

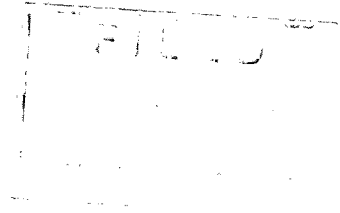
IN THE COURT OF APPEALS OF IOWA

No. 1-360 / 00-1344
Filed December 28, 2001

**TRI-STATE AGRI CORP.,
Plaintiff-Appellant,**

vs.

**JAY CLASING and DEANNA
CLASING, a/k/a JADE FARMS
PARTNERSHIP, IOWA TRUST
AND SAVINGS BANK, EMMETSBURG,
IOWA, and SWEA CITY STATE BANK,
Defendants-Appellees.**



Appeal from the Iowa District Court for Clay County, Patrick M. Carr,
Judge.

Tri-State Agri Corp. (Tri-State) appeals following the entry of judgments on
its mechanic's lien foreclosure action it initiated against the defendants and a
subsequent counterclaim advanced by the Clasings against Tri-State.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Lloyd W. Bierma of Oostra & Bierma P.L.C., Sioux City, for appellant.

Thomas M. Magee, Emmetsburg, for appellees-Clasings.

Heard by Vogel, P.J., and Miller and Eisenhauer, JJ.

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MILLER, J.

Tri-State Agri Corp. appeals following the entry of judgments on its mechanic's lien foreclosure action and the subsequent counterclaim by the defendants Jay and Deanna Clasing against Tri-State. Tri-State contends the trial court (1) erred in allowing evidence concerning crop loss and submitting a jury instruction regarding crop loss damages, and in subsequently overruling its motion for judgment notwithstanding the verdict to vacate the jury's damage award for crop loss, (2) erred in failing to follow the statutory requirement of granting it attorney fees upon the successful completion of a foreclosure on a mechanic's lien, and (3) abused its discretion in allocating costs. We affirm in part, reverse in part and remand.

I. BACKGROUND FACTS AND PROCEEDINGS

Tri-State Agri Corp. (Tri-State) sold goods and services to Jay and Deanna Clasing a/k/a/ Jade Farms Partnership (Clasing) which involved the construction and remodeling of Clasing's grain storage facilities. The project included the construction of two new grain bins, the erection of a used grain bin and the remodeling/retrofitting of a batch-drying bin into an auto-flow drying bin. The project was originally to be completed and operational for the fall harvest on or before October 1, 1996. Several delays ensued. However, Tri-State finally believed the project to be finished on October 19, 1996. Unfortunately, because an incorrect conversion kit was installed in the drying bin when the system was tested, it did not work. Ultimately the correct parts were installed and the system became operational on or about October 30, 1996. When the project was finally completed the final cost was over \$104,000, which exceeded the amount

originally projected by Tri-State. Clasing paid \$40,316.80 to Tri-State during the course of the project but refused to pay any additional amount above that due to alleged faulty and inferior workmanship by Tri-State as well as the delay in the completion of the project which Clasing contended resulted in harvest loss.

Tri-State filed a mechanic's lien on December 3, 1996 in the amount of \$63,025.02. On April 17, 1997 Tri-State filed a petition to foreclose on this mechanic's lien.¹ Clasing filed an answer and counterclaim on May 29, 1997 alleging breach of contract, breach of express warranty, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, negligence, negligent misrepresentation and intentional infliction of emotional distress. Then on June 2, 1997 Clasing filed an offer to confess judgment for \$33,000 plus costs to date and to dismiss the counterclaim with prejudice. Tri-State did not accept the offer and thus the offer was deemed withdrawn. See Iowa Code §§ 677.8, 677.9 (1997). Both parties' pleadings were subsequently amended.

The case was bifurcated with the counterclaim tried at law to a jury and the mechanic's lien foreclosure proceeding later heard in equity by the court. On June 15, 1999 the jury rendered a verdict for Clasing on the breach of the implied warranty of merchantability claim and awarded Clasing \$32,447.95, including \$7500 for crop loss, \$22,642 for defective work, and \$2305.95 for extra electrical work which Clasing had to pay to third parties. The same day the court entered

¹ Tri-State's original petition for foreclosure requested judgment in the amount of \$58,305.64 stating it had agreed to an adjustment of \$10,000. However, Tri-State subsequently amended to increase the amount it was seeking to \$68,305.96 and later yet amended to decrease the amount to \$63,595.05.

judgment against Tri-State in the amount of \$32,267.95.² The court stated in its written judgment entry that Tri-State's petition to foreclose on the mechanic's lien was taken under advisement for later ruling and ordered that execution on the judgment against Tri-State not issue until the court ruled on the mechanic's lien foreclosure. The court also ordered that costs of the action would be taxed by later order.

The trial court heard arguments on the mechanic's lien foreclosure on June 15, 1999 and entered a ruling on August 25, 1999. The court found Tri-State had proved substantial performance and rendered judgment in Tri-State's favor. The court concluded the base contract price was \$93,241.00. With additional charges of \$1618.00 and \$3442.10 the final contract price was determined to be \$98,281.10. The court also found the reasonable cost of repairing the defective or incomplete work by Tri-State was \$22,642.00, the same amount found by the jury for defective work. After giving Clasing credit for payments of \$40,316.00 the court determined the unpaid balance owed Tri-State, before subtracting for the defective work, was \$57,964.30. The court ordered a hearing be set to determine the precise amount of setoff, the propriety of an award of attorney fees and if awarded the amount thereof, as well as the date of commencement of and amount of interest on the mechanic's lien.

Hearing was held and the court entered rulings on these reserved issues on March 8, 2000. In relevant part, the court ruled that (1) the claim and counter claim should not be set off against each other, (2) because Clasing's offer to

² We note this amount differs from the amount of damages awarded by the jury. It is unclear from the record why there is a difference. However as this is not an issue on appeal we simply note the apparent discrepancy.

confess judgment was more than Tri-State's net recovery Tri-State was not successful within the meaning of Iowa Code section 572.32 and therefore its request for attorney fees was denied, and (3) under Iowa Code section 667.10 Clasing should pay court costs accrued to the date of June 2, 1997 (the date of the offer to confess judgment) in the sum of \$80.00 and Tri-State should pay costs accrued after that date in the sum of \$582.24. On March 8 the court also entered a judgment and decree of foreclosure on Tri-State's mechanics lien.

Tri-State filed a motion for judgment notwithstanding the verdict (JNOV) on March 17, 2000 regarding the jury's award on Clasing's counterclaim, and a motion to reconsider pursuant to Iowa Rule of Civil Procedure 179(b) with regard to the court's denial of attorney fees and allocation of costs. Tri-State's JNOV motion addressed only the \$7500 damage for crop loss. Tri-State argued in its motion that there was an insufficient evidentiary foundation at trial for the expert testimony of Paul Kassel (Kassel) relating to crop loss, including a lack of experience, training or knowledge on which the jury could base a decision, and that the testimony and jury instructions were confusing. The court denied the JNOV motion finding it was untimely and "[i]n any event, the motion reiterates complaints about evidentiary rulings made before and during trial which are still considered correct." The court also denied Tri-State's motion for reconsideration, reiterating its previous holding that Tri-State was not successful and thus was not entitled to attorney fees. Finally, although the court concluded it had rested its prior ruling on costs on the wrong statute, it determined that Iowa Code sections 625.1 and 625.3 were the correct statutes and under them its allocation of costs remained correct.

III. MERITS

Tri-State appeals contending the trial court erred in finding its post-trial JNOV motion was untimely and in failing to grant it attorney fees. Tri-State also alleges the court abused its discretion in allowing the expert testimony of Kassel on crop loss, allowing the crop loss damages claim to be submitted to the jury, and in allocating the costs of the action. We address these claims separately.

A. Admission of Expert Testimony of Kassel

In his counterclaim Clasing claimed that he suffered damages from corn loss due to Tri-State's failure to complete the project on or around October 1, 1996 as the parties had agreed. As a result of this failure to complete the project on time, Clasing alleged he was delayed in harvesting his corn. During this delay, strong winds swept through the area of Clasing's farm which he alleged caused some corn to fall off the stalks, known as "droppage," and thus the fallen corn could not be harvested. Clasing claimed had Tri-State completed the work on time he would have had his corn harvested prior to the strong winds and would not have been adversely affected by them. In order to prove he suffered corn loss Clasing offered the expert testimony of Kassel.

Tri-State objected to Kassel's testimony prior to trial through a motion in limine and again during trial. These objections were renewed at the conclusion of the evidence as well as when the jury instructions were submitted. Generally, Tri-State argued Clasing had not provided sufficient evidentiary foundation for Kassel's testimony, the issue exceeded the scope of Kassel's knowledge, and his opinions lacked evidentiary reliability. The trial court allowed Kassel's expert testimony.

Tri-State further alleged that based on Kassel's speculative and unreliable testimony there was not sufficient evidence to submit the issue of crop loss damage to the jury because the testimony and jury instructions on this issue were confusing and would mislead the jury. The court rejected Tri-State's objections and submitted the issue of crop damages to the jury. The jury awarded Clasing damages in the amount of \$7500 for crop loss. As set forth above, Tri-State later filed a JNOV motion arguing this evidentiary issue again and asking the court to exclude the damages for crop loss or grant a new trial. The court denied the motion finding it was untimely and that the evidentiary rulings complained of by Tri-State were correct. We address the merits of the evidentiary issue and need not determine whether the motion for JNOV was timely.

Whether a witness is qualified to give expert testimony lies within the discretion of the district court. *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998). We will not reverse its decision absent an abuse of discretion and prejudice to the complaining party. *Id.*; *Hylar v. Garner*, 548 N.W.2d 864, 868 (Iowa 1996). "We are committed to a liberal rule on the admission of opinion testimony, and only in clear cases of abuse would the admission of such evidence be found to be prejudicial." *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 531 (Iowa 1999) (quoting *Iowa-Illinois Gas & Elec. v. Black & Veatch*, 497 N.W.2d 821, 827 (Iowa 1993)). A trial court abuses its discretion when it exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 612 (Iowa 2000).

Iowa Rule of Evidence 702 provides the standard for admission of expert testimony. The rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 702.

[T]he amount of foundation necessary to establish reliability depends on the complexity of the testimony and the likely impact of the testimony on the fact-finding process. . . .

Determinations of admissibility of such evidence must necessarily be made on an ad hoc basis, . . . and it would be impossible to establish rules binding in every case. Obviously the complexity of the subject matter will influence the foundational showing of reliability.

Johnson v. Knoxville Community School Dist., 570 N.W.2d 633, 637 (Iowa 1997) (citations omitted) (quoting *State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980)).

There is no requirement the expert be able to express an opinion with absolute certainty. *Id.* A lack of absolute certainty goes to the weight of the expert's testimony, not to its admissibility. *Id.* "[T]he witness need not be a specialist in the particular area of testimony so long as the testimony falls within the witness' general area of expertise." *Mensink v. American Grain*, 564 N.W.2d 376, 379 (Iowa 1997) (quoting *Hunter v. Board of Trustees*, 481 N.W.2d 510, 520 (Iowa 1992)). If a witness has met rule 702's threshold qualifications to testify as an expert, the witness should be allowed to testify and any further inquiry concerning the extent of his qualifications goes to the weight of his testimony and not its admissibility. *Hutchinson v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 885 (Iowa 1994). "[I]f an expert makes some flawed assumptions in testifying, that fact goes to the weight to be given the opinion, not to its

admissibility." *Olson*, 579 N.W.2d at 309. The weight of evidence and credibility of witnesses are matters for the trier of fact, the jury in this case. *Eventide Lutheran Home v. Smithson Elec. and Gen. Constr., Inc.*, 445 N.W.2d 789, 791 (Iowa 1989). As with any opinion testimony, the trier of fact can consider the credibility of expert witnesses and is at liberty to reject their testimony. *Bandstra v. International Harvester Co.*, 367 N.W.2d 282, 289 (Iowa 1985).

Tri-State attacks Kassel's credential's as an expert largely on the basis of claims that his method of measurement lacked reliability and he had no specific knowledge of the corn droppage which could be attributed to the windstorm because he did not do any pre-harvest examination of Clasing's fields.

Clasing contacted Kassel on October 30, 1996 and asked if he could estimate the amount of ear droppage per acre to determine his crop loss. Kassel agreed to do so for Clasing as he had done so in the past for corn and soybean losses and he believed it was a "fairly straight forward procedure in terms of determining a loss." Kassel did some field analysis the next day, October 31, 1996 and additional analysis on November 14, 1996. The procedure Kassel used was based on a study completed by the Iowa State Extension Service which determined that on average a farmer will lose three and one-half bushels of corn per acre during a normal harvest. To determine if there is crop loss over and above this average per acre droppage, Kassel utilized a sampling method which required corn on the ground to be picked up in four, thirty inch rows, each with a length of seventeen feet five inches. Based on the weight of the corn picked-up and using a mathematical formula, Kassel could then determine the

total bushels per acre that were on the ground. Any amount over the average three and one-half bushel per acre loss was additional crop loss.

Kassel analyzed nine parcels on Clasing's farm operations using this method. As a result of his analysis, Kassel determined that Clasing had suffered various amounts of loss per acre on different farms but all were above the average three and one-half bushel per acre droppage. Kassel testified to the various loss amounts at trial.

Kassel is a Field Specialist in crop production and protection at the Iowa State University Extension Service. He has both a Bachelor's Degree and Master's of Science Degree from Iowa State in the field of agronomy, is a Certified Professional Agronomist with the American Society of Agronomy, and is a Certified Crop Advisor. He had estimated crop loss on prior occasions using the same method he used on Clasing's fields. In his professional opinion his method reasonably calculates an accurate amount of corn loss and the Iowa State study on which his method was based reasonably estimates the average bushel per acre loss due to droppage.

"A witness' ability to testify as an expert is determined in reference to the topic under examination. The witness must be qualified to answer the particular question propounded." *Hylar*, 548 N.W.2d at 868 (citations omitted). The substance of Kassel's testimony dealt with how much droppage one could expect on average under normal conditions, how much droppage Clasing actually experienced and the method used to determine Clasing's droppage. We conclude Kassel was qualified as an expert to provide the testimony that he provided on these matters and any inquiry concerning the extent of his

knowledge or the assumptions he made went to the weight to which it was entitled, not to its admissibility. *Olson*, 579 N.W.2d at 309; *Hutchinson*, 514 N.W.2d 885. Kassel's expert knowledge and testimony was useful to aid the jury in determining whether Clasing suffered any crop loss and if so what his damages were for such loss. Applying Iowa's traditionally liberal approach to the admissibility of expert testimony we conclude the trial court did not abuse its discretion in admitting Kassel's expert testimony and submitting the question of crop loss to the jury.

B. Denial of Attorney Fees for Foreclosure of Mechanic's Lien

The trial court denied Tri-State attorney fees because it concluded Tri-State was not "successful," as that term is used in Iowa Code section 572.32 (1997) and therefore Tri-State was not entitled to attorney fees under that statute. Tri-State argues the trial court erred in failing to award it attorney fees because it was in fact "successful" in enforcing its mechanic's lien and under such circumstances an award of attorney fees is required by the statute.

At all relevant times until July 1, 1999 Iowa Code section 572.32 provided:

In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, the plaintiff, if successful, shall be awarded reasonable attorney fees.

See, e.g., Iowa Code § 572.32 (1995, 1997).

In 1999 the legislature amended section 572.32 to provide in relevant part:

In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, a prevailing plaintiff may be awarded reasonable attorney fees.

1999 Iowa Acts ch. 79, §5 (codified at Iowa Code § 572.32(1) (2001)). This amendment became effective July 1, 1999. See Iowa Code § 3.7(1) (1999).

Clasing argues the amended statute, rather than the earlier version, applies to Tri-State's request for attorney fees. We agree. See *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d 702, 715-16 (Iowa 1985) (noting that although statutes are presumed to operate prospectively unless expressly made retrospective an exception applies where the statute relates solely to remedy or procedure, and holding that amendment to Iowa Code chapter 572 which allowed attorney fees to persons who successfully enforce mechanic's liens is to be given retroactive effect); see also *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) (“[T]he trial court was correct in fixing and taxing attorney fees pursuant to the statute in effect at the time the judgment was entered.”).

It appears the 1999 amendment to section 572.32 made two substantive changes. First, the change from “the” plaintiff to “a” plaintiff appears designed only to recognize that there may be more than one plaintiff seeking foreclosure in the same case. Second, the change from “shall” be awarded reasonable attorney fees to “may” be awarded reasonable attorney fees appears to make an award discretionary rather than mandatory. See *Baumhoefener Nursery, Inc. v. A & D P’ship*, 618 N.W.2d 363, 368 (Iowa 2000) (holding that under section 572.32 (1997) an award is mandatory but the amount is vested in the trial court’s broad but not unlimited discretion). We discern no significant difference between a “successful” plaintiff under the earlier version of the statute and a “prevailing” plaintiff under the current version.

The trial court applied the former version of section 572.32 and ruled that Tri-State was not “successful” because the \$25,696.35 by which its judgment of \$57,964.30 exceeded Clasing’s judgment of \$32,267.95 was less than Clasing’s

offer to confess judgment of \$33,000.00 (plus costs to date, later determined to be \$80.00). These facts may be relevant under the current version of the statute in exercising discretion as to whether to award attorney fees and the amount of any such award. However, we do not believe the fact that a plaintiff becomes responsible for costs because it fails to obtain a judgment for more than was offered by the defendant has any significant bearing on the question of whether a party was “successful” in enforcing its mechanic’s lien under the earlier version of the statute or was the “prevailing” party under the current version. Further, for the reasons that follow we conclude the trial court was incorrect in concluding Tri-State was not “successful” in its action to enforce its mechanic’s lien, and because we discern no significant difference between a “successful” plaintiff and a “prevailing” plaintiff we further conclude Tri-State was a “prevailing” plaintiff.

The parties have not cited and we have not found a statute or case that defines the term “successful” as used in former section 572.32. However, we conclude that other language contained in both the present and former versions of the statute together with the reasoning and result in certain cases indicate Tri-State was “successful.”

Section 572.32 at all relevant times has dealt with an “action to enforce a mechanic’s lien.” Tri-State’s lawsuit was clearly such an action. If its action is viewed separately from Clasing’s counterclaim, Tri-State was clearly “successful” as it was awarded a judgment of \$57,964.30 and a decree of foreclosure. Its action arguably should be viewed separately because it was tried to the court while the counterclaim was tried to the jury, separate verdicts and judgments

were entered at different times, the judgments were not offset, and neither party has objected to any of these procedures.

However, Clasing did assert a counterclaim and was awarded a judgment of \$32,267.95. This suggests Tri-State's foreclosure action cannot be viewed separately. Nevertheless, when the two actions are viewed together Tri-State received a net recovery of \$25,696.35 and its mechanic's lien was foreclosed. In a case in which the plaintiff was successful in its action to quiet title our supreme court held that a counterclaimant entitled to enforcement of its mechanic's lien was entitled to recover attorney fees (as a "successful" claimant under the pre-1999 version of section 572.32). *Clemens Graf Droste Zu Vischering*, 368 N.W.2d at 716. We have held that where an owner's judgment on a claim against a builder exceeded the amount of the builder's judgment on its counterclaim for mechanic's lien foreclosure, the builder was not entitled to foreclosure and was not a "successful" party entitled to attorney fees under the pre-1999 version of section 572.32. See *Bidwell v. Midwest Solariums, Inc.*, 543 N.W.2d 293, 297 (Iowa Ct. App. 1995). We believe the clear implication of *Bidwell* is that if the builder had received a larger judgment on its counterclaim than the owner received on its claim the builder would have been entitled to foreclosure of its mechanic's lien and would have been a "successful" party entitled to attorney fees.

We conclude the trial court was incorrect in applying the pre-1999 version of section 572.32, and in concluding Tri-State was not a "successful" plaintiff under that statute. Because we discern no substantial difference between a "successful" plaintiff under that statute and a "prevailing" plaintiff under the

current, applicable version of the statute, we further conclude Tri-State is a “prevailing” plaintiff under the current statute and Tri-State is entitled to have the trial court exercise its discretion to determine both whether it is entitled to an award of attorney fees, and, if so, the amount of such an award. Because the trial court determined Tri-State was not a “successful” or “prevailing” plaintiff it failed to exercise that discretion. We reverse on this issue and remand to the trial court to consider Tri-State’s request for an award of attorney fees.

C. Allocation of Costs

Finally, Tri-State claims the trial court abused its discretion in allocating costs. Clasing responds that the court was correct in its allocation of costs, but for the reasons stated in its initial decision concerning taxation of costs. We agree with Clasing.

The trial court initially taxed costs on the basis of Iowa Code section 677.10, which provides: “If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay the defendant’s costs from the time of the offer.” Iowa Code § 677.10 (1999). It ordered that costs accrued to the date of Clasing’s offer to confess judgment, in the sum of \$80.00, be taxed to Clasing and that costs accrued after the date of the offer, in the sum of \$582.24, be taxed to Tri-State. Tri-State, in a motion pursuant to Rule of Civil Procedure 179(b), requested that the court assess costs against Clasing rather than Tri-State. The trial court concluded taxation under section 677.10 was in doubt, it had rested its decision upon the wrong statute, it should have taxed costs pursuant to sections 625.1 and 625.3, but that under

those statutes its order taxing about twelve percent of costs to Clasing and eighty-eight percent to Tri-State was nevertheless correct.

Section 677.10 does not expressly address the situation involved in this case, a claim and counterclaim with recovery on both following an offer to confess judgment. The parties have not cited and we have not found a case addressing that situation. However, the provisions of chapter 677 are designed to encourage settlement and discourage unnecessary and costly litigation and should be construed liberally to serve those purposes. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 153 (Iowa 1992). Clasing's offer to confess judgment for \$33,000.00 plus costs and dismiss its counterclaim was an offer "for a specified sum with costs," \$33,000.00 plus costs, as required by Iowa Code section 677.7. Upon trial Tri-State recovered a net judgment which exceeded Clasing's judgment by only \$25,696.35. Based on the purposes of chapter 677 and construing section 677.10 liberally to serve those purposes, we conclude Clasing's offer of \$33,000.00 should be compared to the \$25,696.35, Tri-State failed to obtain judgment for more than was offered by Clasing, and Tri-State should be taxed all costs from the time of the offer. We therefore affirm the trial court's taxation of costs.

III. CONCLUSION AND DISPOSITION

We conclude the trial court did not abuse its discretion in admitting the challenged testimony of Paul Kassel regarding Clasing's crop loss and allowing the jury to determine damages for crop loss. We conclude the trial court erred in applying former section 572.32, and in determining Tri-State was not a "successful" or "prevailing" plaintiff. We therefore reverse the trial court's

decision concerning attorney fees and remand to the trial court to consider, consistent with the views expressed in this opinion, Tri-State's request for an award of attorney fees. We affirm the trial court's allocation of costs.

Costs on appeal are taxed three-fourths to Tri-State and one-fourth to Clasing.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.