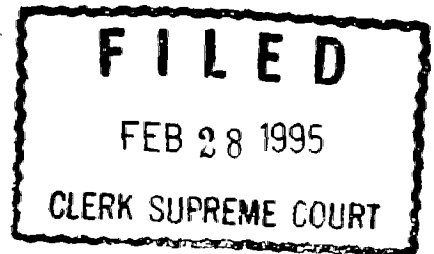


IN THE COURT OF APPEALS OF IOWA

No. 4-504 / 93-1768



ALDEN J. FRISHMEYER,

Plaintiff-Appellant,

vs.

RONALD D. LOWRY and
LOWRY FLYING SERVICE, INC.,

Defendants-Appellees.

DAVID L. WEAVER and
NANCY L. WEAVER,

Plaintiffs-Appellants,

vs.

RONALD D. LOWRY and
LOWRY FLYING SERVICE, INC.,

Defendants-Appellees.

Appeal from the Iowa District Court for Poweshiek
County, Richard J. Vogel, Judge.

Plaintiffs, Alden Frishmeyer and David and Nancy
Weaver, filed suit against Ronald Lowry and Lowry Flying
Service, Inc., (Lowry), alleging Lowry had damaged their
trees by negligently spraying harmful farm chemicals on
them from an airplane. **AFFIRMED IN PART, REVERSED IN PART
AND REMANDED.**

Charles M. Manly, III, Grinnell, and Wallace L. Taylor,
Cedar Rapids, for appellants.

David A. Tank of Davis, Hockenberg, Wine, Brown, Koehn
& Shors, P.C., Des Moines, for appellees.

Heard by Donielson, C.J., and Sackett and Cady, JJ.

CADY, J.

Plaintiffs, Alden Frishmeyer and David and Nancy Weaver, filed suit against Ronald Lowry and Lowry Flying Service, Inc., (Lowry). They alleged Lowry damaged their trees by negligently spraying harmful farm chemicals on them from an airplane. The two actions were consolidated for jury trial. The jury returned verdicts in favor of Lowry. Plaintiffs appealed. On our review, we affirm in part, reverse in part, and remand to the trial court.

Shortly before trial, Lowry sought and was granted a motion in limine to exclude a decision rendered by the Iowa Department of Agriculture and Land Stewardship in a contested administrative proceeding against Lowry. The administrative decision found Lowry was negligent in his application of herbicides, including the application that allegedly damaged the Weaver's trees. The decision revoked Lowry's pesticide applicator's license for one year.

During trial, Lowry denied negligence and denied that any damage to plaintiffs' trees was caused by chemicals released from its airplane. The jury returned a general verdict for Lowry.

Plaintiffs raise three issues on appeal. They contend the district court erred in: (1) sustaining Lowry's motion in limine; (2) inadequately instructing the jury on damages; and (3) improperly assessing court costs against them.

I. Scope of Review

This action was tried at law. Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. On the evidentiary issues preserved for appeal, we review for an abuse of discretion. Gavelock v. Coleman, 493 N.W.2d 94, 96 (Iowa App. 1992). In order to demonstrate an abuse of discretion, appellant must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Weatherly, 519 N.W.2d 824, 825 (Iowa 1994).

II. Motion in Limine

Prior to trial Lowry filed a motion in limine requesting the court to prohibit plaintiffs from mentioning an administrative law judge's decision. Lowry's based his motion on grounds of hearsay, relevance, and possible prejudice. Plaintiff's resisted the motion. The trial court held a hearing and sustained the motion. Immediately following the court's oral ruling, Plaintiffs sought to explain their position further. The court responded, "You're making additional record here. The ruling's been entered." No further record was made and the hearing ended. Plaintiff's did not attempt to admit the decision into evidence at trial or make an offer of proof.

Plaintiffs assert the trial court abused its discretion by sustaining Lowry's motion in limine. In response, Lowry claims Plaintiffs failed to preserve error because they did not make an offer of proof.

The function of a motion in limine is to exclude "reference to anticipated evidence claimed to be objectionable . . . [and] to restrict opposing counsel from asking questions or making statements in offering such matters until the admissibility of [the] evidence can be determined during the course of the trial by presenting to the court in the absence of the jury such evidence by offer and objection." Twyford v. Weber, 220 N.W.2d 919, 923-24 (Iowa 1974). The motion advises the court and opposing counsel of the party's position on a particular matter. Id. It is not a ruling on evidence. Id.

The general rule is that granting or rejecting a motion in limine is not reversible error. Kalell v. Petersen, 498 N.W.2d 413, 415 (Iowa App. 1993). The error occurs, if at all, when the matter is presented at trial. Id. An objection should be made at trial in order to preserve error. Id. There is, however, an exception to this rule. A party does not need to renew their objection at trial if the prior ruling amounts to an unequivocal holding concerning the issue raised. State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982).

The circumstances in this case do not bring it within the exception to the general rule. The trial court did not make an unequivocal or final ruling on the ultimate admissibility of the evidence. It merely stated it had made its ruling on Lowry's motion in limine and would accept no further arguments on that issue. This ruling did

not preclude Plaintiff's from making an offer of proof at trial and was not an irrevocable determination on the admission of the evidence at trial. Rather it was an additional procedural step to the offer of evidence. See Twyford, 220 N.W.2d at 923.

Moreover, even if error was preserved, we conclude the trial court did not abuse its discretion in prohibiting the evidence. We affirm the trial court's decision on the motion in limine.

III. Damages Instruction

Plaintiffs assert the trial court improperly instructed the jury on the issue of damages. Before we reach this question, we must determine whether the issue is moot in light of the jury's verdict. In this case, a general verdict form was used. Thus, it is impossible to determine on appeal whether the jury found in favor of Lowry on the basis of liability or failure to prove damages. We therefore, address the merits of Plaintiffs' claim.

Plaintiffs assert the instruction given by the trial court did not adequately tell the jury how to assess the diminished value of the trees. The instruction stated only that the "proper measure of damage is the decrease in the value of the trees caused by the Defendant's conduct, not to exceed an amount established by the evidence." Plaintiffs assert the instruction should have specified that "Trees may have value beyond their commercial value. For example, they may have sentimental or historic value,

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function as shade or wind breaks, or wildlife habitat, or they may have special environmental value to the owner."

The trial court is required to instruct the jury on the law applicable to all material issues in the case. Iowa R. Civ. P. 196. It must grant requested instructions that state correct rules of law unless the concept is embodied in other instructions. Stover v. Lakeland Square Owners Ass'n, 434 N.W.2d 866, 868 (Iowa 1989). It generally has broad discretion in framing jury instructions and is not required to word them in any particular way. Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa App. 1987). Error in giving or refusing to give a jury instruction does not warrant reversal unless the error is prejudicial. Vachon v. Broadlawns Medical Found., 490 N.W.2d 820, 821 (Iowa 1992).

In Bangert v. Osceola County, 456 N.W.2d 183 (Iowa 1990), our Supreme Court considered the appropriate measure of damages for destruction of a landowners trees. It held if an intrinsic loss has occurred that exceeds the tree's lumber value, the replacement cost, the intrinsic value of the tree, or a combination of both could be used to calculate the damages. Id. at 191. Uses for trees the court considered in its discussion of intrinsic value were: historic, sentimental, environmental, landmark, wildlife habitat, shade and windbreak. Id. at 190.

We conclude the general instruction submitted by the court in the instant case adequately included the intrinsic

value method of calculating damages established in Bangert. It instructed the jury that "the measure of damage is the decrease in value of the trees caused by defendant's conduct." While the instruction does not specify the type of value, we do not believe this confused or misled the jury in the context of this case. Both parties experts testified regarding the trees intrinsic, environmental, and aesthetic value. There was no evidence of commercial or market value. Plaintiffs were not prejudiced by the trial court's instruction on the measure of damage to the trees.

IV. Court Costs

Lowry filed a motion for court costs following the jury verdict in its favor. It requested reimbursement for deposition expenses, witness fees and mileage, and service of a subpoena. Plaintiffs resisted the imposition of deposition costs and the fee and mileage costs for expert witness John Yager. The trial court granted Lowry's motion. We review the trial courts action for an abuse of discretion. Woody v. Machin, 380 N.W.2d 727, 730 (Iowa 1986).

Plaintiffs first assert the court erred in granting deposition costs because the depositions were not introduced into evidence at trial. Plaintiffs correctly point out, the losing party is only required to pay the portion of the deposition costs necessarily incurred for testimony offered and admitted at trial. Iowa R. Civ. P.

157(a); Woody 380 N.W.2d at 730. Thus, a cost award may include only the costs of depositions which are introduced into evidence in whole or in part at trial. Woody, 380 N.W.2d at 730.

Plaintiffs, however, failed to provide a record from which we can determine whether the controverted depositions were introduced into evidence in whole or in part. Plaintiff's ordered an incomplete trial transcript and did not request the trial court to enlarge its order granting the costs requested by Lowry. Without a full record, we must assume the trial court acted within its discretion in ordering Plaintiffs to pay the deposition costs.

Plaintiffs next assert the court erred in its assessment of the expert witness fee. At Lowry's request, the court taxed Weaver and Frishmeyer \$183.00 each for the expert witness fee, statutory witness fee, and mileage costs.

Court costs are taxable only to the extent provided by statute. Schark v. Gorski, 421 N.W.2d 527, 528 (Iowa 1988). Because costs were not recoverable at common law, statutes providing for their recovery are strictly construed. Id. Experts testifying at trial are entitled to an ordinary witness fee of ten dollars a day and their mileage pursuant to Iowa Code section 622.69 (1993), and an additional expert fee not to exceed \$150 pursuant to Iowa Code section 622.72. Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992). Taxation of costs in excess of this amount is error. Id.

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In this case, Plaintiffs' individual claims were consolidated into one trial. The expert testified once for half a day. The presence of multiple plaintiffs does not entitle the expert to a fee and mileage from each Plaintiff. The statute clearly states the expert's additional compensation is not to exceed \$150 per day. Increasing the experts compensation by charging each Plaintiff with a witness fee, mileage costs, and an expert witness fee was error. See id. at 151. We remand the case to the district court to re-assess the expert witness fees consistent with this opinion. Lowry is entitled to one expert witness fee, plus mileage, to be assessed in equal amounts to the plaintiffs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.