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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IVYL COX AND VIVIAN J. COX,

Appellants,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Appellee.

Filed April 28, 1978

465
2-60409

Appeal from Marion District Court - M. C. Herrick, Judge.

Plaintiffs appeal from the grant of a new trial in an action brought to determine the amount of damages due them as a result of the condemnation of their property by defendant. REVERSED AND REMANDED WITH INSTRUCTIONS.

Warren A. Reiter, of Knoxville, counsel for appellants.

Richard C. Turner, Attorney General of Iowa, Asher E. Schroeder, Assistant Attorney General, and Franklin W. Sauer, Assistant Attorney General, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Plaintiffs-Ivyl and Vivian J. Cox appeal from the grant of a new trial in an action brought to determine the amount of damages due them as a result of the condemnation of their property by defendant-Iowa Department of Transportation (hereinafter referred to as "DOT"). Plaintiffs assert that the trial court erroneously concluded that DOT was entitled to a new trial because certain of plaintiffs' testimony should have been stricken and a jury instruction should have been given. They also contend that the court erred in refusing to allow them attorney fees.

DOT condemned plaintiffs' property and the condemnation commissioners awarded plaintiffs damages in the amount of $185,266. Plaintiffs then filed a petition in district court, alleging that the property was of greater value than the commissioners had determined and demanding judgment for $335,000. After a jury trial, a verdict of $254,000 was returned for plaintiffs. DOT's subsequent motion for new trial was granted by the court and plaintiffs' application for attorney fees was denied.

The trial court's ruling on DOT's motion for new trial was based almost entirely upon the testimony of plaintiffs' sole expert valuation witness, Tom Richards. On direct examination, Richards testified that he has been employed in both the public and private sectors as a professional real estate appraiser, broker, and right-of-way consultant for over 20 years. He attended and successfully completed several real estate appraisal courses and he has qualified as an expert and has testified regarding the appraisal of real estate hundreds of times in Iowa District Court, fifty to sixty times in federal courts in Iowa, and occasionally in other jurisdictions.

Richards testified that in the course of preparing for the appraisal of the business owned by plaintiffs which was located on the property in dispute (Shorty's Steak House), he physically viewed the premises for a day and on other occasions, and became familiar with the relevant facts concerning Shorty's operation. He also testified that in arriving at a value for a particular piece of property, an expert appraiser uses three approaches--market, cost and income. After explaining these approaches to the jury, Richards stated that on the basis of the three approaches, the value of Shorty's Steak House was $328,000. DOT's two expert witnesses testified that the value of the property was $180,500 and $170,000, respectively.

During cross-examination, Richards represented that his calculations as to the contributory value of interior furnishings were substantiated by several representatives of a real estate brokerage firm, the J. Albert Murphy Co., who had either personally inspected plaintiffs' business or were familiar with it. Richards also indicated on cross-examination that he had considered the profits of the business in arriving at his calculation using the income approach. Thereafter defendant moved to strike Richards' entire testimony because he had utilized an improper consideration in computing his valuation. However, the motion was overruled by the trial court. DOT also requested that the court instruct the jury to disregard business profits in awarding damages, but the court refused to do so.

In its motion for new trial, DOT alleged that the court had erred in refusing to strike Richards' testimony on the ground previously urged and in failing to give defendant's requested instruction regarding business profits. DOT also claimed that Richards' testimony was based at least in part on an "appraisal" by members of the Murphy firm, the owner and office manager of which had indicated in sworn statements that to the best of their knowledge, no representatives of their firm ever expressed an opinion to Richards as to the value of plaintiffs' property, nor had any oral or written appraisal of the business ever been made. DOT contended that these sworn statements constituted material newly discovered evidence entitling it to a new trial. Defendant also asserted, **inter alia,** that plaintiffs' failure to identify the Murphy brokerage firm in answers to defendant's written interrogatories served to deny it a fair trial because it was unable to adequately prepare for Richards' incomplete, evasive or untruthful responses given during cross-examination.

In response, plaintiffs argued that the valuation given by Richards was his own opinion and that the evidence indicates only that Richards spoke with representatives of the Murphy firm in checking his opinion for accuracy, not that the firm actually appraised plaintiffs' business. They also argued that the jury was properly instructed as to damages and that it was for the jury to determine the weight and credibility of Richards' testimony. Finally, plaintiffs contended that the newly discovered evidence was not material since Richards did not rely upon any information obtained from Murphy representatives in making his valuation.

In granting defendant's motion for new trial, the court concluded that it had erred in refusing to strike Richards' testimony and give the jury instruction requested by defendant. Further, the court concluded that his testimony contained substantial material misrepresentations regarding the source of information relied upon in the valuation of interior items and the amount of salary and management expense attributable to the business.

As an initial proposition, we note that in ruling upon motions for new trial the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties, rule 14(f)(3), Rules of Appellate Procedure, and that the court is slower to interfere with the grant of a new trial than with its denial. Rule 14(f)(4), R. App. P. An order granting or refusing a new trial will be set aside only upon a clear showing of abuse of discretion. Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973); Vojak v. Jensen, 161 N.W.2d 100, 105-106 (Iowa 1968).

Initially, plaintiffs contend that when an expert testifies as to damages, the determination of the weight or value that should be accorded that testimony is solely a matter for the jury, and that by striking Richards' testimony in the instant case, the trial court invaded the province of the jury in this regard and arbitrarily substituted its opinion for the conclusions reached by the jury. See Warrender v. McMurrin, 256 Iowa 617, 621-622, 128 N.W.2d 285 (1964).

The general rule is that expert opinion testimony, even if uncontroverted, may be accepted or rejected, in whole or in part, by the trier of fact. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976); Sondag v. Ferris Hardware, 220 N.W.2d 903, 907 (Iowa 1974); Meade v. Roller, 212 N.W.2d 426, 429 (Iowa 1973). This rule applies even though there are contradictions or inconsistencies in the testimony of a particular witness. Becker v. D & E Distributing Co., 247 N.W.2d 727, 730 (Iowa 1976); see Nelson v. Iowa State Highway Commission, 253 Iowa 1248, 1253, 115 N.W.2d 695 (1962).

On the basis of the record in this case, we conclude that the jury was entitled to give Richards' testimony whatever weight it deemed appropriate in arriving at its verdict. Richards testified that the property was worth $328,000 and DOT's experts claimed it was worth $170,000 and $180,500. The jury award of $254,000 was well within

the range of trial testimony and there is no evidence that it was excessive. See Jones v. Iowa State Highway Commisison, 185 N.W.2d 746, 752 (Iowa 1971). We hold that the trial court erred in granting a new trial on the basis of Richards' testimony.

However, in its brief, DOT also argues that a new trial was properly granted because the sworn statements of the owner and office manager of the Murphy firm constituted material newly discovered evidence which could not have been discovered or anticipated with reasonable diligence before trial.[1]

Requests for new trial based upon newly discovered evidence are not favored by courts and should be closely scrutinized and granted sparingly. Vanden Berg v. Wolfe, 196 N.W.2d 420, 422 (Iowa 1972). To support a motion for new trial on this basis, the movant must show that evidence was discovered following trial, that it was not such as could have been discovered before the conclusion of trial in the exercise of diligence, that it was material to the issue and not merely cumulative or impeaching, and finally that such evidence would probably change the result if a new trial were granted. Yoder v. Iowa Power and Light Co., 215 N.W.2d 328, 335 (Iowa 1974); Farmers Ins. Exchange v. Moores, 247 Iowa 1181, 1187-1192, 78 N.W.2d 518 (1956). In other words, a new trial will not be granted for newly discovered evidence which is merely impeaching or cumulative. City of Des Moines v. Frisk, 176 Iowa 702, 704, 158 N.W. 590 (1916).

In Yoder v. Iowa Power and Light Co, supra, a condemnation case remarkably similar to the instant one, defendant moved for a new trial on the basis of newly discovered evidence consisting of an affidavit containing statements of an individual which were relevant only to discredit plaintiff's appraiser and could not be offered as affirmative proof on any issue in the case. After noting that there is no doubt that impeachment by introduction of such contradictory facts during trial would be permissible, the supreme court affirmed the trial court's denial of a new trial, holding that the newly discovered information would do nothing more than impeach the testimony of plaintiff's expert witness. Id. at 335. The court also quoted portions of

[1] Although both parties addressed themselves to this issue in their pleadings pertaining to the request for a new trial, the court did not specifically respond to it in its ruling on the motion. In light of our holding with regard to the other grounds asserted by the court in its ruling, we feel obligated to consider this argument here as well.

the trial court's ruling on the motion for new trial which stated that the evidence was not of such substance which would produce a substantial change in the verdict in the event that it would be available in case a new trial were granted or if it had been presented during the course of the first trial. **Id.**

We reach the same conclusion here. The newly discovered evidence was relevant for impeachment purposes only, and we conclude that, if it were to be introduced at a second trial or if it had been presented at the first trial, a different result would not be reasonably probable.

As the trial court in **Yoder** noted, "[t]here must be repose to litigation. The Plaintiffs had a full and fair trial on the issues formed . . ." **Id.** Verdicts should not be set aside lightly and the court, in granting a new trial, must be sure there exists sufficient cause to support the exercise of its discretion. 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). We conclude that this case presents one of those instances in which sufficient cause did not exist to support the exercise of the trial court's discretion in granting a new trial. Further, after reviewing the record and jury instructions in this case, we also decide that to the extent that the court's ruling is based upon its failure to give defendant's requested instruction regarding business profits, the grant of a new trial was inappropriate. The trial court fully and satisfactorily instructed the jury in accordance with Iowa Uniform Jury Instructions, Vol. I, Nos. 14.3, 14.4, 14.6, 14.7, 14.9, 14.10, and 14.11. We find no error in the instructions given nor do we think it was error not to give the additional one requested by DOT.

Consequently, we reverse the trial court, reinstate the jury verdict, and remand the case for a hearing and determination regarding plaintiffs' request for attorney fees. See § 472.33, The Code, and Nelson v. Iowa State Highway Commission, supra, at 1255-1258.

REVERSED AND REMANDED WITH INSTRUCTIONS.