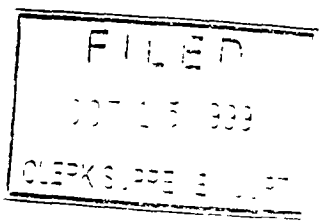
IN THE COURT OF APPEALS OF IOWA

No. 1999-146 (9-362) 98-1840
Filed October 15, 1999



JOHN S. CLARK,
Plaintiff-Appellant,

vs.

ESCUE AUCTION, FRANK ESCUE,
d/b/a ESCUE AUCTION, and MARCIA ESCUE,
Defendants-Appellees.

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

The plaintiff appeals from adverse jury verdicts. He contends the trial court erred in failing to grant his motion to amend his petition to add another defendant, and in overruling his motion for new trial. **AFFIRMED.**

Appellate Counsel:

George W. Wittgraf of Sayre, Wittgraf & Meloy, Cherokee, for appellant.

Mark R. Cozine of Martin, Wibe and Cozine, LLP, Cherokee, for appellees.

Considered by Sackett, C.J., and Zimmer and Miller, J.J.

MILLER, J.

Plaintiff John S. Clark (Clark) appeals from a final judgment, entered after jury trial, in favor of the defendants (Escues) on both Clark's claims and Escues' counterclaim. Clark claims that the trial court erred in denying his motion for leave to amend his petition to add an additional defendant, and erred in denying his motion for a new trial. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

In September 1988 Cherokee State Bank (the bank) obtained a writ of replevin and had the sheriff take possession of certain personal property of Clark's on September 6, 1988. The personal property included approximately forty-five pieces of farm equipment. The bank and Frank Escue (Escue) agreed that Escue would act as the bank's agent to take custody of the personal property and store the farm equipment, and would be compensated by the bank for its services. Major portions of this agreement were reduced to writing on or about October 31, 1988

Escue took possession of the farm equipment on or about September 6, 1988. The bank and Escue agreed the Bank would pay Escue $10 per day for storing the farm equipment. Clark subsequently sought the protection of the United States Bankruptcy Court for the Northern District of Iowa. On March 8, 1990 a Stipulation and Settlement between Clark and the bank was filed with the bankruptcy court, and on March 29, 1990 an amended Stipulation and Settlement was filed. Both contained the following provision:

> The machinery of Jack Clark presently being stored by Bank will be released to him with the stipulation that Clark must get the machinery from where it is presently stored within ten (10) days of the Bank's release of the equipment which shall be no later than the Court's entry of an order approving this Stipulation. If the machinery is left over ten (10) days then it shall be removed at Clark's expense. Clark will be given an opportunity to examine stored equipment prior to releasing the equipment by Escue. Clark shall release Escue upon examination and finding the machinery returned in condition it was received, normal wear and tear excluded.

The bank then wrote to Clark on March 30, 1990. It reiterated the terms of the stipulation and settlement, as amended. Clark had Philip Reinert, of Reinert Machine Shop, examine the non-motorized farm equipment on or about April 3, 1990. Mr. Reinert found the equipment he examined to need repairs costing one thousand four hundred eighty-seven dollars and twenty cents. He could not say when the damage to the equipment had occurred, that is whether before or after the replevin. Clark had Lee Zylstra examine the motorized farm equipment at about the same time. Mr. Zylstra could not determine whether the equipment was in the same condition as it had been when he had seen it at some indefinite time prior to the bank's replevin.

Clark and the bank executed a mutual release on April 16, 1990. The release was very broad in form and content. Each released the other "from any and all liability whatsoever ..." which either "may have or ever claim to have by reason of [their] debtor-creditor relations ... or the bankruptcy proceeding of [Clark]." The release further provided that it covered "all injuries and damages, whether known or not and which may hereafter appear or develop ...". It also provided that each party

executed it "solely in reliance upon our own knowledge, belief and judgment and not upon any representations made by the party released or others on their behalf."

Clark advised the bank's attorney, Richard A. Cook, of his claimed need for repairs to the equipment, and Cook advised him that there would be no payment for any such repairs. Clark also offered to remove some of the items from Escue's farm, but was advised that if he took one piece of farm machinery, he would have to take them all. Cook then acknowledged in a letter dated April 30, 1990 that "[Clark] is apparently unwilling to conclude the return of the equipment to him without some payment of cash or repairs to the equipment."

The bank paid Escues for the storage of Clark's farm equipment until April 9, 1990. No storage payments were made by the bank thereafter, because the bank was relying on the March 29, 1990 stipulation and settlement. Effective April 10, 1990 the Escues increased the storage charge from an earlier "flat rate" of $10 per day to a rate of $1.00 per item per day, o $45 per day. The rate increase was at least in part an attempt to expedite removal of the farm equipment.

The Escues sent statements for storage charges to Clark, initially on a monthly basis, and beginning much later on a quarterly basis. Clark knew the equipment was continuing to be stored and that storage charges were accumulating. There was no express agreement between Clark and the Escues for the payment of such storage charges. The last statement of charges, for the amount of $90,945, was sent on July 24, 1995.

As early as May 25, 1990 Escue offered to waive any and all storage charges against Clark if Clark would release Escue from any damage claims that he might have, as contemplated by the amended stipulation and settlement between Clark and the bank. The bank filed a complaint to enforce stipulation and settlement on behalf of Frank Escue with the bankruptcy court on August 31, 1990. The complaint was dismissed by the bankruptcy judge on September 17, 1990, following a hearing which had been held on September 5, 1990. The dismissal of the complaint occurred in connection with the dismissal of Clark's bankruptcy proceeding, the bankruptcy judge apparently feeling that remaining issues between Clark and the Escues could better be handled in state court.

The Escues made several other later, unsuccessful attempts to resolve any outstanding issues between Clark and themselves. On or about October 30, 1995, Frank Escue caused a "Notice of Claim" to be sent to Clark by certified mail. It alleged a storage lien, and the possible sale of the farm machinery by the Cherokee County sheriff if "storage is not paid in full within six (6) months after notice has been effected." Almost exactly six months later, on May 1, 1996, Clark filed his petition in this lawsuit.

Clark's farm equipment was still stored on Escues' property at the time of trial in this case, apparently unmoved since it had been placed there on or about September 6, 1988.

We will state additional facts relevant to Clark"s claims in connection with our discussions of those claims.

II. MOTION FOR LEAVE TO AMEND

Clark filed his petition at law May 1, 1996 and filed an amendment May 24, 1996. He sought damages for injury which he alleged had occurred to his farm equipment while in Escues' possession as bailee, and damages for loss of use by reason of claimed improper detention of the equipment. Escues filed an answer and counterclaim July 19, 1996 in which they denied material allegations of Clark's amended petition and sought payment of storage charges. On July 19, 1996 Escues also filed a cross petition against the bank. In it they sought contribution or indemnity for Clark's claims, payment of storage costs, and damages for alleged breach of contract, both express and implied. On or about July 23, 1996 Clark filed an answer to Escues' counterclaim. The bank filed an answer to Escues' cross petition, denying its material allegations.

Jury trial was set for July 7, 1998. The Escues and the bank apparently settled the Escues' claims against the bank, and on July 6, 1998 the Escues dismissed those claims with prejudice. Clark then apparently orally sought continuance of trial and to amend to assert a claim against the bank. The court found it necessary to continue trial in order to consider Clark's request to amend and to deal with discovery disputes involving the remaining claims between Clark and the Escues.

In its order continuing trial the court noted that the case had perhaps already been dismissed under Iowa R. Civ. P. 215.1, as it had not been tried sooner than June 30, 1998. It continued trial to August 18, 1998, ordered Clark to file any motion to amend no later than July 10, and set a hearing on any motion to amend, the discovery

disputes, and any motion to reinstate under Iowa R. Civ. P. 215.1, for July 20, 1998 at 2:30 p.m.

Clark filed a motion to amend to add a claim against the bank for damages for negligence. In a July 22, 1998 ruling the court ordered the lawsuit reinstated, denied Clark's motion to amend and ruled on the discovery disputes. Clark challenges the court's denial of his motion to amend.

Leave to amend is to be freely given when justice so requires. IowaR.Civ.P. 69(d) (formerly Iowa R. Civ. P. 88). The privilege of amending pleadings after a responsive pleading is not a matter of right. *In re Marriage of Fields*, 508 N.W.2d 730, 732 (Iowa 1993). A trial court has broad discretion in permitting or denying amendments. *Board of Adjustment of City of Des Moines v. Ruble*, 193 N.W.2d 497, 507 (Iowa 1972). Even though it is a matter largely within the discretion of the trial court, we strongly encourage allowing amendments in the usual situations, and discourage denying permission. *In re Marriage of Fields*, 508 N.W.2d 730, 732 (Iowa 1993). The discretion lodged in the trial court is a legal discretion, to be exercised in the light of all the circumstances in a particular case, and the bounds of fair discretion are exceeded if the ruling lacks a sound legal basis. *Johnston v. Percy Construction, Inc.*, 258 N.W.2d 366, 371 (Iowa 1977). Amendments should not be permitted when they substantially change the issues during or shortly before trial. *See, e.g., Galbraith v. George*, 217 N.W.2d 598, 601 (Iowa 1974). We will reverse a trial court's decision to grant or deny a motion for leave to amend only when a clear abuse of discretion is shown. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 180

(Iowa 1993). An abuse of discretion is shown only where such discretion was exercised by the court on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Vaughan v. Must, Inc.*, 502 N.W.2d 533, 543 (Iowa 1996).

When Clark sought leave to amend to assert a claim against the bank, his lawsuit was already ancient, having been filed more than twenty-six months earlier. It had apparently already been continued beyond December 31, 1997 for trial by June 30, 1998, in avoidance of the automatic dismissal provisions of Iowa R. Civ. P. 215.1. It had also apparently been dismissed pursuant to that rule when not tried on or before June 30, 1998, and had to be reinstated by the trial court's July 22, 1998 ruling. In the twenty-six-plus month history of the lawsuit, Clark had never asserted or sought leave to assert a claim against the bank.

The motion to amend to make a claim against the bank came shortly before trial. The claims to that point involved issues of bailment and storage costs, and the amendment would substantially change the issues by adding a negligence claim. The amendment would to some extent complicate jury submission by adding a party and a legal theory. In addition, the bank would no doubt wish to seek summary judgment on the basis of the April 16, 1990 mutual release, and the time for filing a motion for summary judgment had long since passed. *See* Iowa R. Civ. P. 237(c).

This case did not involve "usual situations" in which an amendment is sought. In the light of all the circumstances justice did not require that leave to amend be given and the trial court did not abuse its broad discretion in overruling the motion for leave to amend.

III. MOTION FOR NEW TRIAL

The case was submitted to the jury on six verdict forms. Verdicts 1 and 2 related to Clark's claim for injury to his farm equipment. Verdicts 3 and 4 related to Clark's claim for detention of his farm equipment. Verdict 5 and 6 related to Escues' claim for storage charges. Verdicts 1, 3 and 5 were to be used for those claims on which the jury found for the claimant and each required the jury to fix the amount of damages and enter a dollar amount in a blank space preceded by a "$". Verdicts 2, 4 and 6 were to be used for those claims on which the jury found in favor of the party against whom the claim was made.

The jury foreperson signed verdict 5, the jury thus finding in favor of Escues for storage charges, and fixed the amount of their recovery at $30,580, (adding a note at the bottom of the verdict which in part said, "$10.00 per day from April 10, 1990 until August 26, 1998.") (August 26, 1998 was the day the verdicts were returned.) The jury foreperson signed verdicts 2 and 4, the jury thus finding in favor of the Escues on Clark's claims for injury to property and the detention of equipment. However, the jury foreperson also signed verdicts 1 and 3, but inserted "0" in each verdict's blank space for rixing the amount of recovery.

The verdicts were apparently accepted by the court and the court filed a written judgment order at 5:59 p.m. the same day, August 26, 1998. Nothing in the appendix indicates that Clark (or Escues) objected to certain verdicts as inconsistent, irreconcilable or contradictory, or asked that the court give the jury further instructions or require it to deliberate further. On September 4, 1998 Clark filed a

motion for new trial asserting, among other things, that verdicts 1 and 2 are inconsistent and irreconcilable, and that verdicts 3 and 4 are inconsistent and irreconcilable. We have serious concerns that Clark may have waived his claims of inconsistency and irreconcilability by not raising them at the time the verdicts were returned, when the trial court could still take corrective action before discharging the jury. We will, however, pass these concerns and address Clark's claims.

We are slower to interfere with the grant of a new trial than its denial. Iowa R. App. P. 14(f)(4). Our standard of review of a denial of a motion for a new trial depends on the grounds asserted in the motion. *Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999). To the extent the motion is based on a discretionary ground, we review it for an abuse of discretion. *Id.*. But if the motion is based on a legal question, our review is on error. *Id.* Both Clark and Escues assert that our review of Clark's claims are for an abuse of discretion, and we agree.

In ruling on a motion for new trial, the trial court has a broad but not unlimited discretion. *Id.*; *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144 (Iowa 1996). We review for an abuse of discretion. *Id.* The trial court's discretion can be exercised only for sound judicial reasons. *Id.* It must not be exercised arbitrarily. *Id.* Courts have no right to set aside jury verdicts through mere caprice or whim, or to reweigh the evidence submitted, or to sit in judgment on the credibility of witnesses. *Id.* We are obligated to view the evidence in the light most favorable to the jury verdicts. *Id.*

Jury verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so. *Wilson v. IBP, Inc.*, 558

N.W.2d 132, 142 (Iowa 1996). Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. *Id.*

Clark claims that verdicts 1 and 2, and verdicts 3 and 4, are inconsistent and irreconcilable and thus constitute "irregularities in the jury's proceedings" within Iowa R. Civ. P. 244(a), and that he was thus entitled to a new trial on this ground. Under that rule the claimed irregularity must have "prevented the movant from having a fair trial" and have "materially affected movant's substantial rights." Although the verdicts in question are inconsistent, we believe, as the trial court did, that the intention of the jury can readily be gleaned from them and that it is therefore possible to harmonize them and give effect to the intention of the jury.

In verdict 2 and 4 the jury found for Escues on each of Clark's two claims. In verdicts 1 and 3 the jury purported to find for Clark on each of those two claims respectively, but on each also fixed the amount of his recovery at "$0". The jury should not have signed both verdi ts 1 and 2 and should not have signed both verdicts 3 and 4. However, when verdicts 1 and 2 are taken together and verdicts 3 and 4 are taken together, the jury's intent to find against Clark on his two claims readily appears. These verdicts are not so logically and legally inconsistent that they cannot be reconciled. The trial court did not abuse its discretion by declining to grant a new trial on this ground.

Clark claims that in verdict 5 the jury awarded excessive damages and that its award appears to have been influenced by passion or prejudice, and that he was entitled to a new trial on this ground. Iowa R. Civ. P. 244(a). On verdict 5 the jury

wrote the sentence quoted earlier in this opinion (apparently to show how it had arrived at its damage award) and then added

> That plaintiff has 7 days from today's date, August 26, 1998 to remove all machinery.
>
> If not removed in 7 days, that defendant can do with as he/she see fit.

Clark urges this annotation is evidence of jury passion or prejudice or both. For two reasons we will not reverse the trial court's denial of a new trial on this ground. First, although Clark raised this issue in his motion for a new trial, in its ruling the trial court did not address or rule on it. Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998); *State Farm Mutual Automobile Ins. Co. v. Tflibsen*, 350 N.W.2d 202, 206 (Iowa 1984). Second, if we were to address the merits, we would find the jury's gratuitous comment to be merely a statement of its members' collective opinion that the ten-year deadlock between the parties needed to be ended .

Clark claims that in verdict 5 the jury awarded excessive damages, that is damages not sustained by sufficient evidence, and that he was entitled to a new trial on this ground. Escues had stored items some twenty times in the past. Escue testified as to reasonable and customary and usual charges for such storage services, and as to what his charges were in this case. The jury could find that his charges were well within reasonable, customary and usual charges for like services. The jury's

award is fully supported by the evidence. The trial court did not err or abuse its discretion in refusing to grant a new trial on this ground.

Clark claims the jury erred in fixing the amount of recovery at "$0" in verdicts 1 and 3 when he had proved injury to his farm equipment by a preponderance of the evidence and had proved damages for detention of his farm equipment by a preponderance of the evidence. The disputes regarding these matters were factual. There was substantial evidence to support the jury's determination that Clark had failed to prove entitlement to an award of damages on either of these claims. Further, for reasons discussed above, verdicts 1 and 3 are mere surplusage to verdicts 2 and 4 respectively, in which the jury found against Clark on both of his claims. Under such circumstances, we find no cause to interfere with the wide discretion permitted the trial court in its ruling declining to grant a new trial on this ground. *See Palleson v. Jewell Cooperative Elevator*, 219 N.W.2d 8, 17 (Iowa 1974).

Clark claims the trial court's denial of his motion for leave to amend to add the bank as a defendant prevented him from having a fair trial, and that he was entitled to a new trial on this ground. We have already addressed, under II above, Clark's challenge to the trial court's denial of his motion to amend.

AFFIRMED.