STATE OF MICHIGAN

COURT OF APPEALS

GARRY HARMON CEMENT CONTRACTOR, INC., Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED May 8, 2012
v HIGHLAND DAIRY, LLC, THEO POELMA, ANNEMIEK POELMA, and POELMA LAND CO, LLC, Defendants/Counter-Plaintiffs-Appellants.	No. 303078 Huron Circuit Court LC No. 09-004205-CK

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In this breach of contract action, defendants appeal as of right following jury verdicts in plaintiff's favor on both the complaint and counter-complaint. The jury awarded plaintiff a $224,468 judgment. We affirm.

Plaintiff was contacted in the spring of 2006 to provide concrete for the first building on what would become a large dairy farm in Sebewaing, Michigan. Work began before the plans were finalized, and the parties eventually agreed that plaintiff would be paid $1,088,770 for his services. Numerous changes were made to the plans during the course of the project, including a decision to erect steel barns, instead of the wood barns that the contract was based on. Although the changes were never approved in writing, plaintiff invoiced for the additional work as the project progressed. Defendants paid plaintiff $1,672,072.99 before they refused to pay the final invoices that totaled $250,332.13.

On appeal, defendants contend that the jury's verdicts are against the great weight of the evidence and the trial court should have granted judgment notwithstanding the verdict (JNOV) because the only evidence that supports the jury's verdict was improperly admitted. We will first address defendants' evidentiary concerns. We review a trial court's evidentiary rulings for an abuse of discretion. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

First, defendants assert that the trial court improperly allowed plaintiff's counsel to repeatedly ask leading questions. Under MRE 611(d)(1), "[l]eading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony." A question is not leading simply because it requires a "yes" or "no" answer. *McKeown v Harvey*, 40 Mich 226, 228 (1879). A leading question, instead, "points to the particular answer desired." *Id*. It is permissible to allow leading questions in preliminary or introductory matters. *Huntoon v O'Brien*, 79 Mich 227, 230; 44 NW2d 601 (1890). Even if the trial court abused its discretion, reversal is only warranted when the use of leading questions resulted in prejudice or created a pattern of eliciting otherwise inadmissible testimony. *In re Susser Estate*, 254 Mich App 232, 239-240; 657 NW2d 147 (2002).

Despite defendant's assertion of pervasive use of leading questions, only four objections were made to the questions that defendants contend were improper. While each of the questions only required a short answer, a review of the record reveals that counsel was walking plaintiff line-by-line through a lengthy exhibit. Once completed, the use of questions requiring only a short answer subsided and no further objections were made. The trial court likely realized that there may not have been another way to proceed through the exhibit in a timely fashion and, thus, gave counsel leeway in developing plaintiff's preliminary testimony. Furthermore, even if the trial court abused its discretion, defendants have not shown how they were prejudiced or that there was a "pattern of eliciting inadmissible testimony." *Watson*, 245 Mich App at 587. Plaintiff's testimony consumed approximately a fifth of the trial transcript, yet defendants only objected to four questions within a short span of one another. This does not rise to the level necessary to require reversal of the jury's verdicts.

Next, defendants assert that the trial court abused its discretion when it allowed plaintiff to testify about out-of-court statements made by defendants' general contractor, Gregg Hardy. These statements were admitted under MRE 801(d), which provides in relevant part:

> *Statements which are not hearsay*. A statement is not hearsay if—
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> * * *
>
> (2) *Admission by party-opponent*. The statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .

"Before an agent's declaration may be received as evidence against the principal, there must be some evidence of an agency relationship." *Przeradski v Rexnord, Inc*, 119 Mich App 500, 504; 326 NW2d 541 (1982).

The trial court did not abuse its discretion because Hardy's statements were made within the scope of his agency. Hardy was involved extensively in building the dairy farm. He helped picked the land for defendants while they were still living in the Netherlands, selected which subcontractors defendants should hire, and approved payment of the invoices that were submitted by the various subcontractors. Although the lending agreement for the construction

loan indicated that all changes must be approved in writing by the lender, the commercial lending officer that handled defendant's loan unequivocally testified that the lender had chosen not to enforce this provision on this project. Because defendants delegated their ability to modify the contract to Hardy, they cannot use this provision to prospectively limit his authority.

Defendants also challenge the admittance of two exhibits. The first was an unsigned, sworn statement that was in the lender's file and used by the title company to disburse payments. This document was admissible under MRE 803(6) because it was routinely created in the normal course of business. Although trustworthiness is an issue of admissibility, a document is only rendered inadmissible if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." MRE 803(6); see also *Solomon v Shuell*, 435 Mich 104, 128; 457 NW2d 669 (1990). Here, the testimony established the integral role sworn statements played in the construction loan process and that the document was maintained in the file. Thus, any remaining questions about the document's trustworthiness were properly left to the jury. The second exhibit was related to the first but contained Hardy's signature. Because the document was made while Hardy was still acting as defendant's agent, it was not hearsay and could be admitted against defendants under MRE 801(d).

Having concluded that the trial court did not abuse its discretion when it admitted the evidence defendants challenge, we now turn to defendants' contentions that the motion for JNOV should have been granted and that the jury's verdict is against the great weight of the evidence because plaintiff did not met his burden of proving that the contract had been modified. We disagree. We review de novo a trial court's decision on a JNOV motion. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). JNOV should only be granted when there is insufficient evidence to create an issue of fact for the jury. *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). "When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law." *Id*. at 123-124. "The grant or denial of a motion for new trial on the ground that the verdict is against the great weight of the evidence is a matter addressed to the sound discretion of the trial judge, whose exercise of that discretion will not be disturbed on appeal unless a clear abuse is shown." *Harrigan v Ford Motor Co*, 159 Mich App 776, 788; 406 NW2d 917 (1987).

"A contract, including a written contract, may be modified orally or in writing." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006). "There must be mutual assent for the modification." *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 11; 708 NW2d 778 (2005). "The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373; 666 NW2d 251 (2003).

Although disputed, mutual assent was shown through an oral agreement and by the parties' affirmative conduct. Plaintiff testified that he was repeatedly assured by Hardy and Theo Poelma that he would be "taken care of" if he performed the work, meaning that he would be paid. A second witness also described for the jury how he was with plaintiff once when Theo Poelma asked plaintiff to pour additional concrete that was not anticipated in the initial contract.

Based on the evidence, a reasonable jury could have found that the payments were not made in error. Defendants asked plaintiff to perform work that was not included in the initial contract and had partially paid for this work. Thus, the jury's verdict is not against the great weight of the evidence, and the trial court did not abuse its discretion when it denied defendants' motion for a new trial.

Similarly, defendants contend that the jury's verdict on their counterclaim was against the great weight of the evidence. We disagree. Evidence was presented that most of the damage defendants alleged was caused by wear from heavy equipment and defendants' failure to perform routine maintenance. Although plaintiff's work was not in line with industry standards, plaintiff was explicitly told to follow the plans and specifications whenever he brought design flaws to Hardy's or Theo Poelma's attention. Plaintiff also readily admitted to incorrectly placing five or six pillars, but explained that defendants declined his offer to replace the pillars during the farm's construction. Defendants' expert conceded during cross-examination that another contractor was responsible for an error that he had blamed plaintiff for. Based on this evidence, the trial court did not abuse its discretion when it denied defendants' motion for a new trial.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan