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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-104 / 89-936

LEE BEHR,

Appellant,

vs.

QUAD COUNTY FARM SERVICES, INC.,

Appellee.

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Appeal from the Iowa District Court for Palo Alto County, Tom Hamilton, Judge.

Plaintiff appeals a judgment entered by the trial court, following a jury trial, denying plaintiff damages for the alleged failure of the defendant to correctly apply chemicals to plaintiff's corn crop. **REVERSED AND REMANDED.**

Eldon J. Winkel of Winkel & Winkel, Algona, for appellant.

Phil Redenbaugh and Corwin Ritchie, Storm Lake, for appellee.

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

OXBERGER, C.J.

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On March 6, 1986, Lee Behr, a farmer in Palo Alto County, filed this negligence action against Quad County Farm Services, alleging that crop oil was not used in a post-emergent application of AAtrex to 1,015 acres of corn field, resulting in a loss of 82 bushels per acre at $2.97 per bushel, for a gross claim of $247,193. Quad County denied Behr's allegations, and contended that Behr was also negligent, requiring a finding of proportionate fault.

Behr harvested his corn crop and sold the corn, receiving the proceeds. In addition, Behr received $125,962 from multi-peril insurance, which was slightly more than fifty percent of Behr's claim. The present case subsequently proceeded to trial. Behr alleged at trial that he had an obligation to repay said amount to the insurance company. Quad County argued that Behr had no obligation to pay back the amount. Quad County additionally argued that Behr's losses were due to poor farming practices and poor weather conditions.

Following the close of all the evidence, the case was subsequently submitted to the jury. The trial court, in its instructions to the jury, specified that the jury should totally disregard all testimony concerning the amount of insurance recovery and what happened to the proceeds. The jury ultimately returned a verdict, finding that both parties were equally at fault, and found that the

total amount of Behr's damages was zero. The trial court received the verdict in open court and asked the jurors whether such verdict was unanimous, to which the jurors responded in the affirmative. The trial court offered both parties an opportunity to poll the jury, but both declined to do so.

Behr subsequently filed a motion for new trial, contending there was an irregularity in the proceedings of the jury which materially affected his rights, in that the finding of no damages was irreconcilable with the special findings. The trial court subsequently denied the motion, on the grounds that Behr did not poll the jury and that Behr had introduced evidence that he was to repay the insurance proceeds from any recovery awarded. Behr has subsequently appealed. We reverse.

Our review is for the correction of errors at law. Iowa R. App. P. 4. We are bound by the findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Behr argues that the trial court erred in failing to grant a new trial because the jury's finding that both he and the defendant were each fifty percent negligent is in irreconcilable conflict with the jury's special finding that Behr suffered zero damages. We agree.

Under Iowa law, all reasonable presumptions are in favor of the general verdict. Dutcher v. Lewis. 221 N.W.2d

755,761 (Iowa 1974). However, when there is an irreconcilable conflict between the general verdict and special findings the latter must prevail and the general verdict cannot stand. Id. Such special findings must be consistent with each other, and clear and definite in their meaning. 89 C.J.S. Trial 563 (1955). Iowa Rule of Civil Procedure 206 provides, however, that if the answers are inconsistent with each other, and are inconsistent with the verdict, the trial court should not order judgment, but either send the jury back for deliberations or order a new trial. Iowa Code section 668.3(6) (1989) states that if inconsistencies exist between verdicts and damages awarded in comparative fault cases, the trial court shall (a) inform the jury of the inconsistencies, (b) order the jury to resume deliberations to correct the inconsistencies; and (c) instruct the jury it is at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

The present case was tried pursuant to the comparative fault statute set forth in Iowa Code chapter 668. In accordance with section 668.1, the trial court instructed the jury that Behr would not be barred from recovery unless his assessed percentage of fault was greater than fifty percent, and that if Behr was assigned a percentage of fault of fifty percent or less, the court would reduce Behr's damages accordingly. The trial court properly instructed the jury of the elements needed to prove fault

on the part of either party. The court also instructed the jury to disregard any testimony concerning the fact that Behr received over $120,000 in compensation from his insurance carrier for damages to his crops, and whether Behr had to return such proceeds if he prevailed in the present lawsuit. The jury returned a verdict finding that both plaintiff and defendant were fifty percent at fault, and that the actions of each were a proximate cause of plaintiff's damages. The jury, however, returned a verdict finding that Behr had suffered zero damages.

We find the special verdict finding to be irreconcilably inconsistent with the general findings that Behr sustained damages caused by the defendant. We find this case similar to the factual situation presented in Bogut v. Jannetta, 410 N.W.2d 451 (Minn. App. 1987). In Bogut, the plaintiff suffered a shoulder injury in an automobile accident. 410 N.W.2d at 453. Following a jury trial, the jury found that both plaintiff and defendant were each fifty percent at fault. Id. The jury also made a special finding that the plaintiff had suffered a permanent injury, but awarded zero damages. Id. The Minnesota Court of Appeals reversed, holding that under the circumstances the trial court should have attempted to cure the defect by either (1) rendering judgment against the party having the burden of proof; (2) ordering a new trial; (3) sending the jury back for further deliberations; or (4)

reconcile the inconsistent answers by using its powers of interpretation or partially direct a verdict. Id. C.F. Veit & Co., Inc. v. Lowry Hill Const. Co. 409 N.W. 2d 47, 49 (Minn. App. 1987) (wherein the court held that a trial court has broad powers to liberally construe inconsistent verdicts where they can be reconciled in any reasonable manner consistent with the evidence).

Applying the above analysis to the facts of the present case, we believe that Behr's motion for new trial should have been granted. The jury found the defendant's actions were a fifty percent proximate cause of plaintiff's damages. Thus their finding of zero damages cannot be reconciled in any reasonable manner with the general finding of fault, since Behr introduced substantial testimony concerning the damage to his crops.

We also note that in its ruling denying Behr's motion for new trial, the trial court attempted to reconcile the inconsistent verdicts by noting that plaintiff had introduced substantial evidence regarding his multi-peril insurance. The trial court, however, had initially instructed the jury to disregard any testimony regarding insurance when reaching a verdict. Though a jury is presumed to have followed its instructions absent evidence to the contrary, see State v. Morrison, 368 N.W.2d 173, 176 (Iowa 1985), we believe, as the Bogut court did, that a review of the evidence confirms that the jury's

inconsistent finding of zero damages was motivated by the testimony regarding Behr's receipt of insurance proceeds equaling one half of his claimed damages. The trial court erred in denying the motion for new trial on a position it had previously instructed the jury against. See also Iowa Rule of Civil Procedure 244 (providing that a new trial should be granted where there is evidence of jury misconduct).

Nor do we believe Behr's motion for new trial fails because he did not personally poll the jury. Pursuant to Iowa R. Civ. P. 203, the court reread the jury's findings to the jury, and meticulously asked the jurors if the verdicts rendered expressed their unanimous decision. All jurors responded in the affirmative. We do not interpret Rule 203, however, as mandating a party to conduct his or her own poll of the jury once the trial court has already done so. A review of the dialogue between the trial court reveals that the jury was in agreement as to its findings. It would only have been repetitious for Behr to ask the same questions the jury had already unanimously answered.

In summary, we hold that Behr was entitled to a new trial, and we therefore reverse the trial court's ruling denying Behr's motion for new trial, and remand this case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm.

I agree with the majority there were inconsistencies in the jury verdict. However, I find the issue was not preserved for appeal. The challenge to the verdict now being raised should have been raised when the jury returned and before they were discharged. Then the jury could have been reinstructed and ordered to return a consistent verdict.

The majority has not addressed the preservation of error issue except to say it was not necessary for appellant to poll the jury. An additional polling of the jury would not have preserved error on the issue of inconsistency of the verdict.