

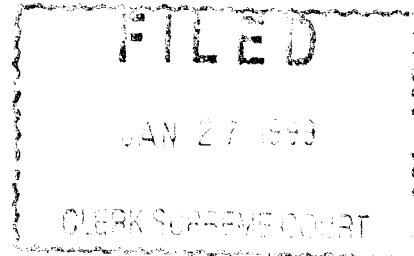
IN THE COURT OF APPEALS OF IOWA

No. 8-684 / 96-1598
Filed January 27, 1999

RIVERBOAT CASINO TOURS, an Unincorporated
Division of **EXECUTIVE TRAVEL, INC.**,
Plaintiff-Appellant/Cross-Appellee,

vs.

THE CONNELLY GROUP, L.P., a Delaware
Limited Partnership d/b/a **PRESIDENT**
RIVERBOAT CASINO,
Defendant-Appellee/Cross-Appellant.



Appeal from the Iowa District Court for Scott County, David E. Schoenthaler,
Judge.

Plaintiff appeals from a judgment entered following a jury verdict in favor of
defendant on plaintiff's breach of contract claim. **AFFIRMED.**

Dennis A. Bjorklund, Iowa City, for appellant.

Jeffrey S. Bittner and R. Richard Bittner of Carlin, Hellstrom & Bittner,
Davenport, for appellee.

Heard by Sackett, C.J., and Streit and Vogel, JJ.

STREIT, J.

Plaintiff Riverboat Casino Tours (RCT) appeals from the trial court's denial of its motion for new trial. RCT's motion was based on several of the trial court's evidentiary rulings, jury instructions, and a claim the jury verdict was not supported by substantial evidence. We affirm the trial court on all issues.

RCT was formed to offer cruise packages on the President Riverboat Casino, owned and operated by the defendant, The Connelly Group (Connelly). Nikki Bowles is the sole officer, director, and shareholder of Executive Travel of which RCT is a division. Edward Ellers is the chief operating officer of Connelly. RCT negotiated a contract with Ellers on behalf of Connelly. Ellers drafted the agreement which was executed in February 1991.

According to Bowles, Connelly began violating the terms of the contract from its inception. Generally, Bowles contends Connelly caused numerous problems for RCT in carrying out the cruise packages and ruined her reputation and business. Bowles claims Connelly specifically breached the contract by: (1) failing to provide a computer link between its reservation system and RCT's office; (2) not allowing RCT to set up a hospitality desk for its customers; and (3) failing to seek approval of the parties' agreement from the Iowa Racing & Gaming Commission to the point of recommending the Commission not approve the contract. She further claims Connelly violated the covenant not to compete by promoting package tours of its own.

Bowles filed a breach of contract suit against Connelly in July 1994. The case progressed to trial and the jury returned a verdict in favor of Connelly. The trial court entered judgment in favor of Connelly and denied RCT's motion for new trial. RCT appeals.

We review the granting or denial of a motion for new trial for abuse of discretion. *Lane v. College*, 581 N.W.2d 214 (Iowa App. 1998). Likewise, we generally review evidentiary rulings for abuse of discretion. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). Jury instructions are reviewed for errors at law. *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 316 (Iowa 1998). In light of these standards, we review appellant's claim the trial court erred in denying her motion for new trial.

First, RCT complains the court erred by granting Connelly's motion in limine regarding an audio-taped conversation and excluding the audio tape at trial as a discovery sanction. RCT did not disclose the tape until the eve of trial, after Connelly had deposed Mueller. The audio tape was a conversation between Bowles and Lisa Mueller, who was in charge of the casino's reservations during 1991. RCT contends the taped conversation contradicts Mueller's testimony at trial, which was favorable to Connelly. Connelly argues RCT did not preserve this issue for appeal because the audio tape was not offered at trial.

The issue of the admissibility of the audio-tape was properly preserved for appeal. The primary purpose of a motion in limine is to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on its

admissibility. *Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa App. 1997). Generally, any error based on the trial court's disposition of a motion in limine is not preserved unless the record includes a timely objection when the challenged evidence is offered at trial. *Id.* When a trial court's ruling is dispositive on the issue of admissibility, however, and not merely intended to protect from prejudicial references, it is considered final for purposes of appeal and no further objection is necessary. *Id.*

The trial court's ruling the audio tape was to be excluded was dispositive of the admissibility of that piece of evidence. No further objection was necessary. RCT's contention still fails. Even if the trial court erred in excluding the evidence, the error did not warrant reversal. *See Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988). Iowa Rule of Evidence 103(a) states that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." There is no prejudice if the record demonstrates a lack of prejudice. *Id.* This record demonstrates a lack of prejudice. RCT was allowed to reference and use the content of the tape in its cross-examination of Mueller. RCT has also failed to show Mueller's recorded statements were inconsistent with her testimony on direct examination. Finally, although we have found the issue properly preserved for appeal, it is difficult to find its exclusion prejudiced RCT when we don't know the precise content of the tape. The trial court's ruling regarding the audio tape is affirmed.

RCT's second contention is the trial court abused its discretion in excluding the attachments to a letter written by Bowles containing references to her competitor's "costs" and "markups." RCT argued the attachments were admissible under the "expert witness" exception to the hearsay rule. No offer of proof was ever made by RCT which established the evidence fell within this exception. When the trial court refused to admit the attachments, RCT had the burden to demonstrate the substance of her proposed testimony by an offer of proof. *See Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa App. 1994). An offer of proof serves both to give the trial court a more adequate basis for its evidentiary ruling and to make a record for appellate review. *Id.* Because no offer of proof was made, the record is not sufficient for us to address RCT's claimed error and we find it was not preserved on this issue and we do not address it. *Id.*

RCT's third contention is the trial court erred by excluding portions of testimony from three of RCT's witnesses. RCT argues the excluded testimony was essential to corroborate Bowles' claims about Eller's dishonest business practices and to prove his motive, opportunity, intent, preparation, plan, and knowledge to breach the contract. The admission of testimony is a matter within the trial court's discretion. *See Flom v. Stahly*, 569 N.W.2d 135, 142 (Iowa 1997). The trial court properly excluded testimony of Ellers' conduct with previous employees as irrelevant and inadmissible character evidence. *See Iowa Rules of Evid.* 402, 608. The trial court did not abuse its discretion in excluding the testimony.

RCT's fourth contention is the trial court erred by giving incomplete and inaccurate jury instructions on breach of contract. RCT does not cite any reference to the record indicating the instruction it proposes on appeal was requested at trial. "We do not consider on appeal objections to jury instructions which were not presented to the trial court." *See Kansas City Life Ins. Co. v. Hullinger*, 459 N.W.2d 889, 897 (Iowa App. 1990). Because RCT did not properly preserve error on this issue at trial, we do not consider it on appeal. *See id.*

RCT's last contention is the trial court erred in denying its motion for new trial. RCT contends the evidence was overwhelmingly in its favor and does not support the verdict reached by the jury. If a jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice, a new trial may be ordered. *Magnusson Agency v. Public Entity Nat. Company-Midwest*, 560 N.W.2d 20, 30 (Iowa 1997). We conclude the district court did not abuse its discretion in denying a new trial. The jury's verdict on the breach-of-contract claim is supported by substantial evidence in the record and substantial justice is effectuated by the jury's verdict in favor of Connelly. The trial court's denial of the motion for new trial is affirmed.

AFFIRMED.