

CLERK SUPREME COURT

Considered en banc.

Defendant Gerrard Realty Corporation, owner of an apartment building, appeals from a judgment entered upon a jury verdict for plaintiff of \$27,500. Plaintiff fell over a child's tricycle on a sidewalk outside the apartment building. On appeal, Gerrard asserts that (1) there was not substantial evidence that Gerrard knew or reasonably should have known of the hazard, and for this reason the verdict failed to render substantial justice and the court should have directed a verdict for the defendant; (2) Gerrard's co-defendants should not have been dismissed from the case at the close of evidence, as their admitted failure to remove the tricycle allegedly was a contributory cause of the accident and thus substantial evidence of negligence on their part; (3) the proximate cause of plaintiff's injury was plaintiff's own alleged negligence; (4) the trial court abused its discretion in refusing to allow certain evidence and in admitting other evidence; (5) the jury arrived at a quotient verdict improperly considered certain facts known to members of the jury personally; (6) the court improperly read from the exhibit which it had excluded from evidence and showed bias against Gerrard's attorney; and (7) the court improperly instructed the jury that defendant Lawrence, the apartment manager, was acting as Gerrard's agent. We affirm.

On November 19, 1975, the plaintiff fell over a child's tricycle, which was standing on the sidewalk in front of her apartment house in a partially shaded area. Because of an injury to her hip, she was obliged to have an artificial joint inserted and to spend some time in a nursing home. At the close of evidence, the court directed a verdict in favor of the co-defendants. The jury returned a verdict for \$27,500 for plaintiff.

I. Notice to the Landlord.

Where the owner retains control of a portion of leased premises, he is liable to the tenant for personal injuries sustained by reason of the unsafe conditions of

those portions of the property over which the landlord retains control. Montgomery v. Engel, 179 N.W.2d 478, 480 (Iowa 1970). The owner has the duty to "exercise reasonable care to maintain those portions of the premises over which he retains control in a reasonably safe condition." Id., citing Coleman v. Hall, 161 N.W.2d 329, 333 (Iowa 1968).

In Bostian v. Jewell, 254 Iowa 1289, 1295-96, 121 N.W.2d 141, 144 (Iowa 1963), the supreme court cited with approval II Restatement, Torts, Chapter 13, section 360:

A possessor of land, who leases a part thereof and retains in his own possession any part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risks involved therein and could have made the condition safe.

See also Primus v. Belleview Apartments, 241 Iowa 1055, 44 N.W.2d 347, 25 ALR 2d 565 (Iowa 1950). The court in Bostian held that it is "the landlord's duty. . . to keep [the premises] in a reasonably safe condition, and that such duty would apply to open and obvious as well as hidden defects." 294 Iowa at 1296, 121 N.W.2d at 145. The court went on to say that the landlord's duty to discover and correct such defects applies whenever the landlord has had a reasonable opportunity to discover and correct them.

We are satisfied that Gerrard had ample notice of the existence of hazards on the walkways at the apartment building in which the plaintiff resided. There was a 78-year-old manager-caretaker, Guy Lawrence, on the premises. Part of his duties was to care for the sidewalks. Lawrence had on occasion picked up tricycles from the sidewalks. He had received complaints about toys on the sidewalks from the plaintiff as well as from at least one other tenant. Gerrard had received a letter, signed by the plaintiff and other tenants, some months

before, complaining about ice and snow on the sidewalks and driveway and suggesting that if Lawrence was unable to maintain the premises properly, Gerrard might hire someone who was able to do so. Lawrence himself testified that he saw the tricycle earlier that morning as he came out of his apartment, and that he did nothing to remove it. Lawrence admitted that he had received frequent complaints about toys from the plaintiffs and from other tenants.

We therefore find that there is ample evidence from which the jury could conclude that Gerrard had actual notice as well as constructive notice that hazardous conditions existed on the sidewalks and driveways around the apartment building in question for a substantial period of time. "The general rule is that the principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends." Vermeer v. Sneller, 190 N.W.2d 389, 393 (Iowa 1971).

In view of this fact, there is no reason for us to conclude either that substantial justice was not done or that the court should have directed a verdict in favor of the defendant.

II. Dismissal of the Case against other Defendants.

The court ruled favorably on a motion by Lawrence, one of the co-defendants, for a directed verdict, and directed a verdict on its own motion in favor of the other co-defendants.

Summary judgment for Lawrence was not abuse of the court's discretion. Iowa R. Civ. P. 237(b). See also 49 C. J. S. Judgments § 35 (1947): In a tort action, "[i]f it appears during the course of the proceedings that a defendant is not liable, the court may render judgment in his favor and allow the case to proceed against the others, and the court's discharge of some of defendants in an

action charging concurrent wrongful acts or omissions will not preclude judgement ²²⁷ against the others."

As for the other defendants, since plaintiff raised no objection at trial, the issue is not preserved for our review.

III. Contributory Negligence.

Gerrard argues that contributory negligence is a defense against a tort action. This is true. However, the burden of pleading and proving that the plaintiff was negligent and that such negligence was a proximate cause of the injury is upon the defendant. Iowa Code § 619.17 (1981). The trial court properly instructed the jury as to the question of contributory negligence, and the jury found that the plaintiff was not contributorily negligent. We find no error.

IV. Questions Concerning Evidence.

Gerrard argues that the trial court abused its discretion when it denied Gerrard's motion to permit the jury to view the site of the accident, when it allowed certain exhibits to be viewed by the jury, when it allowed a medical expert to testify as to possible future consequences or effects of plaintiff's injuries, and when it did not permit the defendant to examine witnesses concerning a variety of matters.

After reviewing the briefs and the record, we conclude that there was no abuse of discretion in any of these instances, and that in any event, none of these alleged errors would have been prejudicial as to Gerrard.

V. Jury Misconduct.

Gerrard claims that there was evidence of jury misconduct in that the jury allegedly arrived at a quotient verdict, and arrived at their verdict on the basis of facts that were not brought out during trial but were known to them personally.

The record clearly shows that the court properly instructed the jury as to the fact that quotient verdicts are unacceptable. There is no evidence in the affidavits presented by Gerrard that the jurors agreed in advance to accept the amount arrived at by averaging out the damage figures put forth by each of them. In the absence of such an advance agreement, there is no misconduct. The procedure is no more than a basis for discussion and for compromise of the various opinions as to the amount to be awarded. Such a procedure is not condemned by the law. Jurgens v. Davenport, Rock Island & N. W. Ry. Co. 249 Iowa 711, 722-23, 88 N.W.2d 797, 804-05 (1958). Citing Klein v. Swift & Company, 248 Iowa 563, 567-70, 81 N.W.2d 469, 472-73 (1957), and Nicholson v. City of Des Moines, 246 Iowa 318, 331, 332, 67 N.W.2d 533, 541 (1954).

Gerrard claims, on the basis of hearsay evidence contained in an affidavit by one of the jurors, that some of the jurors discussed their own experiences or those of persons with whom they were acquainted in paying for surgery similar to that which the plaintiff had to undergo.

We adhere to the distinction between inquiries into the internal workings of the jury and external pressures brought to bear upon the process of arriving at a jury decision. In Wirtanen v. Provin, 293 N.W.2d 252 (Iowa 1980), the supreme court, citing State v. Rouse, 290 N.W.2d 911, 916-17 (Iowa 1980), explained:

The internal workings include what parts of the record or instructions were or were not considered, the jurors' discussion, their motivations, mental or emotional reactions, their vote, or other evidence which seeks to show that the actual decision of the jury was, or should have been, something other than what the verdict indicates. Such matters are said to "inhere" in the verdict. In this context it is appropriate to invoke the parol evidence rule to prevent assaults on a verdict. Upon the basis of the parol evidence reasoning, or upon general policy grounds, or both, this type of evidence is incompetent.

Wirtanen at 259. The court went on to reaffirm the well-established principle that "a jury may not by affidavit or testimony state what influenced the jury in reaching the verdict." Id.

In light of these principles, we conclude that Gerrard's claim of jury misconduct is without merit.

VI. Misconduct of Court.

Gerrard argues that the trial judge made frequent derogatory remarks about defense counsel, attempted to force him to forego making objections, and in a variety of other ways prejudiced the jury against the defendant.

Our examination of those passages in the record to which defendant's counsel refers leads us to conclude that the court was at all times fair, temperate, patient, considerate, and impartial. At times, the court properly and firmly attempted to move the proceedings along. We find no evidence of misconduct or bias on the part of the court.

VII. The Agency Instruction.

Gerrard claims that the court erred in submitting an instruction to the jury concerning the agency relationship existing between Guy Lawrence, manager and caretaker of the apartment, and Gerrard Realty Corporation. In addition to instructions concerning the relationship which exists between agents and principals, the court instructed the jury that "Guy Lawrence was acting on behalf of and as an agent for Gerrard Realty Corp. who was his principal." Gerrard contends that the court thus invaded the province of the jury.

With regard to this issue, we find that Gerrard did not object to the instruction on agency in its final form, and thus did not preserve the claimed error for review. Iowa R. Civ. P. 196. In any event, Lawrence and others testified that he was the manager and caretaker, Gerrard introduced no evidence to the contrary, and Gerrard in its brief on appeal admits that the building was managed by Lawrence. Gerrard can thus scarcely contend that it was prejudicial error for the court to instruct the jury as to Lawrence's status as Gerrard's employee. In any case, Gerrard's failure to make a timely request for additional or more

specific instruction to emphasize its theory of the case leaves it no cause of complaint on appeal. State v. Kaster, 160 N.W.2d 856, 859 (Iowa 1968).

We have carefully considered each of Gerrard's twenty issues presented for review. Each of them is without merit. Some of them appear to be frivolous or to have been introduced with the hope that if enough issues were raised, one of them just might happen to hit the mark. Such an approach is a waste of the court's time and resources.

AFFIRMED.