STATE OF MICHIGAN

COURT OF APPEALS

MARIO MORRI,

Plaintiff-Appellant,

v

DESIGN/BUILD ASSOCIATES, INC.,

Defendant-Appellee,

and

WALDENBOOK COMPANY, INC.,

Defendant.

UNPUBLISHED

No. 192209
Oakland Circuit Court
LC No. 91-419162-NO

Before: Markey, P.J., and Jansen and White, JJ.

White, J. (concurring in part and dissenting in part).

Having in mind the jury's answers to the special verdict questions, I conclude that any trial court errors concerning Offer's testimony or the jury instructions relating to defendant's liability did not affect the verdict, and provide no grounds for reversal.

I agree that the motion for JNOV was properly denied, and that plaintiff failed to preserve any claim of error in the giving of the comparative negligence instruction.

I also agree that the jury's verdict cannot be impeached by the foreperson's statements after trial, and that these statements must be disregarded in determining whether the verdict of 70% comparative negligence was against the great weight of the evidence.

I conclude, however, that based on an in-depth analysis of the record, *Arrington v Detroit Osteopathic Hospital*, 196 Mich App 544, 560; 493 NW2d 492 (1992), and according substantial deference to the trial court, *id.*, the trial court abused its discretion in failing to grant a new trial on the ground that the verdict of 70% comparative negligence was against the great weight of the evidence.

Plaintiff was a masonry laborer whose duty was to assist the masons by setting up the walls, bringing bricks and block to the masons, making mortar, and setting up scaffolding. He also braced the walls when instructed to by the boss or foreman. While plaintiff testified to having fifteen years' experience as a masonry laborer, he testified that he never worked as a mason, and that he never received any training in MIOSHA rules or other regulations regarding when to brace walls, or training regarding working around walls in high winds. The evidence was uncontradicted that plaintiff was injured when the wall fell on him as he was preparing to brace it after being instructed to do so by his foreman. There was no testimony that it was his responsibility as a laborer to brace the wall at some earlier time, or that he appreciated the danger presented in bracing it when he did. Defendant's foreman testified that plaintiff did nothing to cause the wall to fall on him, and that he was not a reckless or careless worker at the job site. Assuming the jury concluded that notwithstanding his lack of training and his position as a laborer, plaintiff's experience should have caused him to appreciate the danger and either insist on his own that the wall be braced earlier, or refuse to brace the wall when instructed to do so by his boss given the windy conditions, the apportionment of 70% fault to him based on this negligence was against the overwhelming weight of the evidence. The trial court abused its discretion in failing to grant a new trial on this basis. I would reverse and remand for a new trial.

/s/ Helene N. White