IN THE COURT OF APPEALS OF IOWA

FILED
MAY 2 3 1989
CLERK SUPREME COURT

BEVERLY McCORMICK and **ROBERT L. McCORMICK,**	)	
Plaintiffs-Appellants,	)	218
vs.	)	
CITY OF GARNER, IOWA,	)	9-85 88-1280
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Hancock County (15439), Stephen P. Carroll, Judge.

Plaintiffs appeal from trial court's order refusing to grant a new trial in a personal injury action. **AFFIRMED.**

Don W. Burington of Laird, Burington, Heiny, McManigal, Walters & Winga, Mason City, and B.C. Berge, Garner, for the plaintiffs-appellants.

C. Bradley Price of DeVries, Price & Wilson, Mason City, for the defendant-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

219

The issue we address is whether the trial court abused its discretion in refusing to grant plaintiffs-appellants Beverly McCormick and Robert McCormick a new trial following a jury verdict for defendant-appellee the City of Garner in plaintiffs' suit against defendant claiming negligence and damage resulting from a fall by Beverly in a shelter house owned and operated by defendant city. We affirm the trial court.

Beverly fell on wet concrete when entering a shelter house owned and operated by defendant City of Garner. Beverly claims to have sustained head and back injuries. The case was submitted to the jury on a lengthy set of interrogatories. The jury answered the first interrogatory finding defendant city at fault and the second saying the fault of defendant city was not a proximate cause of plaintiffs' injury and damage. Having found no proximate cause, the jury as instructed answered no further interrogatories.

After the jury's answers to interrogatories were returned, the trial court entered judgment for defendant. Plaintiffs filed a motion for new trial. The trial court overruled the motion. Plaintiffs appeal.

The sole issue is whether plaintiffs should have been granted a new trial. Plaintiffs' argument centers on the contention they should have a new trial because the jury

found negligence but no proximate cause. Plaintiffs contend the jurors' answers indicated they did not understand or follow the court's instructions.

In ruling on a motion for new trial, a court has broad but not unlimited discretion. We are slower to interfere with the granting of a new trial than its denial. See Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 661 (1969).

Verdicts should not be set aside lightly and in granting a new trial the court must be sure there exists sufficient cause to support the exercise of said discretion. Jones v. Iowa State Highway Comm'n, 185 N.W.2d 746, 749 (Iowa 1971). However, the fact the court may have reached a different conclusion than the jury is not sufficient to set aside a verdict. Houvenagle v. Wright, 340 N.W.2d 783, 785 (Iowa 1983).

When a jury has misapprehended its duty, failed to follow the court's instructions or rendered an inadequate verdict, a new trial should be ordered. Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974); Hartford Fire Insurance Co. v. Lefler, 257 Iowa 796, 801, 135 N.W.2d 88, 91 (1965).

Plaintiffs complain the trial court did not correctly handle the issue of submission of proximate cause. Plaintiffs have no grounds to object to the manner of submission of the issue of proximate cause. No objection was raised to the proposed manner of instruction at the

trial court level. We will not base our disposition on an issue not raised in the trial court. Nelson v. Ludovissy, 368 N.W.2d 141, 144 (Iowa 1985). Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided on appeal. State Farm Mut. Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202, 206-207 (Iowa 1984). We do not ordinarily consider issues raised for the first time on appeal. See Rhiner v. City of Clive, 373 N.W.2d 466, 474 (Iowa 1985); Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 434 (Iowa 1984); Miller v. Bonar, 337 N.W.2d 523, 530 (Iowa 1983).

The plaintiffs also complain about the trial court's treatment of the proximate cause issue during jury deliberations. During the course of the jury's deliberations and prior to the return of its verdicts, the court was informed by the court attendant the jury wished to have a definition of "proximate." The court formulated the following response to the jury: "Ladies and Gentlemen of the Jury: The word, "proximate" must be read with the word "cause" which appears beside it to form the term "proximate cause." Proximate cause is defined in Instruction No. 7."

Before giving such response to the jury, however, the court spoke with counsel for the plaintiffs and defendant. The court told both attorneys about the question from the jury. The court informed both attorneys

of how the court intended to respond. Both attorneys indicated they had no objection to the court's response to the jury's written inquiry. Only then did the court send the written response back to the jury. Because plaintiffs failed to object to the written response when given an opportunity to do so, we will not consider it on appeal. See Farmers Trust & Sav. Bank v. Manning, 311 N.W.2d 283, 288 (Iowa 1981).

Plaintiffs also argue the verdict returned was not supported by substantial evidence because it was inconsistent for the jury to find negligence but not proximately cause. The allegations of negligence submitted to the jury were: (1) the city negligently allowed water to accumulate on the cement floor; (2) the city negligently constructed the building and sidewalk so as to allow the accumulation of water; (3) the city negligently failed to provide a vestibule in the building; (4) the city negligently failed to post warning signs to warn of an alleged unsafe, slippery condition; and (5) the city negligently failed to provide a mat or other abrasive covering at the entrance of the shelter house.

Defendant pled and the jury was instructed concerning the defense of failure to keep a proper lookout.

As to proximate cause, the court instructed the jury an act or omission is a "proximate cause" when the actor's conduct is a substantial factor in bringing about the

condition or injury sustained and when it appears if it had not been for such act or omission the condition would not have been brought about or the injury sustained. The court further told the jury the term "substantial" means an actor's conduct has such an effect in producing the harm as to lead a reasonable person to regard it as a cause. As noted earlier, plaintiffs took no exception or objection to these proximate causation instructions.

It is possible for a jury to find a defendant negligent yet not find a proximate cause between the negligence and plaintiffs' damage. Plaintiffs have the burden to prove proximate cause as well as negligence. See Clubb v. Osborne, 149 N.W.2d 318, 322 (Iowa 1967). In Petersen v. Kuhr, in adopting § 431 of the Restatement 2d of Torts, the court stated:

> In order to be a proximate cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . This is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the Plaintiff's harm. The word 'substantial' is used to denote the fact that the Defendant's conduct has such an effect in producing the harm as to lead a reasonable man to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophical sense' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophical sense' yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Petersen v. Kuhr, 201 N.W.2d 711, 713 (Iowa 1972).

In Johnson v. Junkmann, 395 N.W.2d 862, 865 (Iowa 1986), the court reiterated the Petersen definition and again set forth a two-part test to determine proximate causation:

> Petersen establishes a two part test for proximate cause: (1) but for Defendant's fault, Plaintiff's injuries would not have occurred; and (2) Defendant's fault must be a substantial factor in bringing about Plaintiff's harm.

The trial court determined, and we agree, there was evidence from which the jury could have found the proximate cause of Beverly's fall was her failure to maintain a proper lookout.

We affirm the trial court.

AFFIRMED.