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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-002 / 89-1418

WILLIAM D. MAYS and SHARON MAYS,

Appellants,

vs.

C. MAC CHAMBERS COMPANY, INC. and ROBERT E. ANDREWS,

Appellees.

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Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

Mays appeal a jury verdict against them on their claims of negligent misrepresentation, breach of contract, and fraudulent misrepresentation based on C. Mac Chambers Company's alleged failure to obtain proper automobile insurance coverage for them. **REVERSED AND REMANDED.**

David S. Wiggins of Wiggins & Anderson, P.C., West Des Moines, for appellants.

Ronald A. Riley of Hansen, McClintock & Riley, Des Moines, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

The main issue in this case is whether C. Mac Chambers Company and its insurance agent negligently misrepresented to William and Sharon Mays that Mays had a comprehensive umbrella policy in the amount of $5 million, when in fact the policy was only for $1 million. A jury found in favor of the agent and C. Mac Chambers. On appeal Mays argue they should have been granted a mistrial due to numerous alleged violations by defense counsel of a motion in limine. In addition, Mays believe they deserve a new trial due to the discovery of allegedly new evidence. We determine there is new evidence that could not have been discovered prior to the conclusion of trial; we reverse and remand for a new trial.

On January 28, 1982, William Mays met with insurance agent Robert Andrews at the offices of C. Mac Chambers Company and applied for an automobile insurance policy with limits of $300,000. Chambers issued a binder on The Travelers Insurance Indemnity Company for coverage in that amount for property damage, bodily injury, uninsured motorist coverage, and underinsured motorist coverage. Mays also obtained a comprehensive umbrella policy in the amount of $1 million which Mac Chambers bound through Travelers on February 1, 1982.

Travelers Insurance later advised it would not issue Mays a single coverage amount for liability coverage. Travelers issued instead coverage of $100,000 per person

and $300,000 per occasion. The under and uninsured motorist coverages were issued in the same amount. On June 9, 1982, Mays requested the umbrella protection be increased to $5 million and alleged Andrews promised it would be done. Andrews contacted The Travelers and requested the coverage. Despite repeated requests by Chambers to Travelers, Travelers would not issue an umbrella policy for $5 million.

On July 26, 1982, William and Sharon Mays were involved in an automobile accident with an uninsured motorist. Both Mays were permanently and seriously injured; they then learned that they did not have uninsured motorist coverage in the amount of $5.3 million. On June 13, 1986, William and Sharon Mays filed their petition against Chambers and Robert Andrews alleging negligent misrepresentation, breach of contract, and fraudulent misrepresentation. The case proceeded to trial. During trial Mays made a motion in limine requesting the court not permit defense counsel to discuss prior claims made by Mays against other companies or other lawsuits they may have instigated. The district court granted Mays' motion.

Mays alleged defendants' counsel made nine separate attempts to disclose to the jury Mays had made prior claims against other people and had received large settlements in dismissal of those claims. Mays objected and moved for a mistrial because of defense counsel's alleged misconduct. The district court denied Mays' motion.

The jury returned a verdict in favor of the defendants. Following the district court's denial of Mays' motion for a new trial, Mays appealed. While the matter was pending on appeal, Mays discovered new evidence and asked the matter be remanded to the district court for a hearing on their petition to vacate the judgment pursuant to Iowa Rule of Civil Procedure 252. At the hearing Mays presented evidence from seven witnesses and asked for a new trial. The district court denied Mays a new trial and held they had not met their burden of showing the new evidence could not have been discovered prior to the conclusion of trial. In the district court's opinion, Mays failed to establish any irregularities or fraud in the proceedings that would warrant vacating the judgment or granting them a new trial.

Mays again appealed, and the supreme court ordered the original appeal be consolidated with their appeal on the dismissal of their motion for new trial because of newly discovered evidence. Both issues are now before us. Our standard of review is for corrections of errors at law. Iowa R. App. P. 4.

We address first the issue of newly discovered evidence. Iowa Rule of Civil Procedure 252(f) provides the court may correct, vacate, or modify a final judgment, or grant a new trial, upon the discovery of new evidence. The evidence must be material, could not have been discovered with reasonable diligence for production at trial, or

discoverable within the time for moving for a new trial. Iowa R. Civ. P. 252. The district court is vested with considerable discretion in ruling on a petition to vacate a judgment; its decision will not be overturned unless an abuse of discretion is shown. Cook v. Cook, 146 N.W.2d 273, 275 (Iowa 1966). We determine the court did abuse its discretion here.

Mays contend there are three witnesses who prove irregularities in Robert Andrews' testimony. Newly discovered evidence must be more than cumulative, State v. Overstreet, 243 N.W.2d 880, 886 (Iowa 1976), and the evidence must have been in existence at the time of trial but, for excusable cause, the proponent of such evidence was unable to procure it at that time, Mulkins v. Board of Supervisors, 330 N.W.2d 258, 261 (Iowa 1983). The testimony here does constitute newly discovered evidence under Iowa Rule of Civil Procedure 252 such that a new trial is warranted.

At the time of the original trial Dana Bryant Silverstein was employed by Holmes-Murphy insurance agency. Chambers subpoenaed William Mays' records in the Holmes-Murphy file. Exhibit 222 was identified as a document prepared by a Holmes-Murphy employee. Chambers produced the Holmes-Murphy documents to Mays on the day of trial; they had been subpoenaed just the day before.

On April 24, 1985, William Mays and his attorney contacted Silverstein at Holmes-Murphy. Travelers had

canceled or nonrenewed Mays' insurance. William Mays then had obtained insurance with the Cincinnati Insurance Company; this coverage was exactly the same as Mays had with Travelers except the umbrella policy was for $5 million, not $1 million. Silverstein had shopped around for insurance for William Mays prior to April 24, 1985. Mays told Silverstein he had a Cincinnati umbrella policy and that it had uninsured motorist coverage within the policy. Silverstein testified she found it hard to believe because she had written insurance with that company; that company did not provide uninsured motorist coverage with an umbrella policy nor was it provided in hardly any of the states at that time.

Silverstein then called the C. Mac Chambers Company. She talked to someone who told her there was uninsured motorist coverage on Mays' Cincinnati policy. While she could not name the person with whom she spoke, she stated she normally asked for the agent handling the particular account. She then called Cincinnati Insurance and was told the policy did not provide uninsured or underinsured coverage. Exhibit 222 is her notes about this information.

Over a year later and after the petition was filed, Mays and his counsel attempted to contact Silverstein. William Mays tried to talk with her; he was denied access. A law clerk from the office of Mays' counsel went to talk to Silverstein. Silverstein was shown exhibit 222. At the hearing on the petition to vacate the judgment, she testified as to the events of that meeting:

> Q. (Mays' counsel): And [the law clerk] asked you some questions about [exhibit 222], is that correct? A. (Silverstein): Yes, she did.
>
> Q.: What did she tell--what did you tell her? A.: That I didn't know what they were.
>
> Q.: Were you telling the truth? A.: No, I was not.
>
> Q.: Can you tell us why not? A.: Because I was seven and a half months pregnant and I didn't want to be involved in a trial at that time. I was going into labor, and I didn't want to have any more complications.
>
> Q.: When you told this person that you didn't know anything about it, did you receive a phone call from me that evening to call back? A.: Yes, I did.
>
> Q.: And did you tell me the same thing? A.: Yes, I did.

Silverstein also testified she wrote these notes when William Mays and his attorney were in her office and that she gave Mays a copy. Chambers argues Mays cannot claim surprise when William Mays was present during the preparation of exhibit 222. We find it unimportant that a copy of exhibit 222 was given to William Mays in 1985. After review of that exhibit, we find it vague. The testimony of Silverstein is the important evidence. Silverstein had not been subpoenaed by Mays, but she testified "they were going to, but they didn't." Silverstein purposely hid her knowledge and involvement in this case, therefore making it impossible for Mays to obtain her testimony. We find William Mays, though present, could not have been aware of the circumstances surrounding the preparation of exhibit 222.

Mays could only believe what Silverstein told them. They found no reason to subpoena her once she stated several times she had no knowledge of exhibit 222. The newly discovered evidence of her testimony as to her conversations is not cumulative and is material. We find Mays had excusable cause for their failure to procure her testimony at the time of trial. See Mulkins, 330 N.W.2d at 261.

Because we find this testimony alone is enough to warrant a new trial, we do not address the other alleged new evidence. In addition, we do not discuss the alleged motion in limine violations of counsel, although we do hope such problems will not exist in the new trial. The trial court should not permit evidence of claims made by Mays due to this accident or their previous accident.

REVERSED AND REMANDED.