FILED
JAN 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LARRY EUGENE ROSOL and CHARLES ROSOL,

Appellees,

vs.

HAROLD MOWATT, JR.,

Appellant.

Filed January 31, 1978

359
2-59695

Appeal from Bremer District Court - B. C. Sullivan, Judge.

Defendant appeals judgment entered on jury award of damages for plaintiffs, alleging error in trial court's ruling on an evidentiary objection and motions for directed verdict, judgment notwithstanding the verdict, and new trial. AFFIRMED.

J. Douglas Oberman, of Swisher & Cohrt, of Waterloo, counsel for appellant.

R. L. Donohue, of Donohue Law Office, P.C., of West Union, counsel for appellees.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Harold Mowatt, Jr. appeals from an adverse judgment entered on a jury verdict awarding plaintiff-Larry E. Rosol $5271 and plaintiff-Charles Rosol $15,796.07 in damages resulting from a fire which destroyed their garage and its contents. He asserts that the trial court committed error in refusing to sustain his objection to a hypothetical question and to grant his motions for directed verdict, judgment notwithstanding the verdict, and new trial.

Mowatt initially contends that he was entitled to a directed verdict, both at the close of plaintiffs' case in chief and at the close of all testimony, or a judgment notwithstanding the verdict, because plaintiffs failed to establish that defendant's negligence was the proximate cause of the fire in question. Plaintiffs alleged in their petition that Mowatt's negligence in burning weeds and debris in close proximity to plaintiffs' garage proximately caused the fire which completely destroyed the garage and its contents. Mowatt now argues that, on the basis of the evidence introduced at trial, plaintiffs' theory that Mowatt's negligence proximately caused the fire was only one of several possible explanations for the fire at issue, and that the evidence was insufficient to establish their theory with reasonable probability and certainty.

When presented with a motion for directed verdict or judgment notwithstanding the verdict, both the trial court and this court must view the evidence in the light most favorable to the party against whom the motions are made, whether the evidence is contradicted or not. Rule 14(f)(2), Rules of Appellate Procedure. Every legitimate inference that may be fairly and reasonably deduced therefrom must be carried to the aid of the evidence. Prestype Inc. v. Carr, 248 N.W.2d 111, 118-119 (Iowa 1976); Champlin v. Walker, 249 N.W.2d 839, 840 (Iowa 1977). Furthermore, the mere occurrence of a fire raises no inference or presumption of negligence. Northwestern Nat. Ins. v. Raid Quarries Corp., 249 N.W.2d 640, 644 (Iowa 1977); Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 583 (Iowa 1973); see Ellingson v. Kramer, 255 Iowa 1257, 1262-1263, 125 N.W.2d 777 (1964).

When confronted with the issue of whether evidence was sufficient to generate a factual question regarding causation, the supreme court announced the rule that

> "... expert testimony indicating that it is possible a given factual circumstance was the cause of plaintiff's injury or 'could have caused it' is insufficient, standing

> alone, to generate a fact question. Expert testimony indicating probability or likelihood of a causal connection is necessary for this purpose. However, when testimony of an expert witness that a described condition is merely 'possible' or 'might' exist as a consequence of a stated cause is coupled with other testimony, nonexpert in nature, that the described condition of which complaint is made did not exist before occurrence of those facts alleged to be the cause thereof, a fact question as to causal relation is generated." (citations omitted) Winter v. Honeggers' and Co., Inc., 215 N.W.2d 316, 323 (Iowa 1974); Becker v. D & E Distributing Co., 247 N.W.2d 727, 730 (Iowa 1976); see Northwestern Nat. Ins. v. Raid Quarries Corp., supra, at 643 and rule 14(f)(10), R. App. P.

In other words, plaintiffs were not required to prove their theory of causation by evidence so clear as to exclude every other possible theory. However, the evidence must be such as to make their theory reasonably probable, not merely possible, and more probable than any other hypothesis based upon such evidence. Roller v. Independent Silo Co., 242 Iowa 1277, 1285, 49 N.W.2d 838 (1951); Wilson v. Paul, 176 N.W.2d 807, 809 (Iowa 1970).

The record in the instant case reflects that plaintiffs' expert witness, an insurance investigator, considered Mowatt's fire a "possible or probable" cause of the Rosol fire, although he was not able to state unequivocally that the Mowatt fire was the only and absolute cause. Apparently, the expert used the words "possible" and "probable" interchangeably and did not see any distinction, legal or otherwise, between them. However, his subsequent testimony would tend to support plaintiffs' theory that he was expressing his opinion in terms of probabilities, especially in light of the fact that he had ruled out an electrical malfunction as the cause of the fire.

Even if the testimony of plaintiffs' expert indicated that defendant's negligence was no more than a possible cause of the fire, we conclude that his testimony was sufficient, when coupled with other testimony, both expert and nonexpert, to generate a jury question regarding causation. Winter v. Honeggers' and Co., Inc., supra; John Rooff & Sons, Inc. v. Winterbottom, 249 Iowa 122, 129-130, 86 N.W.2d 131 (1957). Consequently, the trial court properly overruled Mowatt's motions for directed verdict and judgment notwithstanding the verdict. See rule 243(b), Rules of Civil Procedure.

Mowatt also contends that the district court erred in refusing to grant his motion for new trial. See rule 244(f)-(h), R.C.P. Two aspects of that motion warranting discussion here are those dealing with the discovery of new evidence and the ruling of the trial court on an objection to a hypothetical question asked of plaintiffs' expert witness.

Six weeks after the trial of this cause, a Mr. Coan signed a sworn statement that on the day of the fire, he saw Charles Rosol's wife burning debris in front of the garage which burned down. Defendant's attorney indicated that Coan's wife had been contacted by telephone before the trial and had stated that neither she nor her husband had any knowledge of any burning to the west of the building on the day of the fire. Counsel made no further attempts to interview the Coans until after the trial.

Petitions for new trial based upon newly discovered evidence are not favored by the courts and should be closely scrutinized and granted sparingly. Vanden Berg v. Wolfe, 196 N.W.2d 420, 422 (Iowa 1972). Decisions regarding the propriety of granting new trials on the basis of newly discovered evidence are committed to the sound discretion of the trial court, whose ruling will not be disturbed in the absence of an abuse of that discretion. Rule 14(f)(3), R. App. P.; Groves v. Groves, 248 Iowa 682, 698, 82 N.W.2d 124 (1957). Furthermore, "abuse of discretion" means no discretion to do what was done. Verdicts should not be set aside lightly, and the court must be sure there exists sufficient cause to support the exercise of such discretion before it grants a new trial. Every litigant is entitled to a fair trial, but only one. Wilkes v. Iowa State Highway Commission, 186 N.W.2d 604, 607 (Iowa 1971); Yoder v. Iowa Power and Light Company, 215 N.W.2d 328, 334-335 (Iowa 1974).

In order to obtain a new trial on the basis of newly discovered evidence, the party seeking it must demonstrate (1) that the evidence was discovered following trial and before judgment, (2) that it was not such as could have been discovered before the conclusion of the trial in the exercise of due diligence, (3) that it is material to the issue and not merely cumulative or impeaching, and (4) that the evidence will probably change the result if a new trial is granted. Vanden Berg v. Wolfe, supra, at 422; Farmers Insurance Exchange v. Moores, 247 Iowa 1181, 1187, 78 N.W.2d 518 (1956).

In the instant case, the trial court denied defendant's motion for new trial after concluding that there must be an end to this trial at some point. The court noted that Mowatt's attorney had spoken with Mrs. Coan before the trial but had failed to interview Mr. Coan or investigate further any leads resulting from that conversation. As the trial court correctly observed, defendant could have questioned Mr. Coan but did not do so, and therefore, should not be permitted to complain now. The court also concluded that, if Coan's testimony had been introduced at trial, it would have merely

been cumulative in effect, would not have been helpful, and would not have changed the outcome of the trial. Upon this state of facts, we conclude that the district court did not abuse its discretion in refusing to grant a new trial on the basis of newly discovered evidence.

Finally, Mowatt argues that he is entitled to a new trial because the court erred in overruling his objection to a hypothetical question asked of plaintiffs' expert witness. Mowatt contends that the question was based upon facts not in the record at the time the question was propounded. Albrecht v. Rausch, 193 N.W.2d 492, 495 (Iowa 1972). However, defendant's allegation of error is based upon an overly technical and semantically strained interpretation of the question. The form and content of a hypothetical question are matters largely within the discretion of the trial court, and we will not reverse the court's ruling unless that discretion is abused. Hutchinson v. Des Moines Housing Corporation, 250 Iowa 1306, at 1320-1321, 99 N.W.2d 81 (1959). Since we conclude that no abuse of discretion occurred, we affirm the judgment of the district court.

AFFIRMED.