroom. The assessment sampling results indicated only a small amount of *Stachybotrys sp*. mold had aerosolized from the water damaged area and excessive amounts of *Aspergillus sp*. and *Penicilium sp*. were not present in the assessment samples. This project, however, required substantial cleaning efforts on the part of the remediation contractor in order to achieve air clearance results.

The Wisecups argue the house should not have been declared habitable in August 2002 because it did not meet Carlson's own clearance criteria. In making this argument, the Wisecups rely upon Carlson's recommended work plan of May 2002. It referred to "no" spores of certain molds being detected in the interior of the residence as one of the "clearance sampling criteria." Because Carlson's final testing indicated the house had not attained this absolute zero level in August 2002 due to the detection of some spores of one mold, the Wisecups contend State Farm should have not have declared it habitable. However, the jury was entitled to credit Carlson's testimony that the house was habitable and clean, especially since the Wisecups' own expert also concluded

any interior air contamination at that point was insignificant. It should also be noted the insurance policy in question did not insure against mold, but against insured loss caused by the presence of mold. Thus, the ultimate question to be answered by the jury was not whether mold was still in the house, but whether insured loss had occurred that had not been properly addressed by State Farm under the terms of the policy.

We find an abuse of discretion when the court "exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Channon v. United Parcel Serv. Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). In this context, "unreasonable means not based on substantial evidence." *Id*. After a review of the extensive record and exhibits generated during the three-week trial, we find substantial evidence to support the jury's verdict and conclude substantial justice was served. The jury's verdict is not inconsistent with the weight of the record evidence. Accordingly, the district court did not abuse its discretion in denying the Wisecups' motion for new trial.

IV. New Trial: Discovery.

The Wisecups seek a new trial based on alleged error in a trial court discovery ruling. On September 25, 2006, the trial court ordered State Farm to provide "information for any and all claims it has handled within the last seven years on a nationwide basis concerning mold damage." Both parties filed motions to reconsider and State Farm sought to produce information only on Iowa-related claims. On November 16, 2006, the court stated "some modification in the prior order is justified," and ruled:

> To alleviate the burden on defendant State Farm, the court will order that it immediately produce a list for any claims in Illinois and Nebraska like the list it has prepared for any claims in Iowa . . . relating to bad faith and mold, believing that this will at least provide the [Wisecups] with such evidence from Midwestern states with somewhat similar climates and will exclude the large volume of claims which arose from Hurricane Katrina.
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> In addition, defendant State Farm shall produce a corporate representative knowledgeable about any lawsuits filed against State Farm within the last five years for negligence or bad faith arising from State Farm's handling of an insurance claim for toxic mold for deposition by the [Wisecups].

The Wisecups argue the court should not have amended its September order because the amendment severely restricted their discovery and prevented development of their bad faith claim.

When reviewing a district court's ruling on a discovery matter, we afford the district court wide latitude. *See Martin v. B.F. Goodrich Co*., 602 N.W.2d 343, 345 (Iowa 1999). We will reverse only for an abuse of discretion. *Exotica Botanicals, Inc. v. Terra Int'l, Inc*., 612 N.W.2d 801, 804 (Iowa 2000). Under the specific facts of this case, the district court's order attempted to balance the interests of the parties while reaching a compromise between the nationwide discovery sought by the Wisecups and the Iowa-limited discovery sought by State Farm. We find no abuse of discretion.

AFFIRMED.