IN THE COURT OF APPEALS OF IOWA

No. 3-029 / 12-0984
Filed March 13, 2013

STATE OF IOWA,
Plaintiff-Appellant,

vs.

HENRY W. VAN WEELDEN,
Defendant-Appellee.

Appeal from the Iowa District Court for Mahaska County, Paul D. Miller, Judge.

The State appeals from the district court's order granting Henry Van Weelden a new trial. **AFFIRMED.**

Thomas J. Miller, Attorney General, Robert H. Sand and Becky S. Goettsch, Assistant Attorneys General, for appellant.

Matthew B. Moore and Dustin D. Hite of Heslinga, Dixon, Moore & Hite, Oskaloosa, for appellee.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

The State appeals from the district court's order granting Henry Van Weelden a new trial based upon newly-discovered evidence. Upon our review, we find the district court properly exercised its discretion in granting Van Weelden's motion for new trial. We affirm.

I. Background Facts and Proceedings

A Mahaska County jury convicted county Supervisor Henry Van Weelden of theft in the first degree, felonious misconduct in office, and tampering with records for allegedly making false assertions on official letterhead in order to add his wife to the county's health insurance plan. The following facts can be gleaned from the record.

Van Weelden was elected to the Mahaska County Board of Supervisors in 2000. The county offers a self-funded health plan to its employees. The plan was administered by a third party administrator, Auxiant.[1] There are no underwriting requirements or pre-existing condition limitations for new employees and their families who timely enroll in the health plan. Late enrollees are subject to medical underwriting and waiting periods. Van Weelden's service as county supervisor began on January 1, 2001, and at that time, he enrolled himself and his wife, Bonnie, in the health plan.

In April 2004, Van Weelden cancelled Bonnie's coverage. She was then provided coverage under her employer's plan. In June 2008, Van Weelden submitted an employee change form to add Bonnie back onto the health plan.

[1] Bearance Management Group replaced Auxiant as administrator of the county's health plan in July 2009.

Upon review of the application as well as "additional medical records [it] received as part of the review process," Auxiant declined the application "based upon underwriting guidelines."

Van Weelden was re-elected in November 2008. At that time, he contacted Thomas O'Brien of Auxiant to determine whether Bonnie could be enrolled onto the health plan. O'Brien responded via email, setting forth four options for the county to either extend or decline coverage to Bonnie, and stating in relevant part, "We can stay with the administration of the current language (which would mean the individual would not be covered), or the county can give us instruction to make an administrative exception in this case."[2] In essence, two of the three county supervisors would have to agree to add Bonnie to the health plan "on an exception basis" so that no medical underwriting would be required.

The board of supervisors met on January 5, 2009. After the meeting, a discussion took place between Van Weelden and Supervisor Lawrence Rouw regarding Bonnie being added to the health plan without riders since Van Weelden had just been re-elected for a new term beginning January 1, 2009.[3] County engineer Jerome Nussbaum and county emergency management director Jamey Robinson attended the meeting and heard Rouw tell Van Weelden that "as far as he was concerned, being re-elected was the same as being newly-elected." Rouw later testified, however, that he did not tell Van

[2] The Mahaska County auditor, Kay Swanson, was copied on the email.
[3] This topic of conversation was not included in the minutes of the meeting.

Weelden re-elected was the same as newly-elected and, to the contrary, he told Van Weelden to "[f]ollow the 12 month [waiting period]."[4]

On January 13, 2009, Van Weelden called O'Brien and stated, "[I]t is time to get [Bonnie] on the plan. How do we do it?" O'Brien reviewed the options he had previously provided Van Weelden, but Van Weelden responded, "[H]ow do we just get it done?" O'Brien informed Van Weelden to send an instruction from the board of supervisors in order to add Bonnie to the plan.

A few days later, Van Weelden submitted an employee change form to O'Brien to enroll Bonnie onto the health plan. With the change form, Van Weelden included a letter dated January 16, 2009, composed on Mahaska County Board of Supervisors letterhead, stating:

> Tom [O'Brien],
>
> The board of supervisors is in agreement Bonnie Van Weelden should be place[d] on the county insurance starting February 1. The basis for this is that newly elected officials are automatically enrolled along with their family. Since I was just re-elected that should cover us if anyone else has a problem with this. Also there should not be any riders with her placement on the insurance.
>
> Thank You,
> /s/ Henry W. (Willie) Van Weelden

The board of supervisors was considered in agreement if two supervisors (the majority) were in agreement.

Auxiant enrolled Bonnie in the health plan. Auxiant subsequently determined it needed to submit "something official" to American International Group, the county's stop loss carrier, recording the basis for the change—either

[4] Rouw further testified while he and Van Weelden were in the supervisors' office a few days prior, Van Weelden had mentioned he wanted to add Bonnie to the health plan; according to Rouw, he told Van Weelden, "If you want to put her on the plan, she'll have to go on the 12-month waiting period."

a signed addendum or a formal approval in minutes from a board meeting. In a March 16, 2009 letter to the county, Auxiant enclosed an addendum to the health plan for the board to sign and return. And in an April 3, 2009 letter to the county, Auxiant enclosed a proposal detailing the four options the county could take on the enrollment request, the same four options O'Brien had provided Van Weelden in November 2008. The issue came before the board at its April 6, 2009 meeting, but the minutes indicate only that "[t]he matter of the health insurance addendum was tabled." No further action was taken by the board on the issue.

Supervisors Rouw and Greg Gordy alleged they became aware in December 2009 of Van Weelden's January 16 letter to Auxiant requesting Bonnie be enrolled in the health plan. Meanwhile, relations between Van Weelden and Supervisors Rouw and Greg Gordy had deteriorated. Rouw and Gordy claimed they had not agreed to Bonnie's enrollment and brought Van Weelden's letter to the County Attorney, who referred the matter to the Attorney General's Office.

In April 2011, the State filed a trial information charging Van Weelden with theft in the first degree, misconduct in office, and tampering with records.[5] Trial began in February 2012. The crux of Van Weelden's defense was that the majority of the county supervisors (Supervisor Rouw and himself) were in

[5] Our appellate rules require the appellant to prepare and file an appendix that contains "[r]elevant portions of the pleadings, transcript, exhibits, instructions, findings, conclusions, and opinion." Iowa. R. App. P. 6.905(2)(b)(3). Here, the appendix did not contain the trial information listing the crimes for which Van Weelden was charged, the jury instructions setting forth the elements the State had to prove, or the jury's verdict forms. In light of the issue raised on appeal, we consider those documents to be relevant.

agreement that re-elected was synonymous with newly-elected for purposes of enrollment onto the county health plan with no medical underwriting at the time he requested Bonnie be enrolled in January 2009. Following the five-day trial, a Mahaska County jury convicted Van Weelden as charged.

In March 2012, Van Weelden filed a motion for new trial based in part on newly discovered "overwhelmingly exculpatory" evidence, namely: a DVD video recording of the April 6, 2009 board of supervisors meeting in which an eight minute discussion ensued between the supervisors regarding Bonnie's enrollment onto the health plan.[6] During the discussion, Supervisor Rouw stated, in direct contravention of his trial testimony, it was his opinion "a re-elected official would be the same as a newly elected official." In addition, the conversation acknowledged Van Weelden's communication with Auxiant and Louw for the prior three months [since January] regarding Bonnie's enrollment. The State filed a resistance to Van Weelden's motion. Following a hearing, the district court set aside the jury verdict and granted Van Weelden's motion for new trial. The State now appeals.

II. Scope and Standard of Review

A district court is given "unusually broad discretion" in ruling on a motion for new trial that is on the basis of newly-discovered evidence. *State v*. *Miles*, 490 N.W.2d 798, 799 (Iowa 1992) (citation omitted). "This broad discretion is particularly appropriate. It is important to distinguish between the unavoidable, legitimate claims and those proposed in desperation by a disappointed litigant.

[6] It would have been helpful to have had this portion of the DVD referenced by a time stamp. With no such reference, we had to wade through thirty-three minutes of the video before coming upon the pertinent discussion.

From its closer vantage point the presiding trial court has a clearer view of this crucial question, and we generally yield to its determination." *Id.*

A trial court's ruling will not be disturbed unless the evidence clearly shows the court has abused its discretion. *Id.* We will find an abuse of discretion if the trial court clearly exercised its discretion on untenable grounds or acted unreasonably. *Id.* This court is slower to interfere with a grant of a new trial than with its denial. Iowa R. App. P. 6.904(3)(d).

III. Merits

In order for Van Weelden to prevail on his motion for new trial based on a claim of newly-discovered evidence, he must show the evidence (1) was discovered after the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in the case and not merely cumulative, and (4) probably would have changed the result of the trial.[7] *Harrington v*. *State*, 659 N.W.2d 509, 516 (Iowa 2003). "Newly discovered evidence" sufficient to merit a new trial is evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time. *Benson v. Richardson*, 537 N.W.2d 748, 762–63 (Iowa 1995).

The State raises several claims to support its contention that the district court's ruling granting Van Weelden's motion for new trial is "clearly erroneous." Specifically, the State argues the motion should have been denied because "the DVD could have been discovered prior to trial through due diligence," "the DVD

[7] The State contends Van Weelden's motion set forth "outdated dicta" regarding the fourth element required in order to prevail on a motion for new trial. We have reviewed this contention and find it to be without merit. Van Weelden's motion for new trial provided the correct standard and the court used the correct standard in determining whether the motion should be granted.

provides only cumulative evidence," and admission of the DVD "would not change the result of trial."

A. *Due Diligence*. The evidence at issue here is a DVD recording of the April 6, 2009 board of supervisors meeting. Prior to trial, Van Weelden was aware the Communication Research Institute (CRI) recorded "some" of the board meetings. Van Weelden's attorney contacted the Oskaloosa Public Library, which archives CRI recordings of board meetings, but learned only the recordings made after May 2009 were available there. Van Weelden then made arrangements directly with CRI to personally review the pre-May 2009 recordings "pertinent to the timeframes involved." In the recordings he reviewed, Van Weelden did not find anything that supported his recollection that Rouw had agreed "re-elected" was the same as "newly elected" and that Rouw and Gordy had knowledge about Bonnie being added back onto the county's health plan.

After trial, Van Weelden's attorney contacted CRI and inquired whether a recording existed for the April 6, 2009 meeting. Initially, CRI could not locate the recording. But after additional investigation, CRI located the recording for the April 6, 2009 meeting. The DVD had been mislabeled. It was incorrectly marked with the date of "April 6, 2008." The discovery of the April 6, 2009 board meeting DVD recording, which Van Weelden considered replete with exculpatory evidence against the State's two main witnesses (Supervisors Rouw and Gordy), prompted him to file the motion for new trial.

In determining whether Van Weelden acted with due diligence in locating the evidence at issue, the district court found:

> I have considered Defendant's Exhibits B and C. Defendant's Exhibit C, the Affidavit of Defendant, Henry Van Weelden, establishes that Defendant was aware that some of the supervisors meetings were videotaped by Communications Research Institute (CRI), and that he unsuccessfully attempted, prior to trial, to locate a DVD of the April 6, 2009 meeting.
>
> Defendant's Exhibit B, the Affidavit of Sam Looney, establishes that he is employed by CRI, which videos Mahaska County Board of Supervisors meetings. Following trial in this case, he was contacted by Defendant's attorney Matt Moore and asked to search the archives for the April 6, 2009 Mahaska County Board of Supervisors meeting. Looney could not locate such a recording at first, but then found that the DVD which recorded the April 6, 2009 meeting had been mismarked as the April 6, 2008 meeting.
>
> I have considered the cases cited by both parties on the due diligence issue. The State contends that Defendant could have discovered this DVD with due diligence. I agree with Defendant that his attempt to locate the DVD and the subsequent circumstances establishing the DVD was mislabeled satisfies the due diligence requirement.

The State cites to *State v*. *Compiano*, 154 N.W.2d 845, 850 (Iowa 1967), and alleges Van Weelden's "pre-trial preparation was not diligent because he failed to 'exhaust the probable sources of information concerning his case.'" As the court stated in *Compiano*:

> The showing of diligence required is that a reasonable effort was made. The applicant is not called upon to prove he sought evidence where he had no reason to apprehend any existed. He must exhaust the probable sources of information concerning his case; He must use that of which he knows, and He must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed.

154 N.W.2d at 850 (quotations omitted).

In order to find Van Weelden satisfied the due diligence requirement, the district court relied in large part on the fact the DVD was mislabeled. The State claims the district court's reliance on the mislabeling was "clearly erroneous" and alleges only if Van Weelden had "inquired with [CRI] *prior* to trial, and had [CRI]

reported there was no such tape because he failed to notice the mislabeling *prior* to trial, [then] the mislabeling would be relevant."

The foundation of the State's argument is its allegation that Van Weelden made no pretrial inquiry about the recording. The State is mistaken. Van Weelden *did* review CRI's DVDs for the pertinent timeframe prior to trial. He failed to discover the April 6, 2009 recording not because he did not look for it but because it was mismarked as a 2008 recording. He cannot be faulted for failing to discover the recording; even CRI could not locate the DVD upon its initial investigation. Likewise, Van Weelden cannot be faulted for going no further with his investigation at that time in light of his knowledge that not all meetings were recorded. Under these facts and circumstances, we find Van Weelden exhausted the probable sources of information concerning his case and has presented a convincing reason why this evidence was not discovered prior to trial. We affirm the district court's finding Van Weelden acted with due diligence in attempting to locate the evidence at issue.

B. *Cumulative Evidence*. The State argues the DVD "provides only cumulative evidence." Specifically, the State claims the testimony from county engineer Nussbaum and county emergency management director Robinson established Supervisor Rouw agreed re-elected equaled newly-elected,[8] and the testimony from county auditor Kay Swanson established that insurance for Bonnie was discussed in April 2009. As the State contends, "It is unreasonable to contend that proving something for the third time is not cumulative."

[8] This is contrary to the rather dismissive treatment the prosecutor gave the testimony during closing arguments.

On this issue, the district court determined:

> The State contends that the video recorded board of supervisors meeting is merely impeachment and/or cumulative evidence, which does not qualify as newly discovered evidence for purposes of granting a new trial. . . .
>
> Supervisor Rouw's statement at the April 6, 2009 board of supervisors meeting that re-elected official would be the same as newly-elected official for purposes of adding dependents to the health care policy directly contradicts the many statements he made at trial to the jury to the opposite effect . . . . Rouw's trial testimony was not a one-time, casual comment on this issue but was the focus of his testimony.
>
> The DVD also establishes that there had been ongoing discussion by the supervisors for the past two to three months concerning the addition of Bonnie Van Weelden to the county's health insurance coverage, including a meeting on Friday, April 3, 2009, between Tom O'Brien, the administrator of the county's health plan, and supervisors Gordy and Rouw.
>
> While Gordy's statements recorded on the DVD may be considered impeaching, those statements and the other information contained on the DVD are clearly material, in that the DVD corroborates Defendant's defense to those charges.

"Ordinarily, on motions for new trials based on a claim of newly discovered evidence, one convicted of a crime should not be granted a new trial unless the trial court is satisfied that the testimony of a material witness was false or mistaken, and unless a jury might reach a different conclusion without such testimony." *Compiano*, 154 N.W.2d at 849. Here, as the district court noted, the statements made by Supervisor Rouw at the April 2009 board meeting "directly contradict[ed] the many statements he made at trial to the jury to the opposite effect."

Van Weelden's defense strategy relied on his assertion that Rouw agreed with Van Weelden that re-elected was synonymous with newly-elected, an agreement Rouw vehemently denied at trial. Moreover, as the district court noted, "Rouw's trial testimony was not a one-time, casual comment on this issue

but was the focus of his testimony." Under these facts, the impact of Rouw's testimony to Van Weelden's defense was significant.

Although the recording may be cumulative in content as it confirms the testimony of Van Weelden, Nussbaum and Robinson, it is certainly not cumulative in effect. The recording allows one to actually see and hear Rouw stating, "In my opinion, re-elected official *would be the same* as a newly-elected," in direct contravention to his trial testimony. Certainly viewing the recording of Rouw would have a much greater visceral impact on a juror than hearing testimony from just another impeaching witness whom the jury could choose to believe or not.

The State further alleges the DVD is cumulative to the testimony of auditor Swanson concerning the "Health Care Addendum" on the April 6, 2009 board meeting agenda, which Swanson testified referred to the addendum for Bonnie's enrollment to the health plan.[9] We disagree. In this regard, the DVD adds broader evidence to Van Weelden's defense, including discussion of a meeting with O'Brien of Auxiant on April 3, 2009 specifically regarding Bonnie's insurance coverage as well as acknowledgment of ongoing discussion between the supervisors for several months prior,[10] during the time period Van Weelden indicated the supervisors were "in agreement" Bonnie should be enrolled in the health plan. For these reasons, we agree with the district court this evidence was not merely impeaching or cumulative.

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[9] As opposed to Supervisor Rouw's testimony that he did not recall the issue being placed on the agenda or minutes for a formal vote or discussion.

[10] As opposed to Supervisor Rouw's testimony that Van Weelden had "mentioned" wanting to add Bonnie to the health plan in January 2009.

C. *Change the Result of Trial*. The State argues the admission of the DVD "would not change the result of trial because the State conceded the issue in closing and relied on the abundance of other evidence of defendant's guilt." At the outset, we do not find, as the State alleges, the prosecutor "conceded" that re-elected was the same as newly-elected in closing argument. The relevant portion of the State's closing argument on this issue provides:

> PROSECUTOR: [Van Weelden]'s also told by Rouw twice that he needs to follow the plan. Okay. Rouw doesn't know at this point that [Van Weelden]'s even been talking to Tom O'Brien. He's not privy to those conversations and shouldn't be. He doesn't know that. You have to follow the plan. And Rouw thought, well, she has—I think there's a waiting period. But everybody is telling Van Weelden she's a late entrant.
>
> Now, let's assume that there was discussion, as you heard from the engineer and the EMS guy, Well, I was there, and there was discussion about newly elected. Mr. Rouw says, I—I did not say that. I don't recall that. Who knows? The engineer doesn't remember the EMS guy even being there. It goes way back.
>
> The point of the matter is even if Rouw said, Well, that is a good argument. You've got to follow the plan. And what's in Van Weelden's head is he's talked to the expert, he's talked to Tom O'Brien, he knows what he needs to do. And he knows that just having an informal conversation with Rouw is not good enough.

We further disagree with the State that the record contains an "abundance of evidence of Defendant's guilty knowledge." To the contrary, we find the contents of the April 6, 2009 board meeting were critical to Van Weelden's defense. In regard to whether the DVD "would probably change the result of trial," the district court noted:

> The State's case on all three counts centered on when the other two supervisors (Gordy and Rouw) became aware that Defendant sought to place his wife on the county health insurance plan and whether at least one of the two supervisors agreed to her placement on the plan.

> I have closely reviewed the DVD of the April 6, 2009 Mahaska County Board of Supervisors meeting. This video clearly establishes that:
>
> (a) There had been ongoing discussions by the supervisors for the past two or three months concerning the addition of Bonnie Van Weelden to the county's health insurance coverage;
>
> (b) Gordy and Rouw had met with Tom O'Brien, the county's health insurance administrator, on Friday, April 3, 2009, to discuss this issue;
>
> (c) On the DVD Rouw unequivocally stated that "In my opinion, re-elected official would be the same as newly-elected, because your job is gone if not re-elected";
>
> In his trial testimony Rouw also confirmed that if two of the supervisors agreed, Bonnie Van Weelden could be added to the county's health insurance coverage.
>
> I also note that Gordy testified at trial he did not remember ever discussing this issue at the April 6, 2009 board of supervisors meeting.
>
> The ongoing discussions about adding Bonnie Van Weelden to the county's health insurance coverage by the supervisors initially occurred in the timeframe January 2009 through April 2009. The State's trial information was filed on April 22, 2011. The State has filed a statement of pecuniary damages seeking more than $120,000 restitution for health care expenses attributable to Bonnie Van Weelden from February 1, 2009 through March 1, 2012.
>
> For purposes of ruling on this motion, I do not need to determine whether Rouw's repeated statements in his trial testimony (that are contradicted by the information contained in the DVD) are intentionally false, whether he is attempting to protect himself from any responsibility for the large amount of health care expenses which have been paid for Bonnie Van Weelden, or if his memory of the events is faulty.
>
> The jury is entitled to hear the statements made at the April 6, 2009 board of supervisors meeting recorded on the DVD when deciding Defendant's guilt or innocence. The jury may believe, based upon the DVD contents, that Rouw agreed in January with Defendant's position on the interpretation that re-elected means newly-elected. I determine that Rouw's trial testimony lacks credibility in light of the contents of the DVD of the April 6, 2009 Mahaska County Board of Supervisors meeting.

"Because the trial judge sat through the trial, he is in a superior position to decide whether the information on the tapes would have changed the result of the trial." *State v. Romeo*, 542 N.W.2d 543, 550-51 Iowa 1996); *Compiano*, 154

N.W.2d at 849 ("The trial court is generally in a better position than we to determine whether evidence, newly discovered, would probably lead to a different verdict upon retrial, and we have often said we will not interfere with its ruling unless it is reasonably clear that such discretion was abused."). While we are not soothsayers, we do agree with the district court that the newly discovered evidence would probably change the result of the trial.

A trial should be a search for the truth. *See Whitley v*. *C*.*R*. *Pharmacy Serv.*, *Inc*., 816 N.W.2d 378, 386 (Iowa 2012). With this maxim in mind, and considering the facts and circumstances presented, we find the district court properly exercised its discretion in granting Van Weelden's motion for new trial.

Upon our consideration of the issues raised on appeal, we affirm the district court's ruling granting Van Weelden's motion for new trial.

AFFIRMED.

Potterfield, J., concurs; Vogel, P.J., dissents.

VOGEL, P. J. (dissenting)

My concern in this dissent is the lack of "due diligence," which is a factor which must be demonstrated in a motion for new trial, in order to reach the substance of the "newly discovered evidence." The district court and the majority, to correct a perceived wrong, necessarily had to skim over Iowa Rule of Civil Procedure 1.1004(7)—a long established rule of civil procedure. This rule and others provide for an orderly management of trials, promoting both fairness to the parties as well as judicial economy. *See* Iowa Code § 602.4201 (2011) (providing the supreme court may proscribe rules "for the purposes of simplifying the proceedings and promoting the speedy determination of litigation upon its merits"). To deserve a new trial based on newly discovered evidence, not only must that party show the evidence is newly discovered and could not in the exercise of due diligence have been discovered prior to the conclusion of trial, but the evidence must be material, not merely cumulative or impeaching, and there must be a showing that the evidence would probably change the result of the trial if a new trial is granted. *In re Marriage of Grandinetti*, 342 N.W.2d 876 (Iowa Ct. App. 1983). Motions for new trial on the basis of newly discovered evidence are not favored, should be closely scrutinized and granted sparingly. *State v*. *Farley*, 226 N.W.2d 1, 3 (Iowa 1975). Our supreme court has long ago explained the concept of due diligence in *Westergard v*. *Des Moines*. *Ry*. *Co*., 52 N.W.2d 39, 44 (Iowa 1952):

> The showing of diligence required is that a reasonable effort was made. The applicant is not called upon to prove he sought evidence where he had no reason to apprehend any existed. He must exhaust the probable sources of information concerning his case; he must use that of which he knows, and he must follow all

> clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed. But he is not placed under the burden of interviewing persons or seeking in places where there is no indication of any helpful evidence.

Van Weelden cannot show he exercised due diligence in his search for the DVD. Before trial, he did not "exhaust the probable sources of information," nor did he follow the next logical step in his search for the DVD—calling the company which produced the DVD.

The record revealed that before trial Van Weelden attempted to find the DVD in public places where such DVDs were housed. He was unsuccessful in his attempts, yet he failed to pursue a very logical source—the company that produced the DVD.[11] Nor did he engage in any pre-trial discovery, such as taking depositions, to support his claim that Supervisor Rouw had given an earlier indication that "re-elected" was synonymous to "newly elected." The matter then came on for a lengthy trial, rife with conflicting testimony as to who said what. The jury found Van Weelden guilty on three counts, stemming from his various actions.

Understandably displeased with the verdicts, Van Weelden then sought vindication and launched a concerted effort to locate the missing DVD. His attorney contacted the director of Communication Research Institute (CRI) to obtain the DVD from the April 6, 2009 meeting, and he found it. He could have placed the same phone call before trial. Had he done so, the DVD would have been located, and could have been used during trial to impeach the testimony

[11] His motion for new trial rather cryptically describes his pre-trial attempts to locate the DVD. However, his affidavit is much clearer as to what efforts he or his attorney made before and after trial.

offered. Due diligence was exercised, but not until *after* Van Weelden lost at trial. To flip the order in which a party must show due diligence in order to be afforded a new trial renders Iowa R. Civ. Pro. 1.1004(7) a nullity and militates against all notions of judicial economy. It undermines the orderly process established for trial management and rewards a losing party by allowing that party to "try again, try harder", after the trial.

It is important to note that this was not evidence that was withheld by the other party. *See Johnson v. Mitchell*, 489 N.W.2d 411, 415 (Iowa Ct. App. 1992) (finding a new trial may be appropriate when newly discovered evidence is discovered by a party's defrauding of the court); *see also In re Marr. of Bauder*, 316 N.W.2d 697, 699-700 (Iowa Ct. App. 1981) (finding a vacation of judgment and new trial may be appropriate in cases in which one party has not been forthright with the other and the court). Nor was it a case where a witness's memory was jogged after trial, and came forward with exculpatory evidence. *See State v Burgess*, 21 N.W.2d 309 (Iowa 1946).

The DVD was just as discoverable before trial as it was discoverable after trial. The motivation was simply enhanced upon losing at trial. *See Compiano*, 154 N.W.2d at 850 (holding where during trial a party is given reasonable cause to believe favorable and available evidence of material nature exists, it is his duty in exercise of due diligence to ask for a continuance if necessary to investigate and to produce such evidence if found; and having finally submitted the case without doing so and having searched for and found evidence after the verdict, he may not then successfully claim a right to a new trial on the basis that such evidence is newly discovered).

I would therefore reverse the district court as the rationale for granting a new trial was based on the perceived value of what was inaccurately described as "newly discovered evidence." Rather, the district court should have acknowledged due diligence was not demonstrated by Van Weelden until after he lost at trial, and to grant a new trial on that basis circumscribes rule 1.1004(7).