FILED
MAY 22 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LEROY A. FELDHAHN and BERNADINE V. FELDHAHN,	)	
Plaintiffs-Appellants,	)	Filed May 22, 1984
vs.	)	
DALE SHEPARD, d/b/a SHEPARD LUMBER COMPANY,	)	4-89 83-435
Defendant/Cross-Claimant,	)	
and R.K.B. QUALITY CORPORATION,	)	
Defendant/Defendant on Cross-claim/Appellee.	)	

Appeal from the Iowa District Court for Scott County - Margaret S. Briles, Judge

Plaintiff homeowners appeal from a judgment for defendant in their suit for defective workmanship in the plastering of their new house. AFFIRMED.

Jack E. Dusthimer and Charles J. Munson of the Munson Law Offices, Bettendorf, Iowa, for plaintiffs-appellants.

John D. Stonebraker of McDonald, Stonebraker & Cepican, Davenport, Iowa, for defendant-appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Plaintiff homeowners appeal from a judgment for defendant R.K.B. Quality Corporation, a plastering company, in their suit for defective workmanship in the plastering of their new house. The Feldhahns assert on appeal that the trial court should have submitted their negligence claim to the jury, and that their motion for a new trial should have been granted on the grounds the jury did not respond to the merits of the controversy and its verdict did not do substantial justice. We affirm.

The Feldhahns employed defendant Shepard as a general contractor to build their new home. Shepard subcontracted the plaster work to a company then known as Robert Bailey d/b/a Kal-Craft Plastering, which the Feldhahns had insisted Shepard hire. The Feldhahns had difficulty with paint and wallpaper peeling off the walls of the home after construction was completed. They removed various fixtures and moved out of the house in order to allow repairs because of the peeling.

The Feldhahns filed suit against Shepard and Bailey based upon claims of breach of contract, breach of express and implied warranties, and negligence. Defendant R.K.B. Quality Corporation was substituted as defendant for Bailey d/b/a Kal-Craft Plastering. Shepard, the general contractor, filed a counterclaim for money still owed for the construction work, and a cross-claim against R.K.B. The cross-claim was dismissed without prejudice before trial.

The case was tried to a jury as between the Feldhahns and the defendant R.K.B. It appears from the record that the Feldhahns settled with Shepard prior to trial, although no formal order appears in the record dismissing Shepard from the case. The jury returned a verdict for the defendant R.K.B. The court entered judgment on that verdict and awarded the defendant R.K.B. costs of the action. The court also denied the Feldhahn's motion for a new trial and motion for judgment notwithstanding verdict. The Feldhahns then appealed.

I. Jurisdiction. While it appears from the record that the actions between the Feldhahns and Shepard were not formally concluded, we do not find it necessary to dismiss this appeal as premature. It is clear from the record that a settlement was reached between those parties. Moreover, all actions as to the defendant R.K.B. are final and judgment has been entered. Assuming, without deciding, that the parties did not appeal from a final judgment, we believe that under the circumstances it is appropriate for us to entertain the appeal under Iowa Rule of Appellate Procedure 1(c). See Smith v. Korf, Diehl, Clayton and Cleverley, 302 N.W.2d 137, 139 (Iowa 1981).

II. Negligence Instruction. The Feldhahns admit on appeal that they failed to object to any of the instructions given at trial. A party is required to object to instructions, and to make its objections specific enough to alert the trial court to the basis for complaint so that, if there is error, it may be corrected before the case goes to the jury. Wambsgans v. Price, 274 N.W.2d 362, 365 (Iowa 1979).

The Feldhahns contend, however, that their failure to object to the instructions, which did not include their negligence claim, does not preclude their challenging on appeal the trial court's failure to give an instruction on that claim. Specifically, the Feldhahns assert that the trial court's actions in requiring them to choose between a contract theory or a negligence theory at the end of their case was similar to granting a motion to dismiss or a motion for summary judgment on that issue of negligence. At that time the court withdrew the Feldhahns' negligence count after a finding that they had presented nothing in evidence that would "produce new ground for negligence independent of the contract." See generally, M & W Farm Service Co. v. Callison, 285 N.W.2d 271, 276 (Iowa 1979); Busker v. Sokolowski, 203 N.W.2d 301, 303 (Iowa 1972); Mid-Country Meats, Inc. v. Woodruff-Evans Construction, 334 N.W.2d 332, 336 (Iowa Ct. App. 1983); Metropolitan Transfer Station, Inc. v. Design Structures, Inc., et al, 328 N.W.2d 532, 538 (Iowa Ct. App. 1982).

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However, a peremptory ruling of the court telling counsel an instruction will not be given does not relieve a party of its obligation to make objections to instructions in their final form in order to preserve those claims for appeal. Anderson v. Wilcox, 189 N.W.2d 541, 545-46 (Iowa 1971). See Iowa R. Civ. P. 196. The court's ruling sustaining R.K.B.'s motion to withdraw the issue of negligence from the consideration of the jury did not excuse the Feldhahns of their obligation to make an objection in order to preserve the issue of negligence for appeal. Accordingly, the issue of the trial court's failure to instruct on negligence is not properly before us and we do not consider it in this appeal.

III. New Trial. We also do not believe the trial court abused its discretion in denying the Feldhahns' motion for a new trial. The trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice in ruling upon motions for new trial. Iowa R. App. P. 14(f)(3). The fact that a court may have reached a different result is no ground for setting aside a jury verdict and awarding a new trial. Waddell v. Peet's Feeds, Inc., 266 N W.2d 29, 32 (Iowa 1978).

The cause of the failure of the plaster was disputed at trial. The Feldhahns contended that Bailey, acting for R.K.B., applied the plaster during adverse weather conditions without the proper heating and, as a result, the plaster failed to properly set. R.K.B., on the other hand, attempted to show that the Feldhahns decorated the plaster before it had dried properly, and that, in any case, the problems could have been corrected at less expense by removing and replacing only the outer layer of the plaster. The jury, in finding for the defendant, apparently concluded that the Feldhahns failed to sustain their burden of proof to show that Bailey's actions were the cause of the defective plaster. Although the evidence was sharply conflicting, the record does not preclude such a finding.

The Feldhahns alleged the following grounds in support of their motion for a new trial: (1) the jury's verdict shocked the conscience and sense of justice; (2) the

trial court failed to instruct on the issue of negligence; (3) one of R.K.B.'s witnesses filed an affidavit after trial stating that he had mistakenly testified concerning the date when he observed the Feldhahns' priming and painting the walls; (4) the Feldhahns did not receive a fair trial; and (5) the combination of occurrences at trial interacted to prevent justice from being done. The trial court specifically found that although it was "startled and amazed" when the verdict was returned, the verdict was well within the evidence. Assuming arguendo that the issue of a verdict shocking the court's conscience relates to determining liability as well as damages, we do not believe the trial court abused its discretion in denying a new trial on that ground. If the verdict has support in the evidence, as here, the issue of it shocking the court's conscience is unlikely to arise. Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975). As to their second ground, as noted above, the Feldhahns failed to preserve the issue of negligence. Finally, the affidavit of R.K.B.'s witness, Russell Gauker, indicated only that he had been unsure at trial about the times when he observed the Feldhahns' priming and painting the walls of the house. As the trial court noted, his testimony was effectively impeached at trial. The evidence that he had made erroneous statements of fact at trial was newly developed evidence, not newly discovered evidence (see Wilkes v. Iowa State Highway Commission, 186 N.W.2d 604, 607-08 (Iowa 1971)), and could have been developed prior to trial. There is no evidence of specific acts or occurrences at trial which denied the Feldhahns a fair trial or prevented justice from being done.

The Feldhahns also raise numerous other issues in their appellate brief in support of their motion for a new trial. Assuming those grounds are properly before us, we find them to be without merit. Accordingly, the trial court did not abuse its discretion in denying the Feldhahns' motion for a new trial.

AFFIRMED.