IN THE COURT OF APPEALS OF IOWA

No. 2-1186 / 12-0434
Filed February 13, 2013

3140 L.L.C.,
Plaintiff-Appellant,

vs.

STATE CENTRAL FINANCIAL SERVICES, INC., d/b/a STATE CENTRAL INSURANCE,
Defendant-Appellee.

Appeal from the Iowa District Court for Lee County (South), John Linn, Judge.

The plaintiff appeals from the district court order vacating the verdict, setting aside the judgment, and granting the defendant's motion for a new trial. **AFFIRMED ON CONDITION AND CASE REMANDED.**

Curtis Dial of Law Office of Curtis Dial, Keokuk, for appellant.

Michael McDonough of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

3140 L.L.C. brought an action against its insurance company following water damage from a fire sprinkler in a building it owned. 3140 L.L.C. argued the insurance company was negligent or negligently represented that it needed to maintain a working sprinkler system. A jury awarded 3140 L.L.C. $351,784.58 in damages on its claims. The district court vacated the verdict, set aside judgment, and ordered a new trial.

On appeal, 3140 L.L.C. contends the insurance company waived any right to challenge the jury instructions by failing to object to them prior to trial or in its motion in arrest of judgment. 3140 L.L.C. also contends the jury's verdict was supported by substantial evidence. We find any alleged error in the jury instructions was not a proper basis to grant a new trial. We agree with the district court that the jury's verdict was excessive. We find a remittitur is appropriate. Accordingly, we conditionally affirm the trial court's grant of a new trial due to the award of excessive damages.

I. Background Facts and Proceedings.

In December 2004, 3140 L.L.C. purchased property in Keokuk that had been used as a nursing home. They paid $286,000.00 for the property.

In 2007, 3140 L.L.C. purchased an insurance policy on the property through State Central Insurance (State Central). The policy, issued by Mount Vernon Insurance Company (Mount Vernon), did not provide coverage for fire sprinkler leakage.

In November 2007, 3140 L.L.C. was advised as to the necessity of maintaining a fire sprinkler in its vacant property. In a letter dated November 26, 2007, State Central insurance agent Frank O'Connor wrote:

> In reviewing my letter of November 19th to you, I failed to indicate that the recommendations made by the Life Safety Inspector excused you from having fire extinguishers because the property was vacant, but they still want to have the sprinkler system main drain tested regularly to comply with federal regulations. The last test was in 2004, which would indicate that it has not been tested in recent times. This is an engineering requirement that is mandatory.

The Mount Vernon insurance policy was renewed on September 20, 2008. A letter issued on October 9, 2008, by O'Connor states:

> The basic form only provides coverage for fire, lightening, explosion, wind or hail, smoke, aircraft or vehicle, riot, vandalism, sprinkler leakage, sinkhole collapse and volcanic action all as defined and limited within the policy. In addition the policy contains several exclusions including earthquake and flood. Please read Form CP1010 carefully to understand the limitations and exclusions on the property side of the policy.

On December 23, 2008, the building owned by 3140 L.L.C. incurred damage after water pipes and fire sprinklers froze and broke. 3140 L.L.C. made a claim for damages with Mount Vernon but was denied because the policy did not provide coverage for damage due to sprinkler leakage

O'Connor sent 3140 L.L.C. a letter dated February 17, 2009, which informed the company that the insurance policy it had purchased on its property did not require the property to have an operational sprinkler system as a condition of coverage.

3140 L.L.C. filed a petition against State Central seeking to recover damages as a result of the water damage suffered at its property. Following a

partial grant of summary judgment, two claims went to trial: one count of negligence and one count of negligent misrepresentation stemming from State Central allegedly providing inaccurate information about maintaining a working sprinkler system. A jury reached a verdict in favor of 3140 L.L.C. in the amount of $351,784.58, but found 3140 L.L.C. was forty percent at fault. Reducing the total damages by forty percent, the district court entered judgment on behalf of 3140 L.L.C. in the amount of $211,071.74.

State Central moved for judgment notwithstanding the verdict and for a new trial. Following a hearing, the district court vacated the verdict, set aside the judgment entry, and granted a new trial. The court found the damages awarded by the jury "[were] excessive, [were] contrary to the instructions provided by the Court, and [were] lacking in evidentiary support." The court also determined that it erroneously instructed the jury. 3140 L.L.C. has timely appealed from this order.

II. Scope and Standard of Review.

The standard of review for rulings on a motion for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the court. *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). Where the motion and ruling are based on a discretionary ground, our review is for an abuse of discretion. *Id.* State Central argued it was entitled to a new trial because the damages awarded were "flagrantly excessive." We review rulings on a motion for new trial based on the claim a jury awarded excessive damages for an abuse of discretion. *Id.* An abuse of discretion will only be found where the court's

decision "is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree." *Id.*

III. Analysis.

We first address 3140 L.L.C.'s argument that State Central failed to preserve error on its claims relating to the jury instructions. In its motion for judgment notwithstanding the verdict and request for new trial, State Central argued it was entitled to a new trial "for several reasons," including the court's erroneous submission of jury instructions No. 16 and 17. However, it failed to lodge any objections to these instructions before making final argument to the jury. The district court agreed that instruction No. 17 was erroneous in stating State Central was negligent in providing inaccurate information that the insurance policy covered damages caused by leakage from the sprinkler system.

Iowa Rule of Civil Procedure 1.924 states that a party must make any objections to the submission of the proposed jury instructions before closing arguments are made to the jury. "No other grounds or objections shall be asserted thereafter, or considered on appeal." Iowa R. Civ. P. 1.924. State Central argues that, unlike this court, the district court could find the jury instructions were erroneous even without an objection because it has the inherent power to correct its own errors.

In *Olson v. Sumpter*, 728 N.W.2d 844, 847-48 (Iowa 2007), the district court granted the defendant's motion for new trial on the grounds it had failed to properly instruct the jury on the plaintiff's obligation to mitigate damages—an instruction the defendant had failed to object to prior to submitting the case to the

jury. Our supreme court found the district court erred in granting a new trial and rejected the defendant's effort to utilize a post-trial motion "to resurrect error that was waived by her failure to object before closing arguments to the sufficiency of the evidence to support the mitigation instruction." *Olson*, 728 N.W.2d at 849. We find the district court erred in granting a new trial based on instruction No. 17 because State Central failed to lodge a timely objection to this instruction.

The district court also, sua sponte, determined that instruction No. 29 was inadequate because it lacked an explanation or definition of "fair market value." The court noted that State Central did not object to the instruction, but that it initially offered a different instruction that included a definition of "fair market value." The court concluded that it "could have prepared a better instruction by including a definition of fair market value." However, the court made this finding after determining the jury's verdict was contrary to the instruction. Our only question on appeal is whether the jury's verdict conformed with the evidence and the law as instructed.

Instruction No. 29 states:

> If you find that Plaintiff is entitled to damages, you will consider either "diminution in value" or "restoration."
>
> Damage for diminution in value is the difference in the value of the property immediately before the injury and its value immediately after the injury.
>
> Damage for restoration is the reasonable cost of repairing the property by restoring it to the condition it was immediately before the injury plus the reasonable value of the use of the property for the time reasonably required to complete its repair.
>
> If the cost of restoration is greater than the diminution in value, the Plaintiff is limited to recovering only the amount of damages for diminution in value.
>
> There is an exception to this limitation if:

> 1. The cost of restoration is not unreasonably greater than the diminution in value; and
> 2. The Plaintiff retains the property because it is personal to the Plaintiff, and the property will actually be restored to its original condition.
>
> If these propositions are proved by the Plaintiff, damages may be awarded for restoration even if it is greater than the amount of the diminution in value. If these propositions are not proved by the Plaintiff, then the damage award is limited to the amount of diminution in value.

The district court found the substantial evidence presented at trial was that diminution would result in damages between $0 and $115,000, whereas "the cost of repairing the property by restoring it would amount to $351,784." Because the jury found the total amount of 3140 L.L.C.'s damages was $351,784.58, the court concluded the jury chose to use the cost of restoration, which was contrary to the instruction because the cost of restoration was more than the diminution in value.

We agree with the district court that the exception set forth in instruction No. 29 was not followed. Therefore, the question for this court on appeal is whether substantial evidence shows the cost of diminution was less than the cost of restoration and, if so, whether there was substantial evidence to support the jury's verdict of $351,784.58.

Fixing the amount of damages is a function for the jury; therefore, this court is loath to interfere with a jury's verdict. *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007). When reviewing an allegation that a jury verdict is excessive, the evidence is viewed in the light most favorable to the plaintiff. *Id.* We put the most emphasis on whether there is evidentiary support for the verdict. *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). This court may not set aside a verdict merely

because it would have reached a different conclusion. *Triplett*, 742 N.W.2d at 602. A jury award must be reduced or set aside only if it is (1) flagrantly excessive or inadequate; (2) so out of reason as to shock the conscious; (3) a result of passion, prejudice, or ulterior motive; or (4) lacking evidentiary support. *Id.* Where a verdict meets this standard or fails to do substantial justice between the parties, the court must grant a new trial or enter a remittitur. *Id.* at 602-03.

At trial, Ricky Greenfield, a member of 3140 L.L.C. testified that he believed the fair market value of the property prior to the damage from the fire sprinkler to be $590,000. Dan Glasgow bid to repair the damage at a cost of $347,500. The building was sold for $475,000, an amount the plaintiff had been offered on November 13, 2008, prior to the fire sprinkler damage.

In 3140 L.L.C.'s closing argument, its attorney told the jury that the amount of damages attributable to the fire sprinkler leak would be between the difference in value of the building before the damage ($590,000) and the amount it sold for after the damage ($475,000)—a difference of $115,000—and the cost of restoration, which Greenfield testified was $347,500. The jury found 3140 L.L.C. suffered $351,784.58 in damages, an amount in keeping with the cost of restoration. However, this is contrary to instruction No. 29, which required the jury to award damages for the diminution of value if that amount was less than the cost of restoration.

The undisputed evidence shows the diminution in value would be between the fair market value of the building prior to the damage and what it was sold for after the damage. The evidence places the fair market value of the building

before the damage at either $475,000—the November 12, 2008 offer price—or Greenfield's estimate of $590,000. The difference then would be either $0 or $115,000, depending on which figure the jury chose.

An award of damages between $0 and $115,000 is supported by the evidence. The jury's verdict of $351,784.58 is not supported by the evidence or the law. Where a verdict is the result of passion and prejudice, a new trial is warranted. *WSH Props.*, 761 N.W.2d at 49. However, where in the absence of passion and prejudice the verdict is merely excessive because it is not supported by sufficient evidence, justice may be effectuated by ordering a remittitur of the excess as a condition for avoiding a new trial. *Id.* at 49-50.

Exercising our inherent power to order a remittitur as a condition to avoid a new trial, we hold a remittitur is appropriate. *See id.* at 52. The evidence supports an award of damages in the amount of $115,000 less forty percent, or $69,000. We conditionally affirm the trial court's grant of a new trial for excessive damages. If, within fifteen days of the issuance of procedendo, the plaintiff files with the clerk of the district court a remittitur of all damages in excess of $69,000, the judgment shall be reversed. If the plaintiff does not file a remittitur, the district court is affirmed and a new trial is granted. *See id.* (providing for similar disposition in case imposing remittitur on appeal).

AFFIRMED ON CONDITION AND CASE REMANDED.