IN THE COURT OF APPEALS OF IOWA

No. 8-438 / 07-1383
Filed November 13, 2008

DONALD R. KOSS, JR.,
Plaintiff-Appellant,

vs.

IOWA CHICAGO & EASTERN RAILROAD,
a Delaware Corporation,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Donald Koss appeals from the district court's denial of his motion for new trial following a jury verdict in favor of Iowa, Chicago & Eastern Railroad Corporation (IC&E) on his negligence and strict liability claims. **AFFIRMED.**

John Haraldson, West Des Moines, and Paula M. Jossart and Christopher J. Moreland of Yaeger, Jungbauer & Barczak, P.L.C., Minneapolis, Minnesota, for appellant.

Brian J. Donahoe and Onna B. Dominiack of Cutler & Donahoe, L.L.P., Sioux Falls, South Dakota, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

Donald Koss appeals from the district court's denial of his motion for new trial following a jury verdict in favor of Iowa, Chicago & Eastern Railroad Corporation (IC&E) on his negligence and strict liability claims. He contends new trial is warranted on the basis of (1) newly discovered evidence, (2) erroneous admission and exclusion of evidence, (3) error in the jury instructions, and (4) the verdict not being supported by the evidence. We affirm.

I. Background Facts and Proceedings. Donald Koss was employed as a locomotive mechanic for IC&E in February 2004. On February 7, 2004, Koss was injured at work when he slipped on a walkway while preparing to go down a ladder and fell to the ground, landing on his back. He did not report his fall and worked the remainder of his shift. Later that day, Koss was rushed to the hospital where it was discovered he had a ruptured spleen.

On January 24, 2006, Koss filed a petition alleging a violation of the Federal Employers' Liability Act and the Locomotive Inspection Act, stemming from IC&E's failure to provide him with a reasonably safe workplace. IC&E moved for partial summary judgment on Koss's claim of violation of the Locomotive Inspection Act, which the court granted.

A jury trial was held in March 2007. The primary issues were whether the walkway had ice, water, or snow accumulation on it at the time of Koss's fall, and whether the walkway should have been painted with a nonskid paint. Koss argued the diamond surface on the walkway was worn and slippery, while IC&E argued it was new after a 2003 refurbishing.

On April 2, 2007, the jury returned a verdict finding IC&E was not negligent. Koss moved for a new trial on the basis of newly discovered evidence, errors in the admission and omission of evidence, and error in instructing the jury. The trial court denied the motion in all respects.

II. Scope and Standard of Review. We review the denial of a motion for new trial based on the grounds asserted in the motion. *Estate of Long v. Broadlawns Medical Ctr.*, 656 N.W.2d 71, 88 (Iowa 2002). If the motion is based on a legal question, our review is on error, but if the motion is based on a discretionary ground, we review it for an abuse of discretion. *Id.*

In reviewing discretionary matters, we give significant deference to the district court's decision whether to grant the motion. *Id.* However, the district court's decision must not be arbitrary and "must have some support in the record." *Id.* Ultimately, we are reluctant to interfere with a jury verdict or the district court's consideration of a motion for new trial made in response to the verdict. *Id.*

III. Newly Discovered Evidence. Koss first contends the court erred in denying his motion because newly discovered evidence warranted a new trial.

Motions for new trial based on newly discovered evidence are disfavored. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). We will not disturb the trial court's ruling unless the evidence clearly shows the court has abused its discretion. *Id.* We will only find an abuse of discretion if the trial court clearly exercised its discretion on untenable grounds or acted unreasonably. *Id.*

A party seeking a new trial on such grounds must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due

diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if a new trial is granted. *Id.* Under Iowa law, "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. *Id.* at 762-63.

Following trial, Koss discovered a document entitled, "DM&E SACP Concern/Action Tracking Document." The document indicated that in September 2003, the Federal Railway Association (FRA) recommended to the Dakota, Minnesota & Eastern Railroad (DM&E) to "install recommended material on locomotive walkways." The recommended material was "non-skid material" and the target date for installation was December 2003. Although DM&E is a separate corporation from IC&E, they are allegedly operated as a single system under common ownership and common management.

The trial court held, assuming the first two parts of the test for new trial based on newly discovered evidence were proved, Koss failed to prove the evidence would probably change the result if a new trial was granted. It found:

> [T]his document is not evidence that the FRA imposed a standard of applying non-skid paint to IC&E locomotives or that the FRA ordered IC&E to treat all its locomotives with that paint. In addition, two of Plaintiff's witnesses testified that the existence of non-skid paint on the walkway would not have prevented a slip on ice. . . . The basic problem with Plaintiff's argument is that it depends on a finding that the Plaintiff's fall was caused by icy condition, which neither the Plaintiff saw nor either of the other two employees saw or slipped on.

Koss contends there was no accumulation on the walkway, but it was wet and slippery, a condition where non-skid paint is most effective in preventing slipping.

He does not address the trial court's finding that the newly discovered evidence does not establish the FRA imposed a standard of applying non-skid paint to the locomotives or that IC&E was ordered to treat all its locomotives with the paint. He simply states the evidence would be "quite influential" in determining the result of a new trial because, had IC&E installed non-skid material to the walkway, he would not have been hurt. He does not specifically allege the result of the new trial would probably differ if the evidence was admitted.

The district court did not abuse its discretion in denying Koss's motion for new trial on the grounds of the alleged newly discovered evidence.

IV. Evidentiary Rulings. Koss next contends the trial court erred in admitting and excluding certain evidence from trial. He claims these errors warrants a new trial.

We review most evidentiary rulings by the district court for an abuse of discretion. *McElroy v.* State, 637 N.W.2d 488, 493 (Iowa 2001). However, we review hearsay rulings for correction of errors at law. *Id.*

A. Documents produced after the discovery deadline. Koss first claims the court erred in admitting into evidence certain documents IC&E produced after the close of discovery.

On March 12, 2007, Koss filed a motion in limine seeking to preclude the admission of "any evidence, testimony or exhibits pertaining to documents produced after the courts discovery deadline of December 29, 2006." The court denied this portion of the motion. In his motion for new trial, Koss alleged the documents were inadmissible. He identified them as documents that "included inspection reports, equipment history reports and time cards among others,

purporting to indicate that locomotive 4205 was not present in the Nahant yard following Plaintiff's incident." The court denied this portion of Koss's motion for new trial, finding Koss could not show prejudice and the documents were "relevant to rebut certain claims of other employees of the Defendant regarding the locations of locomotive 4205 in the days shortly after the incident and as to when it might have had non-skid paint applied."

IC&E argues Koss has failed to preserve error on his claim because he did not renew his objection to the evidence at trial and, in fact, introduced the evidence at trial. We disagree. Because the court's ruling on the motion in limine was dispositive as to the question of admissibility, Koss did not need to renew his objection at trial and did not waive any error by electing for strategic reasons to introduce the evidence as part of his case. *See Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa Ct. App. 1997).

In considering Koss's claim, we note trial courts have inherent power to enforce discovery rules and have discretion to impose sanctions for a litigant's failure to obey them. *Barks v. White*, 365 N.W.2d 640, 644 (Iowa Ct. App. 1985). The imposition of discovery sanctions by a trial court is discretionary and will not be reversed unless there has been an abuse of discretion. *Id.* The supreme court has been slow to find an abuse of discretion and usually has found an abuse only in cases involving dismissal. *Id.*

The district court allowed the evidence, finding it relevant to rebut the claims of other witnesses. We do not find the court acted on untenable grounds or unreasonably. Because it did not abuse its discretion, we affirm.

B. Hearsay. Koss next contends the court erred in admitting the cab card, daily inspection report, and equipment history report under the business records exception to the hearsay rule. Specifically, he contends IC&E failed to lay proper foundation for admission.

In its ruling on new trial, the district court stated,

> Testimony of the persons who had supervision or control over the documents themselves were offered showing that they were kept in the ordinary course of business, even though the person testifying did not write the documents himself. This is all that is required.

The court also found Koss failed to show prejudice from admission of the documents.

Iowa Code section 622.28 (2005) states:

> Any writing or record, whether in the form of an entry in a book, or otherwise, including electronic means and interpretations thereof, offered as memoranda or records of acts, conditions or events to prove the facts stated therein, shall be admissible as evidence if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness, and if the judge finds that they are not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule.

This statute is to be construed liberally. *Graen's Mens Wear, Inc. v. Stille-Pierce Agency*, 329 N.W.2d 295, 298 (Iowa 1983). The trial court is accorded "broad discretion" to determine whether the statute's requirements are met. *Id.*

Iowa Rule of Evidence 5.803(6) further governs the admission of business records under the hearsay exception.

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to

> make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subrule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Iowa R. Evid. 5.803(6).

The documents at issue were admitted through the testimony of John Witter and Scott Brandon. Witter and Brandon did not prepare the documents themselves, and were unable to identify which employee did. Koss argues that they are therefore unable to verify that the documents were generated at or near the time of the event recorded or by a person with knowledge.

Although Witter and Brandon could not identify a particular employee who made the records, they testified as to the practice of IC&E in the creation of such documents: which categories of employees would make the records, at what time the records would be made, and how the records are kept. They testified the reports would have been completed by train crew members or locomotive mechanics, who would have knowledge of the inspections. We conclude foundation for admission of the documents was established.

Koss also argues the records were not trustworthy. The element of trustworthiness and reliability is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. *State v. Fingert*, 298 N.W.2d 249, 252 (Iowa 1980) (citing C. McCormick, Evidence § 306, at 720 (2d ed. 1972)). Trustworthiness is determined by the source of information from

which the record was made and the method and circumstances of its preparation. *State v. Fisher*, 178 N.W.2d 380, 382 (Iowa 1970).

The testimony shows the records are trustworthy. They were made in the ordinary course of business on a daily basis. Furthermore, the daily inspection reports were federally mandated. According the district court broad discretion, we conclude there was no error in admitting the records.

C. Exclusion of testimony. Koss contends the court erred in excluding the testimony of Darin Logsdon and Charles Rowe. Logsdon would purportedly testify that IC&E sequestered and photographed locomotive 4205 in the days following Koss's fall, although he was unable to identify the men taking the pictures. Rowe would purportedly testify he saw John Witter and Mack Hailey inspecting and photographing the locomotive after Koss's fall and he believed he had seen the photographs.

In its ruling on new trial, the court found that the witnesses' testimony "was contradicted both by their own statements and by the record." It noted there was no evidence of any certainty by the witnesses as to who was taking the pictures and that Logsdon later recanted his testimony.

The rule that witness credibility is to be determined by a jury has limitations. *State v. Smith*, 508 N.W.2d 101, 102 (Iowa Ct. App. 1993). "The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *Id.* at 103 (quoting *Graham v. Chicago & Northwestern Ry. Co.,* 143 Iowa 604, 615, 119 N.W. 708, 711 (1909)).

> The rule that it is for the jury to reconcile the conflicting testimony of a witness does not apply where the only evidence in support of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. We may concede

> that, ordinarily, contradictory statements of a witness do not make an issue of fact; and that such situation may deprive the testimony of all probative force.

Id. (quoting *State ex rel. Mochnick v. Andrioli,* 216 Iowa 451, 453, 249 N.W. 379, 380 (1933)).

We conclude the district court did not abuse its discretion in excluding the testimony.

D. Exclusion of evidence of a federal regulation.

Koss contends the court erred in excluding evidence of federal regulation 49 C.F.R. § 229.17(a), which provides in pertinent part:

> In the case of an accident due to a failure from any cause of a locomotive or any part or appurtenance of a locomotive, . . . that results in serious injury or death of one or more persons, the carrier operating the locomotive shall immediately report the accident . . . . The report shall state the nature of the accident, number of persons killed or seriously injured, the place at which it occurred, the location at which the locomotive or the affected parts may be inspected by the FRA, and the name, title and phone number of the person making the call. The locomotive or the part or parts affected by the accident shall be preserved intact by the carrier until after the FRA inspection.

The district court found evidence relating to this regulation "has no relation at all to the issue of whether IC&E provided Plaintiff with a reasonably safe place to work." It further found there was no evidence that the accident involved "failure from any cause of a locomotive or any part or appurtenance of a locomotive," as required by the regulation.

We conclude the district court did not abuse its discretion in excluding the evidence. The regulation has no bearing on the ultimate issue before the jury. Although Koss contends evidence that IC&E failed to follow the regulation would lead to a jury instruction on spoliation, there is no evidence that IC&E performed

an inspection of the locomotive following the accident or that the regulation required an inspection.

V. Jury Instructions. Koss next contends the district court erred in failing to properly instruct the jury.

We review jury instructions for the correction of errors at law. Iowa R. App. P. 6.4. The standard of review for jury instructions is whether prejudicial error by the trial court has occurred. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999). Jury instructions must be considered as a whole, and if the jury has not been misled, then there is not reversible error. *Id.* We review the disputed jury instruction to determine if it is a correct statement of the law based on the evidence presented. *Le v. Vaknin*, 722 N.W.2d 412, 414 (Iowa 2006).

A. Failure to instruct on spoliation. Koss contends the court erred in denying his request to instruct the jury on spoliation.

Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions. *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). Parties to lawsuits are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record. *Id.* "When weighing the sufficiency of the evidence to support a requested instruction, we view the evidence in a light most favorable to the party seeking the instruction." *Id.* Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Id.*

The intentional destruction of evidence is referred to as spoliation. *Hendricks v. Great Plains Supply Co*., 609 N.W.2d 486, 491 (Iowa 2000). Our supreme court has stated:

> It is a well established legal principle that the intentional destruction of or the failure to produce documents or physical evidence relevant to the proof of an issue in a legal proceeding supports an inference that the evidence would have been unfavorable to the party responsible for its destruction or nonproduction.

Phillips v. Covenant Clinic, 625 N.W.2d 714, 718 (Iowa 2001). Where spoliation has been established, the trial court should instruct the jury that an unfavorable inference may be drawn from the fact that evidence was destroyed. *Gamerdinger v. Schaefer*, 603 N.W.2d 590, 595 (Iowa 1999).

The district court rejected Koss's motion for new trial on the basis it failed to instruct the jury on spoliation. The alleged spoliation relates to the claim IC&E failed to produce or destroyed evidence regarding IC&E's sequestering and photographing locomotive 4205 in the days following Koss's fall, but prior to the alteration of the locomotive walkways. As discussed above, the court found the testimony regarding the taking of any pictures of the locomotive, who took them, and when they were taken was imprecise and excluded it. It further held that because a post-incident remedial measure is not admissible, Koss was not prejudiced by any failure to give the instruction.

We conclude Koss has failed to establish evidence exists showing IC&E inspected the locomotive following his accident and preceding the alteration of the walkway. Therefore, the district court properly rejected his request for a spoliation instruction.

B. Subsequent remedial measures. Koss also contends the court erred in instructing the jury to not consider the fact IC&E applied non-skid paint to the walkway of locomotive 4205 after his fall as evidence of its negligence.

Error in giving a particular instruction does not warrant reversal unless the error is prejudicial to the party. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa 2001). Prejudice is presumed when the jury has been misled by a material misstatement of the law. *Id.*

In his motion for new trial, Koss argues new trial is warranted "because the Court put undue emphasis on jury instruction #12 regarding subsequent remedial measures." He claimed "the Court repeated instruction #12 at least three times . . . ." For the first time on appeal, Koss contends an instruction on subsequent remedial measures was inappropriate because the decision to install non-skid material on the walkways was made prior to Koss's receipt of injuries. Because error was not preserved on this issue, we will not consider it. *See Metz v. Amoco Oil Co*., 581 N.W.2d 597, 600 (Iowa 1998) (stating our error preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal). We instead focus on Koss's argument that the court put undue influence on the instruction.

The district court admonished the jury before Chuck Rowe testified that proof of a change in the surface of the walkway after Koss's fall was not proof of IC&E's negligence at the time of the incident. At the close of trial, the jury received an instruction identical to the admonishment. Koss argues that the court unduly emphasized this instruction. We disagree.

> Where a court admits evidence competent for a certain purpose only, it may at the time admonish the jury as to the purpose for

> which the evidence is admitted, or it may by an instruction limit the evidence to the purpose for which it is admissible, and caution the jury against improper use of it. In fact, it is the court's duty to give such an instruction, and to refuse a proper request therefor constitutes error, unless the evidence can be used by the jury only for the purpose for which it was introduced, or unless the matter is covered by directions at the time the evidence is admitted . . . .

Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 87-88, 99 N.W.2d 404, 410 (1959) (quoting 53 Am. Jur. *Trial* § 670). We find no error in the district court's action of both admonishing the jury during the course of trial regarding the limited purpose for which the evidence was being admitted and then later instructing the jury regarding the evidence.

C. Failure to instruct on custom. Finally, Koss contends the court erred in failing to instruct the jury regarding IC&E's failure to follow its custom of applying non-skid paint to the walkways of its locomotives.

Testimony at trial established that the "bulk" of IC&E's locomotives were painted with non-skid paint and that IC&E "usually" painted its locomotive walkways with Sure Foot non-skid paint. On this basis, Koss requested the following instruction:

> You have received evidence of the custom or practice of Defendant to apply non-skid paint to all of its locomotive[s]. Conformity with a custom or practice is evidence that the defendant was not negligent and non-conformity of the custom or practice is evidence that the defendant was negligent. Such evidence is relevant and you should consider it, but it is not conclusive proof.

The district court refused to give the instruction. In denying Koss's motion for new trial, it found the denial was not error because "[t]here was no evidence that Defendant had a safety standard it adopted prior to February 7, 2004, requiring such non-skid paint to be applied to all walkway surfaces irrespective of their

condition." We concur. Because Koss failed to establish the existence of any such custom or practice, the district court did not err in denying the instruction.

VI. Sufficiency of the Evidence. Koss's final argument is the jury's verdict is not supported by the evidence.

Because a determination of the sufficiency of the evidence presents a legal question, we review the district court's ruling on this ground for the correction of errors at law. *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). A district court may grant a new trial under Iowa Rule of Civil Procedure 1.1004(6) when "the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law." A new trial may be ordered if a jury verdict is not supported by sufficient evidence and fails to effectuate substantial justice. *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007). Evidence is substantial if reasonable minds could find the evidence presented adequate to reach the same findings. *Midwest Home Distrib., Inc. v. Domco Indus., Inc.*, 585 N.W.2d 735, 738 (Iowa 1998).

Reviewing the record as a whole with the proper deference to the jury's verdict and the district court's ruling on the motion for new trial, we conclude substantial evidence supports the verdict. Accordingly, we affirm the district court's denial of Koss's motion for new trial.

AFFIRMED.