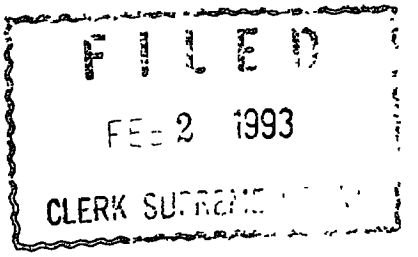
IN THE COURT OF APPEALS OF IOWA



No. 2-602 / 92-78

PHILLIP WILLIAMS and SHARLA WILLIAMS,

Plaintiffs-Appellants/Cross-Appellees,

vs.

HENNING CONSTRUCTION COMPANY,

Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Joel Novak, Judge.

The Williams appeal and Henning Construction Company cross-appeals following a jury verdict in a personal injury lawsuit. **AFFIRMED.**

Jim R. Lawyer and Tom L. Drew of Lawyer, Lawyer, Dutton & Drake, West Des Moines, for appellants/cross-appellees.

Dawn Seibert and John D. Hilmes of Duncan, Jones, Riley & Finley, P.C., Des Moines, for appellee/cross-appellant.

Heard by Donielson, P.J., and Sackett, J., and Perkins, S.J.*

*Senior Judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Plaintiff Phillip Williams was a subcontractor hired to perform brick work at the Wellington Apartments in West Des Moines. The general contractor for the project was defendant Henning Construction Company.

Williams decided to work on Sunday, February 11, 1990, because the project was to be inspected the next day. Williams had finished all of the brick work except for cleaning the bricks with muriatic acid. Williams had asked Henning for a 4 x 8 foot plywood box to use as a work platform. The box was to be placed on the forks of a fork lift type machine called a lull. The box provided by Henning did not have any means to secure it to the lull. Williams decided to use the box anyway. He and a coworker placed the box on the lull and lifted it a few feet. Williams then jumped around on the box to see if it was stable.

Convinced the box was secure on the lull, Williams placed a five gallon bucket of diluted muriatic acid in the box, along with a hose and brush. The coworker lifted the box about thirty feet. As Williams was washing the bricks, the box tipped and fell off the lull. Williams suffered injuries from the fall and acid burns from the muriatic acid.

Williams filed the present personal injury suit against Henning. His wife, Sharla, sought damages for loss of

spousal consortium. Williams also made a claim on behalf of his children, Katie, Phillip Jr., and Sierra, for loss of parental consortium. The case was tried to a jury. The jury assigned fault 80% to Henning and 20% to Williams. Williams was awarded damages of $680,000, which were then reduced by 20%. The jury did not award any damages to Sharla or the children for loss of consortium. We will hereinafter refer to Sharla and the children collectively as the Williams.

The Williams filed a motion for a new trial based on inadequate damages. The district court denied the motion. Henning filed a motion for judgment notwithstanding the verdict based on insufficient evidence to support the verdict. Henning also sought a new trial based on alleged newly discovered evidence. The court denied this motion as well. The Williams appealed the court's ruling and Henning cross-appealed.

The issues presented are:

I. The Williams claim the trial court erred in refusing to grant her motion for a new trial based upon the jury's failure to award consortium damages.

II. Henning claims the trial court erred in failing to grant its motion for a directed verdict and for judgment notwithstanding the verdict on plaintiffs' negligence claims.

III. Henning claims the trial court erred by denying its motion for a new trial based on misconduct of plaintiffs and on newly discovered evidence.

I. The standard for judicial review on the issue raised by plaintiffs is whether or not the trial court abused its discretion in denying the motion for a new trial on their consortium claims. See Iowa R. App. P. 14(f)(3); Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978).

Whether damages are so inadequate as to warrant a new trial is usually left for the trial court to decide, and its discretion in granting or refusing to grant a new trial will not ordinarily be disturbed on appeal unless an abuse or discretion is shown. Kaiser v. Stathas, 263 N.W.2d 522, 524-525 (Iowa 1978). The question of whether damages in a particular case are inadequate turn on the particular facts of that case. Grodt v. Darling, 472 N.W.2d 845, 847 (Iowa App. 1991). If a reasonable jury could determine from the facts presented that the loss was insufficient to support a money award, the court has not abused its discretion in refusing to grant a new trial. Id.

The trial court stated:

> As the Court recalls the evidence it was well within the discretion of the jury not to award damages to the plaintiffs based on their claimed loss of consortium.

Looking at the record, there is evidence the jury could have found the relationship between Williams and his family

actually improved after the accident. The Williams argue that the evidence supporting the loss of consortium claims was uncontroverted. The jury as the trier of fact is always allowed to assess the credibility of the witnesses. It determined plaintiffs suffered no consortium damages. The jury's verdict is supported by the evidence.

The trial court did not abuse its discretion and is affirmed on the denial of a new trial on the issue of loss of consortium.

II. Our standard of review on this issue is for the correction of errors at law. See Iowa R. App. P. 4. In reviewing the propriety of a district court's ruling on a motion for judgment notwithstanding the verdict, we must view the evidence in the light most favorable to the party against whom the motion is directed. Konicek v. Loomis Brothers, Inc., 457 N.W.2d 614, 617 (Iowa 1990). We must determine whether there was sufficient evidence to generate a jury question. Id.

Henning contends there was not sufficient evidence to submit the issues of premises liability (Restatement (Second) of Torts §343A), liability for supplying chattels for the suppliers' business purposes (§392), or liability for failure to warn of a defective product (§388). Henning's contention is based upon its claim that the box used by Williams as a work platform was a known and obvious danger.

Our review of the evidence shows there was sufficient evidence to submit the issues of negligence to the jury. The box was provided by Henning. Henning knew of the intended purpose of the box. The box was defective for its intended purpose. The question of whether the box was a known and obvious danger to Williams was a question for the jury.

We conclude the trial court did not err in refusing to direct a verdict or to grant judgment notwithstanding the verdict. We affirm the trial court on this issue.

III. Henning also contends the trial court should have granted its motion for a new trial based on its claims of misconduct and newly discovered evidence. Motions for new trial on the basis of newly discovered evidence are not favored in the law and should be closely scrutinized and sparingly granted. State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979). This court will not interfere with the trial court's ruling on such a motion unless it is reasonably clear the court abused its discretion. Id.

Concerning Henning's claims of misconduct during discovery, we look to the case of Countryman v. McMains, 381 N.W.2d 638 (Iowa 1986). That case involved allegations of misconduct based on the failure of the defendant to submit to further discovery following the order to compel and a claim that the defendant's attorney failed to cooperate in scheduling further depositions. Id. at 640.

The court determined that such misconduct should have been dealt with through discovery sanctions, not a motion for a new trial. Id.

In the present case, Henning claims Williams engaged in misconduct because he stated in deposition he did not possess a certain document. Henning later learned Williams' counsel in a different lawsuit had custody of the document. However, there is no evidence Williams knew his other counsel had the document. Henning did not file a motion to compel and make any further inquiries about the document. We conclude that if there is misconduct here, it should have been dealt with through discovery sanctions, not a motion for new trial.

Henning also sought a new trial on the ground that this document was newly discovered evidence. There are four requirements which a movant must satisfy in order to obtain a new trial on the basis of newly discovered evidence: (1) the evidence was discovered following trial; (2) the evidence was such that it could not have been discovered before conclusion of the trial in the exercise of diligence; (3) the evidence must be material and not merely cumulative or impeaching; and (4) such evidence would probably change the result if a new trial were granted. Miller v. AMF Harley-Davidson Motor Co., Inc., 328 N.W.2d 348, 353 (Iowa App. 1982).

We find Henning has not sufficiently shown the evidence was material and not merely cumulative or that the evidence would probably change the result if a new trial were granted. We conclude the trial court did not abuse its discretion in denying Henning's motion for a new trial.

We affirm the trial court in all respects. Costs of this appeal should be assessed one-half to each party.

AFFIRMED.