FILED
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CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

RALPH R. RANK and PHYLLIS E. RANK,

Appellants,

vs.

CRESTVIEW HEIGHTS HOMEOWNERS ASSOCIATION, et al,

Appellees.

Filed February 28, 1978

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2-59342

Appeal from Scott District Court - C. H. Pelton, Judge.

Defendants appeal judgment in favor of Association of Homeowners for $10,606.49 to repair access road to plaintiffs' homes. - Affirmed.

Samuel J. Walker, Davenport, for Appellants.

Edward N. Wehr, of Wehr & Lane, Davenport, for Appellees.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendants Ralph and Phyllis Rank, subdividers, appeal a damage award against them and in favor of plaintiff homeowner association for failure to maintain a road properly. On appeal defendants allege the trial court erred in admitting certain evidence and in reaching certain findings of fact. They also allege the trial court erred in appointing a receiver to take responsibility for repairing the road and in granting other relief where plaintiff's petition sought only monetary relief.

Defendants' first assignment of error is that the trial court erred in allowing a home movie into evidence over their objection of lack of a proper foundation. The amateur photographer who took the motion pictures was not called but another resident and member of plaintiff association testified the home movie was a true and accurate representation of the scenes it purported to convey. Defendants argue that the movie portrayed the conditions of the road, if correctly and accurately, at the extreme worst during the spring of the year. They ask this court to adopt the foundation requirements contained in McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289 (1940), for admitting motion pictures into evidence.

It is not necessary that the witness is a photographer or knows anything concerning the taking of pictures or technical data concerning cameras or lenses. The only requirement in Iowa is that the witness "know about the facts represented or the scene or object photographed. After this is established a witness may say whether the photograph correctly and accurately portrays such facts. When the photograph is thus verified it is admissible." Maier v. Illinois Central R. R. Co., 234 N.W.2d 388, 394 (Iowa 1975). The fact that there are differences or changes in conditions will not necessarily exclude the photograph where the changes can be and are explained so that the photograph, as explained, will give a correct understanding of the conditions existing at the time to which the controversy relates. Galbraith v. George, 217 N.W.2d 598, 602 (Iowa 1974); Elkin v. Johnson, 260 Iowa 46, 512, 148 N.W.2d 442 (1967).

The general rule in regard to photographs is that their admission or exclusion rests largely in the trial court's discretion since it has the opportunity to examine

the photographs and hear the evidence given by the witness who identifies them and what they show or do not show. Twyford v. Weber, 220 N.W.2d 919, 924 (Iowa 1974). This is more emphatically the case where they are intended to serve as an illustration or diagram in aid of testimony, rather than as independent evidence themselves. Ingebretsen v. M. & St. L. R. Co., 176 Iowa 74, 83, 155 N.W. 327, 330 (1916).

A ruling on the admissibility of photographs will not be interfered with upon appeal except upon a clear showing of abuse of discretion. **Twyford,** supra. In the instant case, the pictures were used in aid of oral testimony as to the condition of the road; the changes were explained. We find no such abuse of discretion.

Defendants' second assignment is the trial court erred in not excluding testimony which was opinion and conclusion and which the witness was not shown competent to give. The question to the witness concerned the reason for the City of Bettendorf discontinuing garbage collection at the homes of plaintiff's members. Defendants objected on the ground the question called for a conclusion and opinion of someone else other than the testifying witness. The trial court stated it agreed with defendants but that they had to do more than object, where the answer was already given. Defendants moved to strike the answer and the trial court sustained the objection. Defendants have no appealable issue here.

Defendants also argue that the trial court erred in finding Elk Drive, the road in controversy, was wholly owned by defendants. In their answer to plaintiff's petition, defendants admitted ownership of the road in question. Since ownership was admitted, it no longer was in issue in the case.

Defendants' final assignments of error concern the trial court's order creating a receivership to supervise repair of the roadway. Defendants allege the trial court was without power to appoint a receiver where plaintiff did not petition for appointment as provided by § 680.1, The Code, or include it within the prayer of its petition. The purpose of § 680.1 is to protect property, or its rents or profits, that are in danger of being lost or materially altered or impaired, during the pendency of a court action. Since the trial court did not appoint a receiver during the pendency of this action, chapter 680 is inapplicable.

Defendant also alleges the trial court erred in appointing a receiver because by so doing, it awarded relief inconsistent with the petition and not embraced in its issues as required by rule 235, R.C.P. Rule 235 limits relief only in the case of a default, where the defaulting party has failed to appear. Otherwise, rule 235 permits any relief consistent with the petition and embraced in the issues.

In the instant case, plaintiff's petition sought damages because defendants failed to maintain and repair the roadway and it had fallen into a state of disrepair. The petition further stated the reasonable cost to place the roadway in a reasonable state of maintenance and repair was $20,000. The petition then prayed for that amount. The trial court awarded plaintiff $606.49 in actual expenses which they had expended on the roadway. The court also ordered Elk Drive be repaired, appointed a receiver to act in the capacity of a supervising engineer and awarded judgment for $10,000 to be escrowed with the receiver for repairs.

The record shows plaintiff stated in opening remarks it would ask for an appointment of a receiver at the conclusion of the testimony and the request was made. The relief was consistent with the request. Objection to the appointment was not made to the trial court and cannot be made for the first time on appeal. Maier v. Illinois Central R. R. Co., 234 N.W.2d 388, 395 (Iowa 1975).

AFFIRMED.