

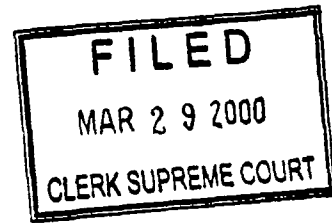
IN THE COURT OF APPEALS OF IOWA

No. 1999-531 (9-792) / 98-1697
Filed March 29, 2000

ALLIE FOX, INC.,
Appellant,

vs.

METZ BAKING COMPANY,
Appellee.



Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Plaintiff appeals the judgment entered upon a jury verdict awarding damages in its action against the defendant for breach of contract. **AFFIRMED.**

Steve Holmes, Fremont, Nebraska, pro se.

Paul R. Elofson of McGill, Gotsdiner, Workman & Lepp, P.C., Omaha, Nebraska, and John D. Mayne of Mayne & Mayne, Sioux City, for appellee.

Heard by Sackett, C.J., Hecht, J., and Habhab, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

HABHAB, S.J.

Allie Fox, Inc., plaintiff-appellant, appeals the judgment entered upon a jury verdict awarding it damages in its action against Metz Baking Company, defendant-appellee, for breach of contract. We affirm.

Background facts. The plaintiff-appellant, Allie Fox, Inc., had a longstanding relationship with the defendant-appellee, Metz Baking Company, in which it would pick up and haul away various types of refuse, including waste bread and waste dough produced in the baking process. In exchange for this service, it was allowed to keep the bakery waste. Allie Fox, Inc. usually utilized this waste by selling it or maintaining it as feed for their livestock. Due to increased disposal costs to Allie Fox, Inc., this arrangement was amended in December, 1992 to include an \$850 monthly fee for this service. In September, 1994, Metz Baking Company informed Allie Fox, Inc. that it wanted to discontinue this relationship even though eleven months remained on the contractual period. This suit followed.

The case was contested on both liability and damages. Metz Baking Company claimed that, as a result of failures of performance by Allie Fox, Inc., it was justified, through its plant manager, Merle Renner, to terminate its relationship with Allie Fox, Inc. Allie Fox, Inc., on the other hand, contended that there was no basis for termination of the relationship, and that it was entitled to damages which included both the contract price of \$850 per month for the eleven months remaining on a one-year notice clause, plus its lost profits from the sale of the bread waste, plus damages for the destruction of its business.

The jury, in response to special interrogatories, found that Metz Baking Company had breached the contract with Allie Fox, Inc., and that Metz Baking Company's performance was not excused because the contract had not been properly terminated for cause.

The jury then made its determination of Allie Fox, Inc.'s damages caused by the breach. It found as follows:

Question No. 3: What is the amount of damages of plaintiff Allie Fox, Inc. caused by defendant Metz Baking Company's breach of the contract? If the plaintiff has failed to prove any item of damage, enter zero for that item.

1.	Loss of profits	\$9,350.00
2.	Loss from destruction of value to business	-0-
	Total	\$9,350.00

Allie Fox, Inc. appeals this decision on two grounds. We set forth those grounds precisely as they appear in the plaintiff-appellant's brief. They are:

Issue 1. Plaintiff wanted admitted into evidence earlier contracts with Defendant to show an evolution of a positive working relationship between the parties. The purpose of which was to counter Defendant's claim of a history of problems with Allie Fox, Inc. over sanitation and other related issues.

Issue 2. The deposition by a former general manager of the Defendant Metz Baking's South Sioux City plant, now retired, and living out-of-state stated that another key witness for the Defendant, also an employee of Metz, had been involved in criminal activity against the Plaintiff (i.e., stealing of Plaintiff's NFW . . . [waste bread] for own use).

Plaintiff wanted to use such evidence to try to impeach said witness. Counsel for Defendant objected as to relevance.

Scope of review. We believe, after reviewing the appellant's brief, that what the appellant seeks is a new trial based on the two issues it presents for our

~~review. The standard~~ of review of a district court's ruling on a motion for new trial is for ~~abuse of~~ discretion. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996); *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 702 (Iowa 1994); *Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989).

In ruling on a motion for a new trial, the district court has broad, but not unlimited discretion. *Cowen v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990). "An inadequate damage award merits a new trial as much as an excessive one." *Foggia*, 543 N.W.2d at 891 (citing *Matthess*, 521 N.W.2d at 702; *Witte*, 443 N.W.2d at 716). "Whether damages awarded are adequate in a particular case depends on the facts of the situation." *Id.* (citing *Matthess*, 521 N.W.2d at 702). "The test we must apply is whether the verdict fairly and reasonably compensates the injury the party sustained." *Id.* (quoting *Matthess*, 521 N.W.2d at 702). "Although evidence presented at trial may justify a higher damage award, this alone does not control. The key question is whether after examining the record, 'giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict affects substantial justice between the parties.'" *Id.* (quoting *Kautman v. Mar-Mac Community School District*, 255 N.W.2d 146, 148 (Iowa 1977)). In *Kautman*, our supreme court stated:

It is not for us to invade the province of the jury. In fact a verdict will not be set aside or altered unless it is, (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption that it is the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support.

Kautman, 255 N.W.2d at 147. The court further stated:

~~If the verdict has support in the evidence the others will hardly arise. If it lacks support they may all arise.~~ The real question in ~~most~~ cases, and here, is the amount and sufficiency of evidence to ~~support~~ the award made. Certainly where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question.

Id.

We believe the verdict reached by the jury has support in the evidence. As the trial court found in its ruling that denied plaintiff-appellant's combined Motion for Judgment Notwithstanding the Verdict and New Trial, there was evidence submitted to the jury as to the amount of the bread waste and the value of that waste. Clearly, the jury had different amounts it could have considered. Figures for pounds ranged from 276,030 or more. The value for bread waste could have been 2¢, 2½¢ or 3¢ per pound. The jury had a number of figures before it and could easily have considered that the expenses offset the revenue.

It is true, as the appellant claims, that there was evidence presented at the trial that could justify a higher and more inclusive damage award. But this alone is not controlling. "The determinative question posed is whether under the record, giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties." *Kautman*, 255 N.W.2d at 148. We hold that it does.

~~Turning~~ now to the two issues presented for our review, evidence lies initially in the discretion of the trial court, and we will not reverse except when an abuse of discretion is shown. We are loath to interfere with the court's rulings on evidentiary matters unless such an abuse of discretion has resulted in prejudice to the complaining party. *Miller v. Bonar*, 337 N.W.2d 523, 528 (Iowa 1983).

Prior contracts as evidence. Allie Fox, Inc. contends that the trial court erred in refusing to admit the prior contracts between the parties. It alleges that it was prejudiced by the exclusion because the contracts illustrate the history and nature of the longstanding relationship between the parties and refute Metz Baking Company's allegations of untimely performance and sanitation problems by Allie Fox, Inc. Metz Baking Company asserts the court properly excluded the contracts because such evidence would have been cumulative. Iowa Rule of Evidence 403 allows for the exclusion of evidence, even though it may be relevant, if it needlessly presents cumulative evidence. Metz Baking Company contends Allie Fox, Inc. repeatedly submitted evidence to the jury regarding the length and extent of the contractual relationship. With Rule 403 in mind, our supreme court has stated, "[a]s a general rule decisions concerning relevance and materiality of evidence are discretionary. We reverse only if the trial court clearly abused its discretion to the prejudice of the complaining party." *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410, 412 (Iowa 1995).

After reviewing the rather limited record before us, we find that the trial court did not abuse its discretion in this ruling. The record contains other evidence that establishes the same facts. Mr. Holmes gave extensive testimony concerning the history of the relationship of the parties. In addition, Exhibit no. 37, which is Mr. Holmes' correspondence to Metz Baking Company, clearly identifies the history of this relationship. We hold the trial court did not abuse its discretion.

After reviewing the record before us, we find that regardless of whether the court abused its discretion in this ruling, Allie Fox, Inc. was not prejudiced by

~~this result. We believe the evidence that was excluded is relevant only to the question of whether~~ or not Metz Baking Company breached their contract with Allie Fox, Inc. In deciding this issue, the jury found for Allie Fox, Inc. Question No. 2 on the jury verdict form was answered as follows: "Was the defendant Metz Baking Company's performance excused because it properly terminated the contract for cause? No." Clearly, the jury did not feel that Allie Fox, Inc. had behaved improperly in servicing this contract. The exclusion of the prior contracts did not prejudice Allie Fox, Inc.

Impeachment testimony. Allie Fox, Inc. alleges that the court erred by refusing to admit into testimony the deposition of Lyle Seeman for the purpose of impeaching the trial testimony of Steve Owens. It contends the testimony of Steve Owens was represented as believable to the jury, confirming Metz Baking Company's position that Allie Fox, Inc. had not adequately performed under the contract. Allie Fox, Inc. contends that submission of the deposition testimony would have served to impeach the credibility of Steve Owens and allow the jury to discredit his testimony.

Metz Baking Company alleges Allie Fox, Inc. attempted to introduce the impeaching deposition testimony before the trial testimony of Steve Owens, allowing ~~the court~~ to refuse to admit the evidence. *Howard v. State*, 248 N.W.2d 108, 110 (Iowa 1976) (a person's credibility is not at issue and cannot be challenged until they have testified to the court). The limited record before us reflects only Allie Fox, Inc.'s failure to cross-examine Steve Owens at trial. It does not include the attempted introduction of the deposition testimony or the

~~court's ruling on this issue. The trial court did not abuse its discretion in excluding this evidence.~~

Again, however, Allie Fox, Inc. fails to show any resulting prejudice from this exclusion. According to Allie Fox, Inc., it felt the deposition testimony would serve to impeach Steve Owens' corroboration of prior testimony pertaining to lack of performance issues by Allie Fox, Inc. The jury clearly found that Allie Fox, Inc. performed adequately under the contract and Metz Baking Company did not have cause to terminate the contract. The exclusion of this evidence did not prejudice Allie Fox, Inc.

Allie Fox, Inc. further alleges these two perceived errors by the court caused the jury to "punish" them by failing to award any monetary damages for the value of the bakery waste available to them under the contract. This suspicion on the part of Allie Fox, Inc. is unfounded. The jury clearly considered the issue of who was at fault and found in favor of Allie Fox, Inc. The record included enough information to allow the jury to find as they did on this issue, including uncertainty in the amount of bakery waste available during the contractual period, a range in the price it could have been sold for, the high monthly expenses which would have been incurred by Allie Fox, Inc. for providing ~~this~~ service, and any failure on the part of Allie Fox, Inc. to mitigate their ~~damages~~.

We have considered all of the issues ~~properly before us~~ and affirm in all respects.

AFFIRMED.