

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STEPHANIE MILLER, JAMES STELLHORN,
and HARLAN, LLC,

Plaintiffs,

v.

MARK DAVIS,

Defendant.

ORDER

10-cv-221-wmc

In this civil action under 42 U.S.C. § 1983, plaintiffs Stephanie Miller, James Stellhorn and Harlan, LLC alleged that defendant Mark Davis violated their rights under the Fourth Amendment by entering their investment property to perform an asbestos inspection without a warrant. A jury disagreed. In the special liability verdict dated February 11, 2013, the jury concluded: (1) someone was on plaintiff's property when Davis visited it on July 7, 2006; (2) Davis obtained that person's consent before entering and inspecting the property; and (3) Davis reasonably believed that this person had authority to consent to his entry.

Plaintiffs have since filed a motion for a new trial pursuant to Fed. R. Civ. P. 59 (dkt. #168), arguing that the verdict is contrary to the manifest weight of the evidence. Although the court must assess the evidence and credibility of the witnesses on a Rule 59 motion, it will "set aside a verdict as contrary to the manifest weight of the evidence only if no rational jury could have rendered the verdict." *Whitehead v. Bond*, 680 F.3d 919, 928 (7th Cir. 2012). In other words, a "new trial should be granted . . . only when the

record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.” *Id.* Plaintiffs’ motion for new trial -- which does little more than reargue the relative credibility of witnesses at trial -- obviously falls well short of this standard.

As an initial matter, plaintiffs argue no rational jury could conclude that anyone was on the property on July 7th to provide Davis with consent to enter. This argument comes down to nothing more than plaintiffs asking the court to reverse the results of a swearing contest that plaintiffs lost before the jury. While plaintiffs point out that Stellhorn, Stephanie Miller and Jessie Miller testified that they were not present and their contractor was not scheduled to begin demolition until late July, the jury evidently believed Davis’ testimony that he encountered two men performing demolition on July 7th. (Tr. Trans. A-26:5-28:25; 1-P-36:6-40:5.) Plaintiffs argue that Davis’ testimony was not credible because some aspects of his story changed between his two, earlier affidavits and his live trial testimony, but plaintiffs were allowed to impeach Davis with these alleged inconsistencies at length during the trial and the jury obviously found any discrepancies to be immaterial, as does this court. (*Id.* A-17:10-30:5) While Davis’s memory had understandably faded and his testimony changed in some respects, that is natural when six years had passed since this seemingly routine inspection took place. In any event, it was certainly not irrational for the jury to disbelieve plaintiffs and infer from Davis’ testimony that (1) either Stellhorn or plaintiffs’ contractor was performing demolition work on July 7, 2006, and (2) that this person consented to Davis’s entry.

Next, plaintiffs argue no rational jury could conclude that Davis acted reasonably in believing the person he spoke to had authority to consent to his entry. This argument also fails at the outset, because the jury was free to conclude on the evidence at trial that the person Davis spoke to *was* Stellhorn, who had actual authority to consent. While Stellhorn testified that he was not present (*id.* at 1-P-98), the jury was not required to believe Stellhorn's testimony over that of Davis. Even if they did, the jury might reasonably have concluded that Davis reasonably believed the worker was Stellhorn. Indeed, there was testimony at trial that plaintiffs' own general contractor told Davis that the *owners* were removing the asbestos-containing stucco (*id.* at A-22, A-25-25, 1-P-32-33), making it reasonable to infer one of the men on the site was an owner. While Davis could not remember whether he asked the workers' names or why he believed at the time that one of them was Stellhorn, that, too, is hardly unusual after six years and it is certainly not enough to so undermine Davis's testimony that a rationale jury could not have found him credible.

Finally, Davis *did* remember that the two men were engaged in demolition acting as if they had authority over the property. (Tr. Trans. A-26:5-28:25; 1-P-36:6-40:5.) A rational jury could have found it reasonable under these circumstances for Davis to assume that plaintiffs hired these workers to perform demolition and gave them implicit (if not express) authority to allow city inspectors on the property to inspect their work, its safety and allow the demolition to proceed. Certainly this is so given the evidence that: plaintiff's general contractor told Davis that the owners were removing asbestos;

these two men appeared to have control of the site for that purpose; *and* they were actively engaged in demolition without an asbestos permit.

Plaintiffs could not explain to the jury, and have not explained in their motion, why it was unreasonable for an inspector to assume that a person hired to perform demolition subject to wide-ranging regulations had authority to consent to related safety inspections.¹ While plaintiffs point to Davis's admission that he did not see these workers actively removing *asbestos*, this fact is irrelevant if the jury also believed Davis's testimony that the workers were engaged in demolition, piles of asbestos remained around the building and Davis had been advised that asbestos was present on the site.

A rational jury might have believed either plaintiffs or Davis. That this jury believed Davis, does not render their verdict against the manifest weight of the evidence. Accordingly, the court will deny plaintiffs' motion for a new trial.

¹ While Davis apparently believed he had authority to enter the property and perform inspections without a warrant or the owner's consent, that does not mean a jury could not find his testimony that he entered plaintiffs' property with consent on this occasion was incredible. Though not relied upon by defendant, even the issue of consent is something of a red herring in this case, because the only tangible harm done to plaintiffs here was Davis's order to the workers -- and ultimately to plaintiffs (assuming for purposes of argument the workers were *not* plaintiffs themselves) -- that they had to stop demolition until after obtaining a permit allowing the safe removal of asbestos. To give that order defendant need not have entered plaintiffs' property at all, since it is undisputed that he was advised asbestos was present and saw evidence of asbestos removal without even entering onto the property.

ORDER

IT IS ORDERED that the motion for a new trial filed by plaintiffs Stephanie Miller, James Stellhorn and Harlan, LLC (dkt. #168) is DENIED.

Entered this 21st day of June, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge