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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JOETTA K. PETERSON and RAYMOND D. PETERSON,

Plaintiffs-Appellants,

vs.

J. A. OLIVENCIA, M.D.,

Defendant-Appellee.

Filed August 29, 1985

5-326
84-1327

Appeal from the Iowa District Court for Polk County - Harry Perkins, Judge.

Plaintiffs appeal from an adverse judgment in a medical malpractice action asserting the trial court erred by not finding juror misconduct and failing to correct confusing instructions. **AFFIRMED.**

Russell S. Wunschel and Gary L. McMinimee of Wunschel, Eich & McMinimee, Des Moines, for plaintiffs-appellants.

John A. McClintock and Chester C. Woodburn III of Hansen, McClintock & Riley, Des Moines, for defendant-appellee.

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

DONIELSON, P.J.

Plaintiffs appeal from an adverse judgment in a medical malpractice action, asserting, inter alia, that the trial court erred: (1) by not granting plaintiffs' cause challenge to a juror and by not granting plaintiffs' motions to vacate and for new trial on the grounds that one of the jurors was biased and incompetent; (2) by failing to grant plaintiffs' motion for new trial based upon jury misconduct; (3) by failing to submit the plaintiffs' requested supplemental instruction after the jury had posed a question to the court during deliberations regarding instructions; (4) by submitting its response to the jury's question; and (5) by failing to grant the plaintiffs' motion for mistrial or motion to vacate the verdict on the grounds of jury confusion.

Defendant asserts, inter alia, that the trial court did not: (1) abuse its discretion in overruling plaintiffs' motions for mistrial and new trial based upon plaintiffs' allegations that a juror was biased and incompetent; (2) err by refusing to grant a new trial on the ground of jury misconduct; and (3) err by refusing to grant a new trial on the ground that the jury was confused with the original instructions.

Joetta brought this action for damages for the injuries suffered by her as a result of Dr. Olivencia's alleged failure to disclose material facts relating to surgery. Raymond Peterson sought damages for loss of consortium.

The matter proceeded to trial and was submitted to the jury. During the second day of its deliberations, the jury sent the following question to the court:

> If Dr. Olivencia did not feel there were any alternatives to the surgery, is he negligent in not advising the claimant?

The trial court instructed:

> The question of negligence is for the jury to determine. You should base your decision upon the facts as disclosed

> by the evidence and you should refer to the instructions previously given for the applicable law.

After further deliberations, the jury, in the late afternoon, sent a second question to the court:

> Re: Instruction #2. Definition "proximate cause." Due to lack of evidence, we are unable to answer the question of proximate cause as to whether Plaintiff would have had the surgery if the alternatives had not been omitted. How to we decide this?
>
> This also ties in with #14?

The defendant requested that the jury, in response to their question, be instructed:

> The question of proximate cause is for the jury to determine. You should base your decision upon the facts as disclosed by the evidence and you should refer to the instructions previously given for the applicable law.

Plaintiffs objected to the requested instruction as not being responsive to the question and requested that Instruction 14, which explained the physician's duty to disclose alternative treatments, be stricken and replaced by a similar instruction which clarified the proximate cause issue by providing:

> The physician has a duty reasonably to disclose to a patient all alternatives to a proposed surgery, as well as all treatments, in order that the necessary consent to treatment be based on an intelligent exercise of the judgment of the person consenting to the treatment. If you find from the evidence that the defendant failed to inform plaintiff in accordance with this duty, then you will find that the defendant was negligent, even if you find that he has exercised due care in the selection of treatment and in the performance of the surgery. If you further find that claimant would not have consented to the surgery had the defendant informed her in accordance with his duty, then you will find that this negligence was a proximate cause of her injuries and damages.

In the alternative, plaintiffs requested a mistrial on the grounds that the jury was confused. The trial court submitted the defendant's proposed instruction and overruled the plaintiffs' motion for mistrial. The jury shortly thereafter returned a verdict for the defendant.

Thereafter, the plaintiffs filed numerous post-trial motions, including a motion challenging juror Juanita True for cause, and motions for mistrial, new trial, and to vacate the verdict on the grounds of juror misconduct, bias, and confusion. In support, plaintiffs submitted the affidavits of three jurors. The affidavits indicated that juror Juanita True announced during deliberations that her mind was made up, that the doctor had done nothing wrong, and that one of her reasons for finding in favor of the doctor was that a verdict for plaintiffs would cause her health insurance rates to go up. The court denied the plaintiffs' motions.

I.

The initial issue to address on appeal is plaintiffs' contention that a juror, Juanita True, was biased and incompetent. The juror in question was 76 years old, however, the plaintiffs made no further showing of her alleged incompetency. A juror is not presumed incompetent merely by their age. See Iowa Code § 607(1) (1985). Thus, we hold that Juanita True was not incompetent to serve as a juror.

The second aspect of plaintiffs' appeal relating to bias of Juanita True is much more difficult. Plaintiffs contend this juror was asked during voir dire whether she believed a verdict against Dr. Olivencia might affect her medical bills. To this question, True responded affirmatively. The plaintiffs then allegedly inquired whether her belief might affect her decision in this case, to which she responded negatively. It is further maintained that upon the commencement of jury deliberations, True indicated that her mind was made up because Dr. Olivencia had done nothing wrong. She apparently stated one of the reasons for her conclusion was that a decision unfavorable to Dr. Olivencia would cause an increase in her insurance rates. Plaintiffs asseverate that such behavior constitutes bias on the juror's behalf and directs us to Smith v. Covell,

100 Cal. App. 3d 947, 955, 161 Cal. Rptr. 377, 381-82 (1980), as authority for this proposition.

In Covell, a prospective juror was asked if there was any aspect of personal injury litigation which would interfere with his ability to render an impartial decision. He made no affirmative response. During deliberations, however, the juror stated he was against people suing others and that high insurance rates were caused by excessive verdicts. The court held the juror had concealed his bias which was inferred from his statements in the jury room.

Covell is similar to the case at hand, yet we conclude its holding is distinguishable. The juror in Covell apparently had a closed mind as to the entire case based upon his attitude toward litigation. True, on the contrary, could well have had an open mind as to whether Dr. Olivencia had acted improperly and mentioned that one, but not the only, reason for her decision was the possible increase in health insurance rates. Although True's statement indicates that her decision may have been made under something less than laboratory conditions, it was certainly within tolerable bounds. Based on this record, we are unwilling to find the requisite degree of irregularity present in True's decision so as to warrant a finding of bias on her behalf.

II. Juror Misconduct

Plaintiffs take the position that jury misconduct occurred so as to merit a new trial. We cannot agree.

The test in Iowa for jury misconduct involves a three-pronged analysis: (1) the procedural problem of proving the objective facts as to what happened during deliberations, (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation by constituting jury misconduct, and (3) it must appear the misconduct was calculated to, and it is reasonably probable it did, influence the verdict. State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984);

Harris v. Deere & Co., 263 N.W.2d 727, 729-30 (Iowa 1978). See also Rhiner v. City of Clive, No. 84-502, slip op. at 26-27 (Iowa Aug. 21, 1985); State v. Jackson, 195 N.W.2d 687 (Iowa 1972); Rasmussen v. Thilges, 174 N.W.2d 384 (Iowa 1970); Hornaday v. Brackelsburg, 248 Iowa 1346, 85 N.W.2d 519 (1957).

As to the first prong, the supreme court articulated which affidavits are incompetent by stating:

> A distinction must be drawn between inquiries into the internal workings of the jury and external pressures brought to bear on the decision-making process. 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 votes, 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. (Authority.) Such matters are said to "inhere" in the verdict. (Authority.) . . . .
>
> We are obliged to ignore statements or affidavits of jurors as to whether the communications influenced their verdict. The principle is well settled a juror may not by affidavit or testimony state what influenced the jury in reaching the verdict. (Authorities.) On the other hand, evidence of external matters improperly brought to bear on the deliberations may be used to attack a verdict. These "objective" facts may be testified to by a juror. (Authorities.) Because such matters do not "inhere" in the verdict, the parol evidence rule is not violated. . . .

Crowley v. Glessner, 328 N.W.2d 513, 514 (Iowa 1983); citing State v. Rouse, 290 N.W.2d 911, 916-17 (Iowa 1980); Harris, 263 N.W.2d at 729.

The Crowley court held the affidavits were incompetent not because they contained statements which were made by jurors, but rather for concluding that such statements influenced the jury's decision. The affidavits in this case contain statements of what was said during deliberations, but avoid indicating what, if any, impact such statements had on the jury. Plaintiff has to our satisfaction documented that True stated health insurance rates would increase if a decision against Dr. Olivencia was returned. Thus, such statements are

objective facts as to what transpired. The effect these statements had on the jury, however, presents a more challenging problem because of the subjective nature of the effect, if any, such statements had on the jury's verdict.

Discussions by jurors as to the effect of a judgment against a governmental body which could have adversely affected the jurors given their taxpayer status was not held to be juror misconduct. See Fleener v. Board of Supervisors of Powesheik County, 246 N.W.2d 335 (Iowa 1976). Further, the jury's awareness of insurance is not considered to be outside of the permissible bounds of jury deliberations. Moose v. Rich, 253 N.W.2d 265, 270 (Iowa 1977). It is a trying matter to determine whether True's statement had an impact on the jury's determination, yet we find the effect, if any, did not exceed tolerable bounds. Courts should avoid pervading the unique province of the jury, especially in regard to matters which "inhere" in the verdict. We further believe that statement by True, even if calculated to influence the verdict, did not alter the jury's decision.

III. Jury Instructions

Plaintiffs' final contention is that the jury was confused as to the proximate cause issue and sought assistance which was not provided by the court. The jury did seek a clarification of the proximate cause standard and, according to plaintiff, was so frustrated after the trial court's second supplemental instruction regarding proximate cause that the verdict was returned shortly thereafter. Plaintiffs claim the instructions as given required Joetta to show she would not have consented to the surgery had she been adequately informed under both the duty instruction (Number 2) and the proximate cause instruction (Number 14).

In support of plaintiffs' claim that the jury was confused, an affidavit was submitted which indicated the same. Because misunderstanding or confusion

are subjective and inhere in the verdict, such affidavits are incompetent. See Anderson v. Goodyear Tire & Rubber Co., 259 N.W.2d 814 (Iowa 1977); citing Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa 195, 210 (1866) ("such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, . . . [such as] that he misunderstood the instruction of the court."). We hold that these affidavits cannot be used to show the jury was confused.

Next, the legal sufficiency of the instructions given to the jury must be reviewed. The instruction at issue was originally offered by plaintiffs and adopted by the court. It was after the jury's requests for clarification that plaintiffs sought to rephrase this instruction. Defendant argues that plaintiffs submitted the original instruction and are therefore barred from appealing its inadequacies.

A misstatement of the law in an instruction to a jury is reversible error. Heldenbrand v. Executive Council of Iowa, 218 N.W.2d 628, 637 (Iowa 1974). Supplemental instructions, like the one at issue, are proper and oftentimes desirable. Brown v. Lyon, 258 Iowa 1216, 1222, 142 N.W.2d 536, 539 (1966).

The instructions given to the jury, in their entirety, adequately described the duty and proximate cause issues. Even if some degree of ambiguity existed, it did not amount to a misstatement of the law. The trial court was well within its discretion in handling the supplemental instruction in the manner it chose. Plaintiffs' appeal is denied.

AFFIRMED.

Sackett, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

The obviously false answer given by juror, True, denied plaintiffs a fair trial. That her presence on the jury was prejudicial is shown by the special interrogatories and the answers given to them. While the jury unanimously found the doctor to be negligent, it found (7-1) that the negligence was not the proximate cause of the injuries and damages to plaintiffs. While that set of answers seems fatally inconsistent under the facts of this case, the importance of the numerical result is that but for the juror, True, the vote may have been six to two, which would have been a failure to answer the interrogatory by the appropriate majority. In other words, the swing of one vote, Mrs. True's, would have required further deliberation or a mistrial.

It is also obvious that the jury was confused by the instructions and, absent a proper explanation of those instructions, justice demanded the declaration of a mistrial.

I would reverse and order a remand for new trial.