STATE OF MICHIGAN

COURT OF APPEALS

GARY A. MILLER,

Plaintiff-Appellee,

v

LAKE STATES INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 27, 1999

No. 199486
Ogemaw Circuit Court
LC No. 92-001893-CK

Before: Markey, P.J., and Bandstra and Markman, JJ.

MARKEY, P.J. (dissenting)

I would affirm the trial court's denial of defendant's motion for a new trial; consequently, I dissent.

Plaintiff filed a breach of contract action against defendant after defendant denied plaintiff's fire insurance claim on his pizzeria business because the fire resulted from arson. Defendant claimed that plaintiff was responsible for the fire. The jury determined that defendant failed to meet its burden of proof on the arson claim and that plaintiff had proven his case; thus, it rendered a verdict for plaintiff equaling $161,675 in damages. Shortly after defendant appealed to this Court, the prosecutor's office charged plaintiff and several others with arson and fraud based on Vernon Roach's confession that he started the fire at plaintiff's request. The charges against plaintiff were eventually dismissed. This Court remanded to the trial court to hear defendant's motion for relief from judgment,[1] which the trial court denied. Defendant again appealed to this Court, and we remanded a second time for the trial court to consider defendant's motion for a new trial. After the hearing, the trial court denied defendant's motion finding that a different result was not likely.

The majority agrees with defendant's argument that the trial court abused its discretion by refusing to grant defendant a new trial based on newly discovered evidence that plaintiff conspired to burn his business. I disagree. A trial court may grant relief from judgment on the grounds of "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)." MCR 2.612(C)(1)(b). To merit a new trial, the moving party must show

that the evidence itself, not merely its materiality, (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994); *Nickel v Nickel*, 29 Mich App 25, 31; 185 NW2d 200 (1970).

Although I too agree that the trial court properly found that the evidence was newly discovered and could not have been discovered with reasonable diligence in time for trial and that the new evidence was not cumulative, neither did the trial court did not abuse its discretion in determining that the newly discovered evidence probably would not have resulted in a different verdict. *People v Davis*, 199 Mich App 502, 515-516; 503 NW2d 457 (1993). Indeed, a strict test is used when ruling on motions for a new trial to ensure that parties use "care, diligence and vigilance in securing and presenting evidence." *Murchie v Standard Oil Co*, 355 Mich 550, 561; 94 NW2d 799 (1959).

According to the trial court, defendant could not satisfy the third element because the allegedly newly discovered evidence contradicted defendant's theory at trial, and plaintiff was not successfully prosecuted in a criminal trial for the arson:

> In the trial of this matter there was strong evidence by eyewitness testimony, that at the time and place of fire that the Plaintiff was at his place of business and in the location where an expert said the fire started and incendiary materials were located on the scene and there was previous evidence of fires which were arguably questionable and faced with this strong defense case the jury verdict was made in favor of Plaintiff.
>
> In addition the Court heard testimony and the jury heard testimony that the business was the Plaintiff's only source of livelihood and there was generally undisputed testimony that Plaintiff's business was successful and that it was a reasonably sound livelihood made available to Plaintiff. There was reasonably strong testimony that it would be inconsistent for Plaintiff to have torched his building. Presumably the trier of fact in the second trial could/would hear testimony from the so called arson conspirators who were not prosecuted and in addition the Plaintiff who was not criminally prosecuted and there would be certainly an effort made to nullify the testimony of the author of the newly discovered evidence, Mr. Roach. It all boils down to the ultimate question – is a different result "probable."
>
> The court is satisfied that a different result is NOT probable for the principal reason that Defendant's present case will be absolutely contradictory to the first case and therefore does not leave the Court in a position to believe a different result, i.e., different jury finding can be said to be probable.
>
> Mr. Miller was not criminally prosecuted. Four people were charged two of whom plead and against two others charges were dismissed. Obviously the two exonerated Defendants can be expected to be of the position that no conspiracy to burn occurred! [Emphasis added.]

Unfortunately, and surprisingly, the majority opinion in this matter appears to be a thinly disguised, indeed, unabashed de novo review and "rehearing" of defendant's motion for new trial. The majority reviews, analyses, and discusses both the proffered and admitted evidence and simply reaches a contrary conclusion than that of the trial court. Then, when contemplating the high hurdle of holding that the trial judge abused his discretion, the majority constrains to conclude that in evaluating the third factor, the trial judge applied an incorrect standard, and thus abused his discretion, thereby justifying their impermissible foray into trial court territory.

I agree with the trial court's reasoning and strongly disagree with the majority's contention that the trial court did not apply the correct standard. Merely reading the trial court's opinion in toto evidences that the trial court appropriately analyzed the evidence adduced at trial, the proffered proofs, the credibility of witnesses and the probability of a different result. The judge, like the jurors, heard the entire trial and is clearly in a much better position than this Court to determine this issue. At trial, defendant presented eyewitness testimony placing plaintiff in the garage behind the restaurant, which is where the fire began.

The neighbor, who testified unequivocally that plaintiff was the person he saw inside the storage garage, further said it was not unusual to see plaintiff in the garage at that time of night but that it was unusual for the lights in the garage to remain on. Moreover, the witness testified that he had seen plaintiff's truck parked at the restaurant sometime before the fire.

A sheriff's deputy testified that at approximately 4:36 he was alerted to a fire at that location. When he arrived, he observed a small fire coming from the northeast corner of the garage. The deputy also testified that the plaintiff's brother arrived approximately five minutes after he did and that plaintiff arrived "a couple of minutes after his brother." In other words, it appears that plaintiff was already at the scene when the fire was still confined to just part of the garage, i.e., it had not yet come anywhere near to burning the restaurant.

The fire chief testified that the call for the fire came in at 4:36 a.m. and that they arrived at the fire nine minutes later. He testified at the time he arrived, the garage itself was fully engulfed, and the fire was beginning to spread to the restaurant. He agreed that sheriff deputies and various other people, possibly even plaintiff, were already at the scene by the time the fire engines arrived.

Plaintiff himself testified that the restaurant closed at 11:00 p.m. and that at about 12:30 a.m. he met up with his brother and another man, that they went into West Branch to buy food for the restaurant, returned to the restaurant to leave the food there, and then went to plaintiff's house, approximately a mile and a half from the restaurant. There they watched videos most of the night. When plaintiff's friend and brother left, they returned almost immediately. On their way home they drove by the restaurant and saw the garage on fire. They came back to tell plaintiff, who then followed them back to the scene. Plaintiff's testimony was corroborated both by his brother and by the other friend. Most importantly, their time frames are also substantiated by the deputy sheriff's testimony.

There is also no question but that after the insurance company denied coverage and before trial plaintiff rebuilt the restaurant on his own and resumed business. Defendants had contended that plaintiff

wanted the business burned because the business was unprofitable. Plaintiff countered this testimony with his own that the restaurant business had been his sole source of income for a long time, that it continued to be, that he had the business immediately rebuilt, and that the restaurant that burned was already quite new. Certainly, these facts rendered defendants allegations as to motive for arson unbelievable. These facts would not change upon retrial.

Defendant also had two expert witnesses who testified. Both of them opined that the fire had begun inside the garage storage area, which was apparently supported by the eye witness who testified to seeing plaintiff inside the garage sometime before the fire. Each expert believed accelerants were used despite the fact that they could not locate scientific evidence of their use. Plaintiff had no expert testimony. Nonetheless, despite this evidence, the jury found for plaintiff and awarded him all of his damages.

Later, five individuals, including plaintiff, were charged with setting the fire. Eventually, two of them, one of whom was Vernon Roach, admitted to starting the fire and plead guilty to preparation to burn real property. Charges against plaintiff and the other two were dropped.

According to the motion for relief from judgment hearing transcript, Roach and three others, including the two who had the charges against them completely dropped, were the ones who started the fire of the *garage*. Roach testified that he had been offered $1500 to start the fire and that after the fire Gary Miller had called him to ask him "[j]ust about when, if I did it." Additionally, Roach testified that that was the only thing Miller asked him. Obviously, if plaintiff was there observing the fire at the time it was burning, he would have no reason to call Roach to see if the job had been done yet!

Mr. Roach's allegations that plaintiff hired him to set fire to plaintiff's business presents a very different defense theory that is indeed mutually exclusive to much of defendant's proofs at trial, i.e., that plaintiff was not at the scene before the fire but that Mr. Roach and others set the fire at plaintiff's request, then later plaintiff called to determine if the job were done. In other words, although defendant may have a new witness, it loses or damages the credibility of virtually every other witness, including experts, it called at trial. Also, Mr. Roach, and another individual, *not plaintiff*, was successfully prosecuted and pleaded to a lesser offense relating to the arson. That evidence is devastating to defendant's theory. Moreover, Roach's testimony is highly suspect.[2] So, on retrial, defendant's proofs would be vastly different, but the testimony would not affect the most critical factor in an arson defense: motive. Certainly, the trial court did not clearly abuse its discretion when, after listening to the entire trial and reviewing Roach's proffered testimony both for substance and credibility, it determined that on balance a different result was not probable. Obviously, the evidence defendant presented against plaintiff at trial did not convince the jury, and Mr. Roach's testimony, absent corroboration that is not likely to be forthcoming from defendant or others, would be insufficient to render a different result probable on retrial. *Parlove, supra*.

I respectfully submit that it is the majority which invokes the wrong standard of "in our judgment," when instead it should be looking at whether an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the ruling. *Cleary*

v The Turning Point, 203 Mich App 208, 210; 512 NW2d 9 (1994). Clearly, more than adequate justification exists.

Accordingly, I believe that the trial court did not abuse its discretion in denying defendant's motion for a new trial or for relief from the judgment in favor of plaintiff and would affirm.

/s/ Jane E. Markey

[1] Although defendant's motion sought relief from judgment, the court's order stated that it was denying a motion for new trial.

[2] A review the partial preliminary examination transcript attached to defendant's appellate brief reveals only that Roach pleaded guilty to attempted preparation to burn and would serve two years' incarceration for this offense. Neither party offers evidence to contradict Roach's admission to this guilty plea.