Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-369

JANUARY TERM, 2003

	}	APPEALED FROM:
	}	
Bertha E. and Carlton C. LaFrance	}	Franklin Superior Court
	}	
v.	}	DOCKET NO. S 341-99 Fc
	}	
Gerald and Jeannine Ostiguy	}	Trial Judge: Ben W. Joseph
	}	

In the above-entitled cause, the Clerk will enter:

In this negligence action, defendants appeal from the Franklin Superior Court' s order granting plaintiffs' motion for a new trial. We conclude that the trial court improperly substituted its judgment for that of the jury in ordering a new trial. We also disagree that a comment defense counsel made during closing argument was prejudicial and required the court to overturn the jury' s verdict. We therefore reverse the order, and remand to the trial court for entry of judgment for defendants.

The evidence in this case shows that plaintiff Bertha LaFrance suffered injuries following a fall on defendants' premises while she and her husband, plaintiff Carlton LaFrance, were seeking to purchase tomato plants. Plaintiffs alleged that defendants failed to keep their business premises in a safe condition, and that Mrs. LaFrance tripped over a three-inch pot hidden in overgrown grass near defendants' greenhouse. The parties hotly contested the condition of defendants' premises before the jury. The jury saw photographs purporting to represent the condition of the area in which Mrs. LaFrance fell. Plaintiffs challenged those photographs as inconsistent with the true state of the premises at the time of the accident.

In support of their case, defendants produced medical and lay testimony regarding Mrs. LaFrance' s difficulty walking due to physiological problems with her left leg, in addition to arthritis. Mrs. LaFrance' s medical problems existed before her fall on defendants' premises. One witness testified that she had seen Mrs. LaFrance hold on to furniture when walking on at least one occasion. Defendants also produced testimony that, immediately after her fall, Mrs. LaFrance explained her fall by stating that her hip popped out. According to several witnesses, she did not mention tripping over a flower pot or getting her feet tangled up in the overgrown grass, but instead stated that her hip popped out and she fell. An emergency medical technician called to the accident testified, however, that Mrs. LaFrance told him that she got her feet tangled up in something before she fell. He also testified that the photographs of the area around defendants' greenhouse did not show the long grass and several flower pots that were present in the area when he attended to Mrs. LaFrance. The evidence also included a statement by plaintiff Carlton LaFrance that he should not have brought Mrs. LaFrance with him because it was too far for her to walk.

The jury rendered a verdict for defendants, concluding that they were 40% negligent and plaintiff Bertha LaFrance was 60% negligent. Plaintiff moved for a new trial, arguing, among other things, that the verdict was contrary to the weight of the evidence, and defendants' counsel made an improper argument to the jury. The trial court granted plaintiffs' motion, but denied defendants' motion to take an interlocutory appeal to this Court. We granted defendants' motion in this Court for permission to appeal before final judgment.

We review an order granting a motion for a new trial under the abuse-of-discretion standard. Hardy v. Berisha, 144 Vt. 130, 134 (1984). Unless the party claiming error demonstrates that the court abused its discretion, we will not reverse the order. Id. When considering a motion for a new trial, the trial court must give the jury' s verdict presumptive support. Lockwood v. Lord, 163 Vt. 210, 216 (1994). The court must weigh the evidence in the light most favorable to the verdict because " it is the protected duty of the jury to render a verdict." Hardy, 144 Vt. at 133-34. Only if the verdict is clearly wrong may the trial court disturb the verdict and order a new trial. Lockwood, 163 Vt. at 216. " A verdict is clearly wrong and unjust if the ' jury has disregarded the reasonable and substantial evidence, or found against it, through passion, prejudice, or some misconstruction of the matter.' " Id. at 216-17 (quoting Weeks v. Burnor, 132 Vt. 603, 609 (1974)). The trial court may not, however, substitute its judgment for the judgment of the jury even when the evidence is subject to multiple interpretations. Id. at 217.

In its order granting plaintiffs' motion for a new trial, the trial court reasoned that the jury must have rejected defendants' claim that the area around their greenhouse where Mrs. LaFrance fell was mowed and free of flower pots because they found defendants negligent. From this the court decided that the jury concluded that defendants were lying. Then, although the court instructed the jury on comparative negligence, it concluded that the jury had no basis on which to conclude that Mrs. LaFrance was negligent, despite noting that Mrs. LaFrance said that she fell because her hip popped out. The court further concluded that Mrs. LaFrance tripped over a pot hidden in the grass and that there was no basis in the evidence for concluding that she should have seen the pot. The court ignored the evidence defendants presented concerning Mrs. LaFrance' s impaired mobility due to the problem with her left leg and her arthritis.

On its face, the court' s order demonstrates that it substituted its judgment for that of the jury, and failed to view the evidence in the light most favorable to the jury' s verdict. As the above summary of the evidence shows, the jury could have concluded that Mrs. LaFrance was negligent by failing to exercise due care by stepping into tall, tangled grass considering the physical impairment that made it difficult for her to walk normally. The verdict was not clearly wrong based on the evidence the jury had before it. It was, therefore, an abuse of the court' s discretion to order a new trial.

We next address defendants' claim that the court erred by ordering a new trial based on a portion of defense counsel' s closing argument. The portion of the argument the trial court found objectionable was the following:

> My clients, you' re being asked to give this kind of money against my clients. This is, we' re not fooling around in here. This is serious stuff, and this stuff in regards to the evidence and what you believe and what you find to be true is key. I don' t think, I don't doubt for a moment that you don't understand your responsibilities in that regard, but we're here in the courtroom too. . . .
>
> . . . . You' ve seen pictures of his place. You' ve seen the kind of person he is, how he deals with his family. Pictures of his property. My negligent Mr. Ostiguy who had this, you know, dangerous condition there at his home.

Although plaintiffs did not object to the argument until months after the verdict was rendered, the court found the excerpted portion of defendants' closing argument to be misleading and so prejudicial that it threatened the integrity of the trial process. It determined that a new trial was therefore required. We disagree.

We have expressed reluctance to overturn a jury verdict based solely on the argument of counsel. Brown v. Roadway Express, Inc., 169 Vt. 633, 635 (1999) (mem.). The party claiming that opposing counsel' s allegedly improper argument warrants a new trial must demonstrate that the argument was prejudicial. See Debus v. Grand Union Stores of Vt., 159 Vt. 537, 544 (1993) (where defendant made no showing of prejudicial effect of counsel' s argument to jury, Court will not vacate judgment). If opposing counsel' s reference to improper matters is obscure or oblique, the trial court need not order a new trial. See Hardy, 144 Vt. at 136 (obscure and oblique references to insurance is an exception to general rule that references to insurance are reversible error).

The court found the reference to an award against defendants for " this kind of money" was misleading and prejudicial because it implied that defendants were not insured when in fact they had insurance. We have reviewed defense counsel' s argument and conclude that the reference was plainly obscure and oblique within the context of the entirety of the argument. When considered in light of the evidence supporting the jury' s verdict, we fail to see any prejudice flowing

from the comment the court found so objectionable. The court' s decision is untenable and must be reversed.

Reversed and remanded for entry of judgment for defendants.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice