

STATE OF MICHIGAN
COURT OF APPEALS

NORMA KELLY,

UNPUBLISHED

Plaintiff-Appellee/
Cross-Appellant,

v

No. 199501
Washtenaw Circuit Court
LC No. 94-001276 NO

BUILDERS SQUARE, INC.,

Defendant-Appellant/
Cross-Appellee.

Before: McDonald, P.J., and O’Connell and Smolenski, JJ.

O’CONNELL, J. (dissenting.)

I respectfully dissent. In my judgment, the trial court erred in granting a partial new trial on the issue of damages, and in admitting evidence of subsequent remedial measures.

There is no legal requirement that a jury award damages simply because liability was found. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). Indeed, the plaintiff bears the burden of proving damages, and a jury is free to accept or reject such proofs. *Id.* at 172-173. The original jury in this case had the best opportunity to understand all the issues and evidence involved, and its refusal to award noneconomic damages should have been respected. I would affirm the original jury verdict. The granting of a new trial on the issue of damages was wholly gratuitous. If in fact a new trial was warranted, the entire case should have been submitted to the jury. See *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich 485, 489; 129 NW2d 897 (1964) (despite authorization within the court rules, partial new trials limited to the question of damages are disfavored); *Dooms v Stewart Bolling & Co*, 68 Mich App 5, 22-23; 241 NW2d 738 (1976) (“as a rule of thumb, appellate courts do not favor the practice of granting partial new trials in personal injury cases, . . . owing to the fact that liability and damage issues are commonly interwoven”).

I find further error in the court’s decision to admit, over objection, evidence that defendant, the day after the incident, instituted the subsequent remedial measure of securing the fans with a rope. Although the court admitted the evidence not to prove negligence but to rebut the assertion of a defense

witness that the fans could not have been stacked with greater care, the overwhelming effect of this evidence on the jury was to suggest that defendant had acted to remedy its negligence of the day before.

Although I would affirm the original jury verdict, if a new trial is necessary it should be on both damages and liability. On retrial, I would not allow the evidence of the subsequent remedial measure. MRE 407.

/s/ Peter D. O'Connell