

**IN THE COURT OF APPEALS OF IOWA**

No. 9-227 / 08-0922  
Filed June 17, 2009

**WEST REALTY, INC., d/b/a RE/MAX WEST REALTY,**  
Plaintiff-Appellant,

**vs.**

**WILLIAM R. FOX,**  
Defendant/Third-Party Plaintiff/Appellee,

**vs.**

**ROBERT NEVITT, d/b/a FIRST NEVITT REALTY,**  
Third-Party Defendant/Appellee.

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Appeal from the Iowa District Court for Dallas County, Gary G. Kimes,  
Judge.

Plaintiff appeals the trial court's evidentiary ruling. **AFFIRMED.**

John P. Roehrick and Kevin M. Kirlin of Roehrick Law Firm, Des Moines,  
for appellant.

Thomas M. Boes and Michael H. Figenshaw of Bradshaw, Fowler, Proctor  
& Fairgrave, P.C., Des Moines, for appellee Fox.

Jeffrey A. Boehlert and Cory D. Abbas of Patterson Law Firm, L.L.P., Des  
Moines, for appellee Nevitt.

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

**MAHAN, P.J.**

The sole issue on appeal is whether the trial court erred with respect to the scope of defendant's expert witness's testimony. Finding no abuse of the trial court's broad discretion in evidentiary matters, we affirm.

**I. Background Facts and Proceedings.**

West Realty brought this action against William R. Fox alleging breach of "Buyer Agency Agreement." West Realty alleged Fox purchased farm property for which West Realty was entitled to a commission despite his using the services of a different realty agent. Fox asserted various defenses, and a third-party petition was filed against Robert Nevitt (the agent who arranged the ultimate sale of the farmland at issue).

Fox and Nevitt designated Timothy C. Meline as an expert witness. In a supplemental answer to West Realty's interrogatory, served in October 2007, the scope of Meline's expected testimony was outlined as follows:

Mr. Meline is expected to testify concerning the standard of conduct of real estate agents in the state of Iowa and the failure of Nancy Nevins to act in accordance with both published and accepted standards.

Mr. Meline is expected to testify based upon the factual circumstances of the underlying transaction as conveyed to him and based upon his review of discovery responses. Specifically, Mr. Meline is expected to testify that Ms. Nevins did not have a broker agency agreement, documentation or other sufficient authorization from the seller of the subject property so as to represent she was an agent on behalf of said seller. Accordingly, Ms. Nevins does not have a right to recover payment from the Defendant for any alleged commission on the sale of the subject property.

Ms. Nevins'[s] use of a boilerplate contract of adhesion with an elderly man, such as Mr. Fox, raises serious questions of her conduct as a broker agent. It appears from the evidence that Ms. Nevins did nothing more than obtain a signature from Mr. Fox on a purported buyer agency agreement. She never actively engaged in

negotiations, sight visits, preparation of an offer, obtaining a listing agreement from the actual seller, or anything further to earn a commission. By failing to comply with Iowa Code chapter 543B.56, she failed to meet the “minimum service” rule required of a realtor. It would be unconscionable under these circumstances for her to claim that she has earned any sort of commission or fee.

...  
... In addition, Mr. Meline relies upon the standards promulgated by the National Association of Realtors, the Des Moines Area Association of Realtors, and Iowa Code chapter 543B.56, as well as the custom and practice and his own experience.

... Mr. Meline has relied upon the discovery responses of the parties, discussions with defense counsel, as well as a review of the applicable standards cited herein. In addition, Mr. Meline has relied upon his experience as a licensed realtor.

West Realty scheduled a deposition of Meline about two months before trial, but cancelled that deposition.

On April 15, 2008, West Realty moved in limine “in order to avoid surprise and prejudice to the Plaintiff, the Defendant’s expert witness in this cause should not be permitted to testify beyond the fair scope of the interrogatory answer provided.” In a second supplemental answer, served April 21, 2008, it was noted that “Mr. Meline has also been provided with copies of the transcripts” of various depositions.

Trial commenced on April 28, 2008. At trial Nancy Nevins, a real estate agent for West Realty, testified the “Buyer Agency Agreement” was an exclusive agreement and because Fox purchased property while subject to that agreement, she was entitled to a commission. West Realty then renewed its motion in limine asking that Meline not be allowed to opine that the agreement was non-exclusive for Fox and would allow Fox to utilize the services of another realtor without being obligated to compensate West Realty. The trial court

overruled the motion. On appeal, West Realty contends the trial court abused its discretion in overruling its motion in limine.

## II. Scope and Standard of Review.

“As in all evidentiary matters, the trial court has broad discretion in making rulings on expert testimony . . . . We will disturb its rulings on such matters only upon a finding of abuse of that discretion.” *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994) (citations omitted); *accord Flom v. Stahly*, 569 N.W.2d 135, 142 (Iowa 1997); *Millis v. Hute*, 587 N.W.2d 625, 628 (Iowa Ct. App. 1998). An abuse of this broad discretion will be found only where the court exercised its discretion “on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *Mohammed v. Otoadese*, 738 N.W.2d 628, 632 (Iowa 2007).

## III. Merits.

Iowa Rule of Evidence 1.508(4) provides:

*Expert testimony at trial.* To the extent that the facts known, or mental impressions and opinions held, by an expert have been developed in discovery proceedings under rule 1.508(1)(a) or 1.508(1)(b), the expert’s direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert’s testimony in the discovery proceedings as set forth in the expert’s deposition, answer to interrogatories, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or mental impressions and opinions on matters with respect to which the expert has not been interrogated in the discovery proceedings.

(Underlining added.) The purpose of rule 1.508(4) “is to avoid surprise to litigants and to allow the parties to formulate their positions on such evidence as is available.” *Millis*, 587 N.W.2d at 628.

West Realty argues it

was given insufficient notice that Meline would provide expert opinion testimony that the Agency Agreement between West Realty and Fox . . . was a non-exclusive agreement which allowed Fox to utilize any realtor to purchase the Chew Farm without any obligation to provide a commission to West Realty.

We reject this contention.

The answer to plaintiff's interrogatory outlines that Meline was "expected to testify concerning the standard of conduct of real estate agents in the state of Iowa and the failure of Nancy Nevins to act in accordance with both published and accepted standards"; that he would testify "based upon the factual circumstances of the underlying transaction as conveyed to him and based upon his review of discovery responses"; that "Ms. Nevins did not have a broker agency agreement"; and that "Ms. Nevins'[s] use of a boilerplate contract of adhesion with an elderly man, such as Mr. Fox, raises serious questions of her conduct as a broker agent"—all of which sets out a fairly broad scope of testimony.

In addition, we conclude from this record that West Realty had adequate notice of the broad scope of Meline's opinions. The trial court could reasonably determine West Realty was not subject to undue surprise by Meline's opinions.

Moreover, it was plaintiff that—for the first time during trial—asserted that the "Buyer Agency Agreement" was an "exclusive" agreement despite the absence of that term in the agreement (and the presence of the term "non-exclusive"). The trial court noted this new assertion and that it was Nevins, who was designated as one of plaintiff's experts, who had raised the assertion in her testimony. It appears West Realty sought to use its own "surprise" assertion, while barring defendants from responding.

We believe the trial court did not err in allowing Meline to testify with respect to the “purported buyer agency agreement” noted in the defendants’ supplemental answer. We conclude the trial court’s decision concerning this trial management issue falls well within the scope of its discretion. We affirm.

**AFFIRMED.**