

IN THE COURT OF APPEALS OF IOWA

No. 1-263 / 90-1344

FILED

DEC 31 1991

CLERK SUPREME COURT

VERNARD BARGLOF,

Appellee,

vs.

SPENCER HOTEL, INC.

Appellant.

Appeal from the Iowa District Court for Clay County,
Joseph J. Straub, Judge.

Defendant appeals the district court's grant of a new
trial in a slip-and-fall case. **AFFIRMED.**

Dick H. Montgomery and Richard J. Barry of Greer,
Montgomery, Barry & Bovee, Spencer, for appellant.

Vernard Barglof, appellee, pro se.

Considered by Donielson, P.J., and Schlegel and Hayden,
JJ. Sackett, J., takes no part.

SCHLEGEL, J.

In June 1983 Vernard Barglof was self-employed as a salesman in the siding business. He subcontracted the actual application of the siding to others. On June 25, 1983, Barglof wished to speak to one of his applicators. He saw the applicator's car parked outside the Tangney Hotel in Spencer, Iowa, that evening. The Tangney Hotel is owned by defendant, Spencer Hotel, Inc.

Barglof parked his car on Grand Avenue next to the applicator's car. He then went into the Tangney by the bus patron's door on Grand Avenue. Barglof did not see the applicator at the hotel bar. However, another acquaintance bought Barglof a drink. Barglof then left to continue to look for the applicator.

Barglof went back out the bus patron's door to see if the applicator's car was still there. He saw the car and proceeded on the sidewalk beside the hotel on his way to another establishment. Barglof saw a puddle of water near the bus patron's door, but decided to walk through it. Barglof slipped and fell while walking through the puddle. After he got up he went back into the hotel and informed the desk clerk he had fallen outside. Barglof used some of the hotel's towels to dry off and went on his way.

The Tangney pumped ground water out of its basement through a pipe which discharged onto the sidewalk. Thus, there was often a puddle of water in this area, and the sidewalk there had been stained a rust color from the water.

Barglof claimed he had been injured by the fall. He stated the next day he was so sore he could not get out of a car without help. Barglof was forced to cancel his sales appointments. He initially saw a chiropractor for his problems and later was referred to other physicians. Barglof testified no treatment had been effective and he had continuous pain after the accident.

Barglof claimed that because of his injury he could not keep up his sales, and eventually he lost his business. Due to his financial problems, Barglof was arrested and charged with conversion of certain collateral. He was later acquitted of these charges. Barglof was convicted of conspiracy to commit theft when a friend of his took Barglof's repossessed car off the dealer's lot. Barglof asserted that all of these problems arose because he was unable to work full-time after the accident.

Before the trial the district court granted Barglof's motion in limine which sought to prevent the defendant's witnesses from testifying that Barglof was lying about his injuries. One of the witnesses, Dr. Pugh, a physician and psychiatrist, testified Barglof was fabricating about his injuries. The court instructed the jury to ignore this testimony.

The jury returned a verdict finding defendant was at fault, but found the hotel's fault was not a proximate cause of any damage to Barglof.

Barglof filed a motion for a new trial. The district court granted this motion. The court concluded Dr. Pugh invaded the province of the jury on the issue of proximate cause by testifying as he did. The court also noted that Dr. Pugh spoke to one of the jurors personally as he was leaving the courtroom and that Mrs. Pugh spoke to another one of the jurors as she was leaving the courtroom. The court determined substantial justice had not been effected in this case. The hotel appealed the grant of a new trial.

This action was tried at law. Our scope of review is on assigned error only. Iowa R. App. P. 4.

In ruling on a motion for new trial, broad but not unlimited discretion is vested in the trial court, and the grant of a new trial will not be disturbed unless an abuse of discretion is shown. Kiner v. Reliance Insurance Co., 463 N.W.2d 9, 13 (Iowa 1990). We are more reluctant to interfere with the grant of a new trial than its refusal. Id. Furthermore, we will not find an abuse of discretion unless it is shown that the trial court's discretion was exercised on ground clearly untenable or to an extent clearly unreasonable. Id.

Generally, improper testimony is not unduly prejudicial if the jury is admonished to disregard it. Berg v. Des Moines General Hospital Co., 456 N.W.2d 173, 178 (Iowa 1990). There are instances, however, when improper testimony is so prejudicial that an admonition to disregard it is an insufficient curative. Id.

When the trial court orders a new trial, concluding that substantial justice has not been done, the basis for such ruling need not be reversible error. Thompson v. Rozeboom, 272 N.W.2d 444, 446 (Iowa 1978). A trial court may order a new trial on the ground that the verdict failed to effectuate substantial justice between the parties. Id. at 447. There need only be a basis in the record for the granting of a new trial. Id. If such a basis is present, no abuse of discretion is found. Id.

In the present case there is clearly a basis in the record for the district court's decision to grant a new trial. Dr. Pugh's testimony that Barglof was fabricating his injuries violated the court's ruling on the motion in limine. The district court did not abuse its discretion in finding there was a very strong possibility the jury relied upon the testimony of Dr. Pugh, even though they had been cautioned to disregard it, due to the fact that Dr. Pugh is a specialist in psychiatry.

We affirm the district court's grant of a new trial in this case.

AFFIRMED.