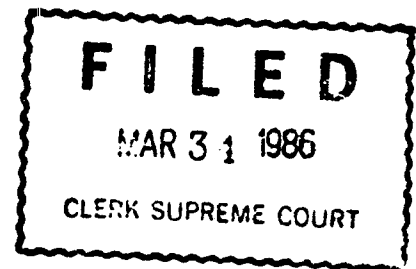


IN THE COURT OF APPEALS OF IOWA



KATHLEEN R. SULLIVAN and GARY
R. SULLIVAN,

Plaintiffs-Appellants,

vs.

MARVIN H. DUBANSKY,

Defendant-Appellee.

Filed March 31, 1986

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5-709
85-569

Appeal from the Iowa District Court for Polk County (CL35-20373) - Arthur
E. Gamble, Judge.

Plaintiffs appeal the trial court's denial of their motion for a new trial
due to a lack of opportunity to poll the jury. **AFFIRMED.**

W. Michael Murray of Murray, Davoren & Dudley, Des Moines, Iowa, for
plaintiffs-appellants.

John A. McClintock and Richard G. Blane II of Hansen, McClintock &
Riley, Des Moines, Iowa, for defendant-appellee.

Considered by Donielson, P.J., Snell, and Schlegel, JJ.

SCHLEGEL, J.

Plaintiffs appeal the trial court's denial of their Motion for New Trial due to a lack of opportunity to poll the jury. We affirm.

On February 20, 1985, after the jury had been instructed and sent out to deliberate in a medical malpractice action, plaintiffs' counsel conferred with the trial judge and indicated that he would be waiting for the verdict at his office. It is unclear from the record exactly what plaintiffs' counsel told the trial judge. On appeal counsel maintains that he said that he "would like to be called when the jury reached a verdict." At the hearing on the motion for a new trial however, the trial judge stated that it was his understanding that plaintiffs' counsel "wanted to be called with the verdict." Counsel does concede that a problem in communication did occur on this point.

The jury returned its verdict the next day and gave it to the trial court without either party, or counsel for either party present. The trial judge accepted the verdict, in favor of defendant on all counts, and asked the jury, "Is this your verdict, so say all of you?" The trial judge indicated in the record that there were eight positive responses.

Immediately after taking the verdict, the trial judge called plaintiffs' attorney. The phone conversation went as follows:

Trial Judge: We have a verdict. The jury came back in favor of the Defendant on all counts.

Plaintiffs' Counsel: Oh. You've taken the verdict already?

Trial Judge: Yes.

Plaintiffs' Counsel: Oh. Okay. Thank you.

At this time the jury had been discharged but, according to the trial judge, were still in the courthouse and would have been recalled at this point if plaintiffs' counsel had indicated on the phone that he wanted to poll the jury.

On March 4, 1985, plaintiffs filed a Motion for New Trial due to their lack of opportunity to poll the jury. The trial court ruled against plaintiffs and they appeal that ruling. Plaintiffs argue that they were deprived of their right to poll the jury without proper notice, waiver, or any procedure whatsoever.

The authority that allows a party to poll the jury is found in Iowa Rule of Civil Procedure 203(b). It provides:

(b) Return-poll. The jury agreeing on a general verdict, special verdicts, or answers to interrogatories shall bring the finding into court where it shall be read to the jury and inquiry made if it is the jury's finding. A party may then require a poll, whereupon the court or clerk shall ask each juror if it is his or her finding. If the required number of jurors do not express agreement, the jury shall be sent out for further deliberation; otherwise, the finding is complete and, unless otherwise provided by law, the jury shall be discharged.

Plaintiffs allege that this rule gives a party the right to poll the jury after the verdict is rendered. They further argue that the failure of the court to give the party notice that the jury is returning its verdict, or to obtain a knowing waiver, violates the rule and thereby nullifies the verdict. They conclude that this right is so fundamental that deprivation of it without consent warrants reversal, and cite State v. Callahan, 55 Iowa 364, 7 N.W. 603 (Iowa 1880).

We do not construe Iowa Rule of Civil Procedure 203(b) as supplying the parties in an action with such a fundamental right. Under Rule 203(b), after the jury has reached its verdict (general or special) or answered interrogatories, it "shall bring the findings into court where it shall be read to the jury and inquiry made if it is the jury's finding. A party may then require a poll," (Emphasis ours.) Although in a portion of the rule the word "shall" is used, with respect to the polling of the jury, the word used is "may." We therefore interpret this language to impose a duty upon the trial court to poll the jury once a party has made an affirmative request. This interpretation thus negates any argument that the trial court has an automatic duty to poll the jury unless the party

expressly waives such a "right." In other words, the duty is upon the party requesting a poll to be taken and to make it known to the trial court before the jury is discharged. A failure to request such a poll therefore would be deemed as a waiver.

This interpretation is in line with other authorities on this issue.

To be sure that the verdict announced is indeed the verdict of all of the jurors, a party may demand a poll of the jury before the verdict recorded It is too late to challenge a verdict as ambiguous or to demand a poll after the verdict has been recorded and the jury discharged.

Baker v. Sherwood Constr. Co., 409 F.2d 194, 195 (10th Cir. 1969).

The object of polling the jury "is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." Each party has a right to have the jury polled. The right, may, of course, be waived by failing to make the request when the jury returns its verdict in open court and before the jury is discharged.

5A, Moore's Federal Practice, ¶ 49.07 (2d ed. 1976).

Plaintiffs have also failed to show that they were prejudiced by the trial court's action.

The trial court has a duty to disregard any error or defect in the proceeding which do not affect the substantial rights of the adverse parties. See Iowa Code § 619.16. Section 624.15 of the Iowa Code further states that, "No exception shall be regarded in an appellate court unless the ruling has been on a material point, and the effect thereof prejudicial to the party excepting." As we have noted, the trial judge asked the jurors, "Is this your verdict, so say all of you?" All eight members of the jury responded affirmatively. There were no negative responses. Plaintiff has failed to produce any evidence demonstrating prejudice in light of this discussion between the trial court and the jury. Nor will we presume prejudice has automatically arisen. A judgment

should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to prejudice of the losing party. Baysinger v. Haney, 261 Iowa 577, 583, 155 N.W.2d 496, 499 (1967).

The record reveals that the failure of the trial court to allow plaintiffs the opportunity to poll the jury was due in fact to plaintiffs' counsel's failure to make it clear that he wished to do so. Because we have determined that this is not an automatic right afforded in this case to plaintiffs, we must in turn conclude that plaintiffs have waived any such right by the apparent communication problem between counsel and the trial judge. Moreover, plaintiffs have not shown that they were prejudiced due to such a problem. Therefore, we affirm the trial court's denial of plaintiff's Motion for New Trial.

Plaintiffs request that we impose upon defendant the costs of additional transcript that they allege were not necessary for the issues raised in this appeal. Moreover, plaintiffs allege defendant waited long after the ten day limitation provided for in Iowa Rule of Appellate Procedure 10(b), to designate the additional portions of the transcript that were to be included. We conclude that defendant shall be assessed the costs associated with additional transcripts in this appeal.

We hold the trial court did not err in denying plaintiffs' Motion for New Trial, and therefore affirm its judgment.

AFFIRMED.