IN THE COURT OF APPEALS OF IOWA

No. 0-695 / 99-0755
Filed February 7, 2001

ALBERT BLOODGOOD, WANDA BLOODGOOD, JERRY ROBY, JANET ROBY, JOHN SCHARNBERG, BECKY SCHARNBERG, KARI SPINLER, PAULA SPINLER, ALAN BILLYARD, LINDA ANDERSON, CHARLES JOHNSON, PHIL BUSSANMAS, CATHERINE BUSSANMAS, PEARL WOOD, KEITH WILBUR and NANCY WILBUR,
Plaintiffs-Appellees/Cross-Appellants,

FILED
FEB 07 2001
CLERK SUPREME COURT

vs.

ORGANIC TECHNOLOGIES CORPORATION, TIM DANLEY, and MIKE DANLEY,
Defendants-Appellants/Cross-Appellees,

MYRON HIRSCHMAN and KRISTIE HIRSCHMAN,
Defendants.

Appeal from the Iowa District Court for Warren County, Richard D. Morr, Judge.

Defendant corporation and defendants Danley appeal from the district court's judgment for plaintiffs awarding them damages and injunctive relief on their negligence claim arising from the defendants' operation of a compost facility. Plaintiffs cross-appeal. **AFFIRMED ON BOTH APPEALS.**

Mark Landra of Sullivan & Ward, Des Moines, until withdrawal, and then Jeffrey L. Goodman and John R. Perkins and Robert K. DuPuy of Pingel & Templer, P.C., West Des Moines, for defendants-appellants.

Brenda L. Myers, West Des Moines, until withdrawal, and then Kathryn S. Barnhill, West Des Moines, for appellees.

Heard by Sackett, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Organic Technologies Corporation and Tim and Mike Danley appeal from the district court's judgment for the plaintiffs awarding them damages and injunctive relief on their negligence claim arising from defendants' operation of a compost facility. Defendants claim the district court erred in not granting their motion for continuance or application for order recognizing an automatic stay resulting from their codefendants' bankruptcy. Defendants further claim the district court erred in submitting negligence instructions which incorporated the elements of nuisance, in submitting the negligence count when the plaintiffs allegedly failed to offer substantial evidence of the appropriate standard of care or breach of duty, in permitting the separate allocation of fault to the individual defendants, and in admitting allegedly unfounded testimony regarding health injuries arising from the compost operation. In addition, defendants claim plaintiffs' counsel engaged in prejudicial misconduct by questioning and commenting on the defendants' ability to pay the judgment. Finally, defendants claim the jury verdict was contrary to law and influenced by passion and prejudice. Plaintiffs cross-appeal, claiming the district court erred in failing to submit their trespass and punitive damages claims. We affirm on both appeals.

I. Background Facts and Proceedings. This case arises from the operation of Organic Technologies Corporation (OTC), a compost facility located in Warren County. Plaintiffs, neighbors living near the facility, sued OTC, its owners the Danleys, and its previous owners the Hirschmans, seeking damages

for negligence, common law nuisance, statutory nuisance, and trespass.[1] The Danleys raised the affirmative defense of comparative fault, requesting the fault of OTC and the Danleys be compared with that of "all other current and former parties to this action, including Plaintiffs."

The Hirschmans began operating OTC in 1991. The Iowa Department of Natural Resources (DNR) issued an operating permit to OTC in 1992. In 1993, OTC submitted a "Comprehensive Solid Waste Management Plan," which was incorporated in the DNR operating permit.

Neighbors initially fought the rezoning of the property. Once OTC became operational, neighbors began complaining of odors, dust, noise, and litter emanating from OTC, and increases in rodents and insects. Neighbors complained to Warren County and the DNR. The DNR issued an administrative order, and the Warren County Health Department cited the facility for alleged violation of regulations and ordinances.

The Danleys purchased OTC in September 1995. The Danleys were made aware of OTC's operational problems and neighbors' complaints just prior to their purchase of OTC. In addition, DNR employees and the Warren County director of planning and zoning met with the Danleys shortly after they purchased the property to discuss the neighbors' ongoing concerns. The number of

---

[1] The neighbors' law action was consolidated with an equity action filed by N.I.C.E., a nonprofit corporation comprised of property owners living in close proximity to OTC, seeking abatement of the alleged nuisance and a permanent injunction against OTC from further operation of its business at its Warren County location. The nuisance count was tried to the court and the judge issued findings of fact, conclusions of law, judgment and order of abatement and injunction, essentially ordering the closing of the facility and permanently enjoining it from operating at the Warren County location. The court's decision in the equity action is not part of this appeal.

complaints received by the DNR and Warren County increased after the Danleys took over OTC.

The Danleys expanded the operations at OTC after taking over, and failed to meet standards set by the DNR. Shortly after Danleys took ownership of OTC, a fire destroyed a building used in the composting process.[2] The Danleys did not rebuild, and thus did not comply with the DNR's operating permit and plan which required composting to be done within a constructed building once the facility brought in 10,000 tons, and required expansion of the covered composting building as the quantity of materials increased.[3] Repeated inspections by the DNR during the Danleys' ownership of OTC revealed numerous and continuous violations of the permit, the operating plan, and DNR rules and regulations. According to the DNR employees conducting the inspections, reasonable efforts by the Danleys to follow the DNR's recommendations would have remedied the odor problems at OTC. Instead, Danleys failed to make good faith efforts to follow the DNR's recommendations or remedy the problem. Kathleen Bason, a DNR employee, testified Danleys were uncooperative and ridiculed the DNR's requirements. The Danleys represented to the DNR several times, as early as 1996, they would shut down the facility, but failed to follow through. At one point,

---

[2] Danleys claim an arsonist started the fire, but Thomas O'Mara, a volunteer fire fighter, testified the fire department determined the fire resulted from spontaneous combustion, rather than arson.

[3] OTC took in over 28,000 tons of waste in fiscal year 1994-95; 34,500 tons in fiscal year 1995-96; over 43,000 tons in 1996-97; and about 30,000 tons in fiscal year 1997-98.

Tim Danley told Bason they would not submit a closure plan and would not close "until the neighbors agreed to drop their lawsuit."

At trial, plaintiffs testified about how problems with odors, dust, and noise affected the enjoyment of their property and caused them health problems. Plaintiffs compared the odors to "being in a room where someone has vomited," "dead pigs in a pile of straw," ammonia, dead animals, sour corn, rotten garbage, decaying flesh, manure, spoiled vegetables, and rotten eggs. Many plaintiffs rated the odors as a "10" or "12" on a scale of 1 to 10. Some plaintiffs' allergy and sinus symptoms worsened after OTC began operations. Odors from the facility burned their eyes, noses, and throats and made them sick to their stomachs. Plaintiffs reported an increase in flies, mice, and other vermin. Plaintiffs testified due to the odors, they could no longer use their decks or patios, open windows, have friends or relatives over, cook out, hang laundry outside to dry, or work outside in the yard or garden. Even with windows shut, plaintiffs reported the odors filtered into their homes. Plaintiffs living closest to OTC testified litter from the facility blew all over the neighborhood and into their yards. Trucks came into the facility at all hours, even on weekends. Dust and clouds of smoke from fires, one lasting two days, lingered in the neighborhood. Some of the neighbors personally complained to Mike and/or Tim Danley, but never saw any improvement in conditions at the facility.

Tim Danley is president and 100% owner of OTC. He makes all major financial decisions for the company, and is responsible for its overall management. Mike Danley transferred his one-third ownership interest in OTC

to his son, Tim, after plaintiffs filed their lawsuit. Mike oversees the overall operation of OTC. He determines which materials OTC accepts or rejects, where the accepted materials are unloaded, and when to turn windrows. He participates in every phase of the composting process, and is responsible for assuring OTC meets applicable state and local rules and standards. Both Mike and Tim dealt with the DNR when it conducted inspections of OTC. Both testified they were aware of problems with the DNR and Warren County when they took over the facility. Despite the awareness of neighbors' complaints, Danleys expanded OTC's operations. Danleys admitted the operation of OTC resulted in dust, noise, fires, and odors that could be smelled on neighboring properties. Rather than closing the facility, they chose to continue servicing customers. For at least three years prior to trial, Tim Danley represented to neighbors, Warren County, and the DNR that he would be closing the facility, but failed to do so until after the trial began.

In February 1999, just prior to trial, the Hirschmans sought bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of Iowa. The district court denied Danleys' motion for continuance/application for a stay order recognizing the automatic stay. At trial, Danleys requested the Hirschmans be allocated fault on the verdict form, because their entire defense of the claims against them was based on the theory the problems alleged by plaintiffs began under Hirschmans' ownership. Plaintiffs argued Hirschmans should not be placed on the verdict form and no fault should be allocated against them.

The district court directed verdict on plaintiffs' claims for punitive damages and trespass. The court, however, found an evidentiary basis for submission of nuisance, as well as negligence or fault. It submitted the plaintiffs' claims to the jury "on fault and fault alone." The court instructed the jury to disregard all testimony relating to health complaints or fears, diminution of property value, and pollution of well or ground water.

The jury returned verdicts awarding plaintiffs damages totaling $420,000.[4] The jury apportioned fault twenty-five percent each to Myron Hirschman, Kristie Hirschman, Tim Danley, and Mike Danley. The court entered judgment on the jury verdict against Tim and Mike Danley and OTC individually, jointly and severally, for damages awarded against the Danleys. Due to the automatic stay resulting from the Hirschmans' bankruptcy, the court entered judgment against OTC for all damages awarded against the Hirschmans. Tim and Mike Danley and OTC (hereinafter referred to collectively as "Danleys") appeal.

II. Motion to Continue/Application for Stay. We review the district court's denial of Danleys' motion for continuance/application for state court order recognizing automatic stay for errors at law. Iowa R. App. P. 4; *White v. Northwestern Bell Tel. Co.*, 514 N.W.2d 70, 74 (Iowa 1994). Danleys argue the district court violated the automatic stay required by section 362(a) of Chapter 11 of the United States Code because the Hirschmans were "indispensable parties"

---

[4] The jury awarded $50,000 to Albert Bloodgood, $60,000 to Wanda Bloodgood, $30,000 each to Jerry and Wanda Roby, $15,000 each to John and Becky Scharnberg, $15,000 to Alan Billyard, $15,000 to Linda Anderson, $50,000 to Charles Johnson, $20,000 each to Phil and Catherine Bussanmas, $60,000 to Pearl Wood, and $20,000 each to Kenneth and Nancy Wilber. The jury awarded nothing to Paula and Kari Spinler.

to the litigation and plaintiffs' claims against Danleys were derivative of the same claims asserted against the Hirschmans. Danleys contend the district court's violation of the automatic stay renders void all proceedings occurring after the bankruptcy petition was filed, including the trial. We disagree.

Section 362(a) of Chapter 11 of the United States Code provides the stay of legal action against a debtor who has sought protection in bankruptcy:

> . . . [A] petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of (1) the commencement or continuation, . . . of a judicial . . . action or proceeding *against the debtor* that was . . . commenced before the commencement of the case under this title. . . .

11 U.S.C. § 362(a)(1) (1999) (emphasis added). The automatic stay does not apply to non-bankrupt codefendants of a debtor "even if they are in a similar legal or factual nexus with the debtor." *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 677 (8th Cir. 1992) (quoting *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3rd Cir. 1992)). The only exception to this rule relates to non-bankrupt codefendants in "unusual circumstances." *Id.* In circumstances where the debtor and non-bankrupt party can be considered one entity or as having a unitary interest, a section 362(a)(1) stay may suspend an action against a non-bankrupt codefendant. *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1148 (5th Cir. 1987).

We find no "unusual circumstances" requiring application of the automatic stay to all defendants in this case. The allegations brought by plaintiffs relate to the separate and distinct periods of time during which each defendant owned OTC. The Danleys and the Hirschmans do not have a unitary interest such that

a section 362(a)(1) stay should apply to the Danleys. Therefore, the district court did not err in refusing to grant Danleys' motion. Moreover, once the district court denied their motion, the Danleys—not plaintiffs—insisted the Hirschmans be allocated fault on the verdict form. In contrast, plaintiffs argued the Hirschmans should not be placed on the verdict form and no fault should be allocated against them.[5]

Contrary to Danleys' assertions, we conclude the Hirschmans were not indispensable parties as defined in Iowa Rule of Civil Procedure 25(b).[6] The Danleys owned and operated OTC from September 1, 1995 forward. Evidence at trial established conditions at OTC worsened after Danleys took over. Danleys' liability could be determined whether or not Hirschmans were still parties in the case. Plaintiffs' based their claims against Danleys on events occurring during the Danleys' ownership and upon the Danleys' own conduct. Thus, Danleys' liability is not derivative from the Hirschmans, as suggested by Danleys. Furthermore, Tim and Mike Danley testified the Hirschmans operated OTC competently, and they never pursued cross-claims against the Hirschmans.

---

[5] While the issue has not been raised on appeal, we question the district court's inclusion of Hirschmans on the verdict form. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 863 (Iowa 1994) ("[T]he potential insolvency of a codefendant should be borne by the solvent defendants, not by the plaintiffs."); *Pepper v. Star Equip., Ltd.*, 484 N.W.2d 156, 158 (Iowa 1992) ("[I]f a defendant or third-party defendant has a defense to the plaintiff's claim, that party's fault is not to be considered in the allocation of aggregate causal fault by the trier of fact.").

[6] Rule 25(b) provides: "A party is indispensable if the party's interest is not severable, and the party's absence will prevent the court from rendering any judgment between the parties before it; or if notwithstanding the party's absence the party's interest would necessarily be inequitably affected by a judgment rendered between those before the court." Iowa R. Civ. P. 25(b).

Finally, we conclude the district court's denial of their motion did not prejudice Danleys. They presented direct evidence of the problems during the Hirshmans' operation of OTC. Hirschmans were not in court to defend themselves against this evidence, and the jury allocated fifty percent of the fault to the Hirschmans on the verdict forms, thus diverting liability from Danleys. We affirm the district court on this issue.

III. Jury Instructions. We review objections to jury instructions on assigned error. Iowa R. App. P. 4; *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994). The only grounds for objections we may consider on appeal are those specified in objections to the trial court. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 618 (Iowa 1991). To preserve error for our review, a party must specify the subject and grounds of the objection. Iowa R. Civ. P. 196; *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 638 (Iowa 1998).

Danleys contend the district court erred: (1) in submitting the elements of nuisance as the standard of negligence, and (2) in submitting plaintiffs' negligence count to the jury where plaintiffs failed to offer substantial evidence of duty/standard of care or breach of duty. Danleys claim they preserved error by timely motions for directed verdict and judgment notwithstanding the verdict. However, Danleys failed to object to the jury instructions.[7] Therefore, we

---

[7] During discussion of jury instructions with the court and counsel, defendants' counsel stated: "Defendants have no objections to the jury instructions as prepared by the court, in light of the court's ruling that the claim of negligence is still viable."

conclude Danleys failed to preserve error on these issues, and we need not address their merits. We affirm the district court.

IV. Allocation of Fault. We review for correction of errors at law. Iowa R. App. P. 4. Danleys argue the district court erred in permitting the allocation of fault to Tim and Mike Danley, individually. They contend plaintiffs failed to present evidence that would require piercing the corporate veil, or to show they should be held liable for individual tortious acts committed in the course of their operation of OTC. We disagree.

A corporate officer is individually liable for torts which he commits while acting within as well as outside the scope of his employment. *Grefe v. Ross*, 231 N.W.2d 863, 868 (Iowa 1975). Corporate officers can be held liable for negligence if they take part personally in the commission of the tort against a third party. *Haupt v. Miller*, 514 N.W.2d 905, 909 (Iowa 1994). This doctrine of individual liability for corporate officers is distinct from the doctrine of "piercing the corporate veil," which is primarily used to impose personal liability upon the owners, directors, or officers of the corporation attempting to use the corporate entity as an "intermediary to perpetrate fraud or promote injustice." *Id.* at 908.

Danleys contend the district court erroneously submitted the issue of individual liability to the jury, and permitted the jury to conclude mere status, rather than proof of negligence, conferred individual liability. However, Danleys did not object to the court's instructions. Therefore, they have failed to preserve error on this issue. Iowa R. Civ. P. 196 (to preserve error, a party must specify the subject and grounds of the objection).

Even if Danleys had properly preserved error, we conclude the district court did not err in its instructions to the jury. Plaintiffs offered sufficient evidence from which the jury could identify specific conduct on the part of Danleys which would constitute negligence, thereby subjecting them to individual liability. Such evidence includes ignoring neighbors' complaints, doubling the amount of materials coming in to the facility, and failing to follow DNR recommendations and remedy repeated violations. Mike and Tim Danley testified they were personally responsible for the management and operation of OTC. They personally participated in, authorized, and/or directed the conduct which led to plaintiffs' complaints. The district court properly instructed the jury as to fault, negligence, ordinary care, and proximate cause. The district court did not err in permitting the allocation of fault to Tim and Mike Danley, individually.

V. Admission of Testimony. Our review of the admission of testimony is for abuse of discretion. *Kuta v. Newberg*, 600 N.W.2d 280, 289 (Iowa 1999). The trial court denied Danleys' motion in limine, which sought an order preventing the mention of "cancer" or testimony as to plaintiffs' personal belief they had cancer or were likely to contract cancer as a result of the operation of OTC. Danleys contend the district court erred in admitting unfounded testimony regarding injury to health allegedly resulting from the operation of OTC.

Plaintiffs testified the odors from OTC burned their eyes, noses and throats, and made them sick to their stomachs. Some plaintiffs testified about the development or worsening of allergies and sinus problems after OTC began operations. Others testified about a general concern and fear of future illness. A

few plaintiffs mentioned "cancer" during their testimony. Even though the court did not submit plaintiffs' fear of future illness claims to the jury, this testimony was relevant to those claims.

After careful review of plaintiffs' testimony, we conclude no prejudice resulted from the admission of plaintiffs' cancer and injury to health testimony. Only two of the sixteen plaintiffs claimed to have had cancer. Albert Bloodgood made no claim for damages against Danleys for his cancer. The jury's verdict in Bloodgood's favor was not higher or disproportionate to the verdicts in favor of the other plaintiffs. The jury awarded no damages to Kari Spinler, despite testimony regarding his cancer. Most of the remaining plaintiffs made no mention of "cancer" during their testimony. Nearly all the plaintiffs, during Danleys' counsel's effective cross-exam, admitted no doctor would make a link between their illness or fear of future illness and the operation of OTC. The damages awarded to each plaintiff were commensurate with his or her testimony, the degree to which each plaintiff personally suffered, and the proximity of their homes to OTC.

Furthermore, the district court submitted the following limiting instruction to the jury:

> There has been no credible medical or scientific evidence that there has ever existed a threat to human health or safety, either present or future, as a result of the operation of OTC. Likewise, there has been no credible medical or scientific evidence that any of the plaintiffs has ever been exposed to a hazardous substance of any kind resulting from such operation. Finally, there has been no credible medical, scientific or statistical evidence that any increased fear of future illness on behalf of any of the plaintiffs is rational or exists.

> You are instructed to disregard all such testimony in your consideration of all issues in this case.

We believe juries understand limiting instructions. *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 252 (Iowa 1993). To believe otherwise would be asking appellate courts to speculate a jury disregarded evidence and clear admonitions. *Id.* There is a strong presumption proper limiting instructions reduce any possible prejudice to acceptable levels. *Id.* We conclude the court's limiting instruction eliminated any possible prejudice in this case. The court did not abuse its discretion in admitting plaintiffs' testimony regarding cancer and injury to health.

VI. Misconduct by Counsel. We review the district court's denial of a motion for mistrial or new trial based upon attorney misconduct for abuse of discretion. *Rosenberger Enters., Inc. v. Insurance Serv. Corp. of Iowa*, 541 N.W.2d 904, 906 (Iowa Ct. App. 1995). A new trial is required for improper conduct by counsel if it appears prejudice resulted or a different result would have been probable but for any misconduct. *Id.* at 907. A trial court has considerable discretion in determining whether alleged misconduct was in fact prejudicial. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 543 (Iowa 1996). An abuse of this discretion is shown only where "such discretion was exercised by the court on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Danleys claim plaintiffs' counsel tried to inform the jury of Danleys' ability to pay a judgment by individual resource or insurance during trial and closing

arguments. We find Danleys' allegations of misconduct by plaintiffs' counsel without merit.

A. Insurance. Plaintiffs' counsel questioned Tim Danley regarding recovery of insurance proceeds by OTC due to a fire that destroyed a building at the facility shortly after Danleys took over OTC in September 1995. Danleys contend plaintiffs offered the insurance information for the sole purpose of informing the jury the Danleys, unlike the Hirschmans, could pay plaintiffs for any damages the jury might award.

Absent a showing of prejudice, the introduction of insurance coverage into a negligence suit will not be critical. *Carter v. Wiese Corp.*, 360 N.W.2d 122, 130 (Iowa Ct. App. 1984). Contrary to Danleys' assertions, Iowa Rule of Evidence 411 does not apply, because plaintiffs' references to insurance during the questioning of Tim Danley had no relevance to the issue of whether the Danleys were insured against liability to cover any damages awarded in this case.[8] The evidence showed Danleys failed to use insurance proceeds collected on the burned building to reconstruct it, even though the facility's DNR permit required a building on site; and re-construction of the building would have remedied odors and other conditions at the facility. The solicited testimony was used to impeach Tim Danley's testimony he had done everything he could to reduce odors, and his claim the fire was caused by arson. Danleys fail to show prejudice resulted from the introduction of this evidence.

---

[8] Iowa Rule of Evidence 411 provides: "Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully."

B. Hirschman Bankruptcy. Plaintiffs' counsel asked Tim Danley to admit any recovery against the Hirschmans would be "meaningless" since Hirshmans had no assets to pay a judgment. The court sustained an objection by Danleys' counsel, and the question remained unanswered. The jury was never informed of Hirschmans' bankruptcy, and assigned fault to Hirschmans. Danleys have failed to show they were prejudiced by plaintiffs' counsel's question.

C. Income. Plaintiffs' counsel asked Mike Danley about the amount of income he received from OTC during years of operation. He was unable to provide the information requested by counsel. During rebuttal argument, Danleys contend, plaintiffs' counsel asked the jury to consider the total revenue derived by OTC and the Danleys during their ownership of the business, and misrepresented that OTC had more than $2 million in annual revenues during Danleys' ownership. Plaintiffs assert their rebuttal argument was made necessary after Danleys' counsel, in closing arguments, claimed plaintiffs were only out to "make a quick buck at the expense of Defendants so that they could retire."

The district court has broad discretion in passing on alleged misconduct during jury arguments. *Moore v. Vanderloo*, 386 N.W.2d 108, 116 (Iowa 1986). Before a new trial will be granted for misconduct in argument, it must appear prejudice resulted or a different result would have been probable, but for the misconduct. *Id.* at 116-17. Danleys have made no such showing here.

Danleys have failed to show prejudice resulted or a different result would have been probable but for any alleged misconduct. The district court did not abuse its discretion in denying Danleys' motions for mistrial and a new trial.

VII. Damages Awards. A motion for new trial is the proper method for challenging the adequacy of damages. Iowa R. Civ. P. 244(d); *Gorden v. Carey*, 603 N.W.2d 588, 589-90 (Iowa 1999). The court can grant a new trial, or impose conditions pursuant to rule 250. *Ort v. Klinger*, 496 N.W.2d 265, 269 (Iowa Ct. App. 1992). A new trial is not a matter of right. *Id.* In ruling on motions for new trial, the trial court has broad, but not unlimited, discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3); *Gorden*, 603 N.W.2d at 590. We review the trial court's ruling on an abuse of discretion standard. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996). We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4); *Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990).

The amount of damages awarded is peculiarly a jury, not a court, function. *Gorden*, 603 N.W.2d at 590. We do not set aside a verdict simply because we might have reached a different conclusion. *Ort*, 496 N.W.2d at 269. It is not for this court to invade the province of the jury. *Id.* The jury's verdict should not be set aside or altered unless the plaintiff proves the verdict: (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice

or other ulterior motive; or (4) is lacking in evidential support. *Gorden*, 603 N.W.2d at 590.

In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict. *Clarey v. K-Products, Inc.*, 514 N.W.2d 900, 903 (Iowa 1994). In considering whether the verdict is excessive, the evidence must be considered in the light most favorable to the plaintiff. *Ort*, 496 N.W.2d at 269.

We conclude substantial evidence supports the jury's verdict in this case. Plaintiffs testified as to how the odors, litter, noise and dust emanating from OTC affected their day-to-day living. They described burning eyes, noses, and throats caused by the odor from the OTC facility, and how OTC's operations negatively affected the use of their property. Each plaintiff attempted to place a dollar figure on the extent to which OTC's operations had affected his or her daily life. Based on the evidence presented at trial, plaintiffs were entitled to compensatory damages for the annoyance, discomfort, and interference with the full enjoyment of their property, even though damages were not susceptible to exact measurement. *Kriener v. Turkey Valley Comm. Sch. Dist.*, 212 N.W.2d 526, 536-37 (Iowa 1973).

The jury apparently took into account each plaintiffs' testimony, the degree to which he or she suffered, and the proximity of their homes to the OTC facility. The jury awarded plaintiffs living closer to OTC higher damages than plaintiffs living farther away. The Spinlers, who lived the furthest away from the facility, received no damages. In addition, Danleys present no evidence to support their

claim the jury rendered a "quotient verdict" when it assigned twenty-five percent fault to each individual defendant. We affirm the district court on this issue.

VIII. Cross Appeal. We review the trial court's directed verdict for errors at law. Iowa R. App. P. 4. Where no substantial evidence exists to support each element of a plaintiff's claim, the court may sustain a motion for directed verdict. *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Hasselman v. Hasselman*, 596 N.W.2d 541, 545 (Iowa 1999). We view the evidence in the light most favorable to the party against whom the motion was directed. *Godar*, 588 N.W.2d at 705.

Plaintiffs contend the district court erred in failing to submit their trespass and punitive damages claims to the jury. We disagree.

A. Trespass. One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land. *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 301 (Iowa 1994) (quoting Restatement (Second) of Torts § 158 (1964)). Plaintiffs failed to prove defendants intentionally caused litter, dust, or odors to enter on plaintiffs' property. The district court correctly directed verdict in favor of defendants on this issue.

B. Punitive Damages. In order to present their punitive damages claim to the jury, plaintiffs were required to prove by a preponderance of clear,

convincing, and satisfactory evidence that the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another. Iowa Code section 668A.1(a) (1999). "Willful and wanton" means:

> [T]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

McClure v. Walgreen Co., 613 N.W.2d 225, 230 (Iowa 2000) (quoting *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990)). Mere negligent conduct is not sufficient to support a claim for punitive damages. *Id.* Such damages are appropriate only when actual or legal malice is shown. *Id.* at 231. Actual malice is characterized by such factors as personal spite, hatred, or ill will. *Id.* Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights. *Id.*

We conclude plaintiffs failed to present clear, convincing, and satisfactory evidence of "willful and wanton" conduct by Danleys to warrant submission of their punitive damages claim to the jury. The district court properly directed verdict in favor of defendants on this issue.

IX. Conclusion. We affirm the district court's decision in all respects.[9]

AFFIRMED ON BOTH APPEALS.

---

[9] We remind appellant of Iowa Rule of Appellant Procedure 15, which provides: "Appellant shall prepare and file an appendix to the briefs which shall contain . . . (2) any *relevant portions* of the pleadings, transcript, instructions, findings, conclusions, and opinion; . . ." (emphasis added). Iowa R. App. P. 15(2). Appellants included unnecessary portions of the transcript in the record on appeal.