

IN THE COURT OF APPEALS OF IOWA

No. 1999-552 (9-813) / 98-2291
Filed March 15, 2000

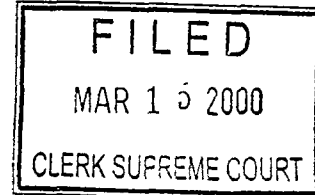
MICHAEL D. VAN BAALE,

Plaintiff-Appellant,

vs.

SUNSET HOMES, INC., fka MIDLAND HOMES, INC.,

Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, Larry J. Eisenhower,
Judge.

Plaintiff appeals from the district court judgment entered following a jury
verdict in defendant's favor in plaintiff's personal injury action. **AFFIRMED.**

Curtis J. Krull of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des
Moines, for appellant.

Samuel C. Anderson of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Heard by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

VAITHESWARAN, J.

Michael Van Baale worked for a company that subcontracted for Midland Homes, Inc. While working on a home, Van Baale fell off the roof. He sued Midland, asserting the general contractor failed to furnish appropriate safeguards. A jury returned a verdict in favor of Midland. Following denial of his motion for new trial, Van Baale appealed. He contends the district court erred in: (1) permitting Midland to designate and use an expert on Occupational Safety and Health Act (OSHA) standards; (2) allowing evidence of OSHA and industry standards; (3) refusing to preclude evidence of industry standards for failure of Midland to plead avoidance, justification or excuse as affirmative defenses; and (4) refusing to grant a new trial based on claimed insufficiency of the evidence. We affirm.

I. Background Facts and Proceedings

All Seasons Mechanical, Inc. performed heating and cooling work for Midland on housing projects in Ames. Van Baale was a supervisor for All Seasons. On February 15, 1995, freezing rain mixed with snow began to fall. The following morning, Van Baale told the framing subcontractor he intended to perform some flue work on the roof. The framer testified he advised Van Baale against it, in light of the ice. Van Baale climbed onto the roof, but slipped off and broke bones in his right leg.

Van Baale filed a negligence lawsuit against Midland on February 14, 1997. On July 30, 1997, the district court signed a scheduling order agreed to by the parties. The order set the following deadlines: January 16, 1998 for Van Baale's designation of experts; March 20, 1998 for Midland's designation of experts; July 17, 1998 to file pleadings; and August 17, 1998 for trial to begin. Van Baale only

designated his treating physician as an expert. Midland did not designate any experts within the time frame set by the scheduling order.

On July 17, 1998, Van Baale moved to amend his petition to add a breach of contract claim based on violation of OSHA standards. Ten days later, Midland filed a motion in limine. Midland sought to preclude Van Baale from introducing evidence of OSHA standards, on the ground he did not timely designate an expert witness to lay a foundation for introduction of the standards. Midland alternately sought to continue the trial to permit Midland to retain its own expert. On August 4, 1998, Midland designated an OSHA expert.

On the morning of trial, the district court heard oral argument on Midland's motions. The court overruled the motions, agreed to take judicial notice of the OSHA standards Van Baale sought to introduce, and permitted Midland's expert witness to testify regarding the applicability of the standards. Van Baale did not call a rebuttal witness to respond to the opinions of Midland's expert.

II. Expert Testimony

We review a district court's ruling on admission of expert testimony for abuse of discretion. *Klein v. Chicago Cent. & Pac. R.R. Co.*, 596 N.W.2d 58, 60 (Iowa 1999).

A. Timeliness of Designation

Van Baale asserts the district court should have excluded Midland's OSHA expert because Midland did not timely designate the expert. He premises his argument on Iowa Rules of Civil Procedure 125 and 136. We will address each in turn.

1. Rule 125

Van Baale contends the district court had independent authority under rule 125(e) to compel timely disclosure of experts. Rule 125(e) states:

The court has discretion to compel a party to make the determination and disclosure of whether an expert is expected to be called as a witness and shall do so to ensure that determination and the disclosures required by this rule within a reasonable and specific time before the date of trial. Upon motion, or at a discovery conference held pursuant to R.C.P. 124.2, or on its own initiative, the court may prescribe the sequence in which the parties make the determination and disclosures provided for under the rule.

Because this subsection affords a court discretion to compel "disclosures required by this rule," it must be read in conjunction with the balance of the rule. The remaining subsections contemplate that a party has asked the opposing party for expert witness information. See Iowa R. Civ. P. 125(a) (permitting party to serve expert witness interrogatory, take deposition and/or obtain documents); 125(c) (duty of supplementation triggered if no previous disclosure "in response to an appropriate inquiry directly addressed to these matters").

Van Baale concedes he did not serve Midland with an expert witness interrogatory pursuant to Iowa Rule of Civil Procedure 125 or seek other expert discovery from Midland. Because no such request was made, we find rule 125(e) inapplicable. Additionally, rule 125(c), pertaining to supplementation of expert discovery, and decisions construing that rule, do not apply. See, e.g., *Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins. Co.*, 452 N.W. 2d 389, 393 (Iowa 1990); *Golden Circle Air, Inc. v. Sperry*, 543 N.W.2d 629, 632-33 (Iowa App. 1995).

2. Rule 136

Van Baale next contends the district court should have excluded Midland's expert because Midland failed to designate the expert within the time frame set forth in the court's scheduling order. Midland concedes it did not designate its expert until August 4, 1998, despite a scheduling order which prescribed a deadline of March 20. However, the company maintains it could not designate an OSHA expert by the deadline because Van Baale did not notify it of claimed OSHA violations until late May, and did not amend his petition to raise such a claim until a month before trial.

Rule 136 (b) authorizes a district court to set time limits for designating experts. Rule 136(e) allows the court to impose sanctions upon a party who fails to obey a scheduling order. See *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 305 (Iowa 1998).

Van Baale's original petition raised a general negligence claim. The specifications of negligence contained in the petition made no mention of OSHA standards or a claimed violation of those standards. The petition did allege "[d]efendant was under a legal or contractual duty to provide specified safeguards against danger and failed to do so." However, Van Baale did not specify the particular legal or contractual duties he believed Midland violated.

The amended petition filed on July 17, 1998, contained the same specifications of negligence as the original petition, but added a breach of contract claim stating, "Midland Homes breached the terms and conditions of the contract by failing to observe and comply with all applicable OSHA regulations relating to the construction of the house where Mr. Van Baale was working when he was injured."

Midland retained an OSHA expert approximately two and a half weeks after this amended petition was served. We conclude Midland acted as quickly as feasible to retain an expert after learning Van Baale intended to rely on OSHA regulations. Midland had no reason to designate an OSHA expert before the March 20 deadline set forth in the scheduling order because nothing in the original petition put Midland on notice that Van Baale might rely on OSHA regulations. Indeed, Van Baale himself did not designate an OSHA expert. Therefore, Midland reasonably could have believed in March 1998 that OSHA was not an issue in the case. Under the particular circumstances of this case, we are not convinced the district court abused its discretion in permitting Midland's designation of an expert after the deadline contained in the scheduling order.

B. Admission of Expert Testimony

Van Baale contends the district court should not have admitted expert testimony pertaining to the OSHA standards the court judicially noticed. He maintains admission of this evidence violates the parol evidence rule. We reject this contention.

The parol evidence rule "forbids the use of extrinsic evidence to vary, add to, or subtract from a written agreement." *Montgomery Properties Corp. v. Economy Forms Corp.*, 305 N.W.2d 470, 475-76 (Iowa 1981). The rule applies to written contract actions. *Fed. Land Bank of Omaha v. Emberton*, 460 N.W.2d 488, 491 (Iowa App. 1990). For reasons that are not clear in the record, Van Baale did not pursue his breach of contract claim. Therefore, we conclude the parol evidence rule is inapplicable.

Within the context of its parol evidence argument, Van Baale also appears to contend Midland's evidence of OSHA and industry standards is irrelevant. Van Baale, however, opened the door to this testimony by requesting that the court judicially notice certain OSHA regulations. Having done so, Midland was entitled to present a defense that the regulations and industry standards did not create a duty of care. Therefore, we conclude Midland's evidence of legal and industry standards was relevant. See Iowa R. Evid. 401 (defining "relevant evidence").¹

Van Baale does not argue the testimony of Midland's expert is inadmissible under Iowa Rule of Evidence 702. *Cf. Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 535 (Iowa 1999) (concluding district court did not abuse discretion in finding expert qualified to testify about design defects and in allowing testimony). Therefore, we need not address this issue.

III. Affirmative Defense

Van Baale next contends the district court should have precluded Midland from presenting all its witnesses because the content of their testimony implicated affirmative defenses which Midland did not plead. Van Baale first raised this issue in his motion for new trial.

¹ *Cf. Hariri v. Morse Rubber Prod. Co.*, 465 N.W.2d 546, 548-49 (Iowa App. 1990) (permitting expert testimony on whether defendant complied with OSHA standards as relevant to issue of negligence). *But see Anderson v. Glynn Const. Co.*, 421 N.W.2d 141, 145 (Iowa 1988) (OSHA standards inapplicable to claim against non-employer); *Rinkleff v. Knox*, 375 N.W.2d 262, 266-67 (Iowa 1985) (holding expert testimony on OSHA standards not relevant in action by or against non-employee); *Gerace v. 3-D Mfg. Co.*, 522 N.W.2d 312, 318 (Iowa App. 1994) (holding district court did not abuse discretion in excluding evidence of OSHA standards because regulations pertained only to employers).

A motion for new trial is ordinarily not sufficient to preserve error in the absence of objections made during trial. *Hobbiebrunken v. G & S Enters., Inc.*, 470 N.W.2d 19, 23 (Iowa 1991). We are not convinced he preserved error. *Id.* However, we elect to pass on this error preservation issue and address the merits of Van Baale's contention. See *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

Van Baale specifically contends Midland's witnesses impermissibly testified to the affirmative defenses of avoidance, justification or excuse. We disagree. Iowa Rule of Civil Procedure 101 states:

Any defense that a contract or writing sued on is void or voidable, or was delivered in escrow, or which alleges any matter in justification, excuse, release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded.

An affirmative defense is "one resting on facts not necessary to support plaintiff's case." *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352, 355 (Iowa 1994) (quoting *Erickson v. Wright Welding Supply, Inc.*, 485 N.W.2d 82, 86 (Iowa 1992)).

The jury instructions properly placed on Van Baale the burden of proving Midland breached a standard of care and the breach proximately caused his damages. Midland did not concede any of the elements of Van Baale's negligence case, controverting the facts Van Baale claimed established a breach as well as the applicable standard of care. Its defense, therefore, was not based on justification, avoidance or excuse. Cf. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996) (concluding defense which arose only after the facts of petition had been proven was an affirmative defense); *Marquis v. Nuss*, 451 N.W.2d 833, 836 (Iowa 1990) (holding doctor's assertion of "mistake in judgment" was not affirmative defense on which he had burden of proof). Accordingly, we reject this contention.

IV. Substantial Justice

Van Baale finally challenges the district court's denial of his motion for new trial. A district court may order a new trial if a jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice. *Johnson v. Knoxville Community Sch. Dist.*, 570 N.W.2d 633, 641 (Iowa 1997). We conclude the verdict is supported by sufficient evidence. The jury reasonably could have believed that Van Baale's own negligence in climbing on a roof he knew to be icy was the sole proximate cause of his injuries. For the previously stated reasons, we also find the verdict effectuated substantial justice. We find it unnecessary to address Van Baale's remaining challenges to the verdict.

AFFIRMED.