

FILED

DEC 29 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD LORENZO PETTENGILL,

Plaintiff-Appellee,

vs.

**MUSCATINE COUNTY, IOWA; BOARD OF
SUPERVISORS OF MUSCATINE COUNTY,
IOWA; JOAN C. AXEL, VERNON SHEPARD,
A.C. ALLEN, PAUL SATERTHWAIT, and
JANICE I. TORRENCE,** as Members of
the Board of Supervisors of Muscatine
County, Iowa; and **MARTIN H. NOONAN,**
as County Engineer of Muscatine
County, Iowa,

Defendants-Appellants.

Filed December 29, 1982

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2-66416

Appeal from Muscatine District Court, L. D. Carstensen, Judge.

Defendants appeal from the grant of plaintiff's motion for a new trial in this personal injury tort case arising from a single-vehicle accident. **AFFIRMED.**

John C. Stevens of Lewis & Stevens, P.C., Muscatine, for defendants-appellants.

Marie Prince Cohen of Allbee, Conway, Allison & Denning, Muscatine, for plaintiff-appellee.

Considered en banc.

Defendants appeal from the grant of plaintiff's motion for a new trial in this personal injury tort case arising from a single-vehicle accident. Plaintiff's truck allegedly bounced off a very rough county road and fell over on its side in a ditch. On appeal, defendants assert the plaintiff's motion for new trial should not have been granted because (1) jurors' affidavits cannot be used to show that the jury considered allegedly inadmissible evidence; (2) plaintiff's request for an instruction that the jury was not to consider the county's road funding problems in determining liability was not sufficient to preserve error because (a) it was orally requested in general terms, not dictated into the record, and (b) no exception was made to the instructions as given, which omitted plaintiff's requested limiting instruction; and (3) the court's general instruction that the jury was to consider only admissible evidence, coupled with its sustaining an objection to testimony about county road funds, was sufficient to convey to the jury that it was not to consider such evidence. We affirm.

Plaintiff Pettengill sued the defendants for failing properly to maintain a county road, asserting that the road was so rough that even though he was driving no more than ten m.p.h., his heavily-laden semi bounced off the road into the ditch, where it toppled over on its side, injuring Pettengill.

At the trial, Pettengill filed a motion in limine in which he asked that the defendants not be allowed to introduce evidence concerning the lack of available funds for road maintenance on the ground that such evidence would be irrelevant. The court did not rule on Pettengill's motion, and counsel for the defendants referred to this matter several times during the trial. Pettengill's attorney asked the court to instruct the jury that evidence of lack of funds for repair was

irrelevant and should not be considered in its determination of liability, but the court refused to give such instruction. When the jury returned the verdict for the defendants, Pettengill moved for a new trial, alleging that the court had erred in failing to give the requested instruction and attaching to his motion affidavits signed by two jurors stating that lack of sufficient funds for repair had been discussed by the jury during its deliberations and that such evidence was thought by the jurors to be a proper consideration in determining liability. The trial court then granted plaintiff's motion for a new trial on the ground that the requested instruction should have been given. Defendants then brought this appeal.

I. The Jurors' Affidavits.

Although counsel for the plaintiff included jury misconduct (considering inadmissible evidence in arriving at a verdict) as one of the grounds in support for his motion for a new trial, the court, in granting that motion, did not find that there was juror misconduct. He based his conclusion on the trial court's failure to grant a requested instruction concerning cost of road maintenance. It is therefore unnecessary for us to dwell upon the competence of the affidavits to impeach the verdict of a jury, since at this point, that is not at issue.

II. Preservation of Right to an Instruction.

The defendants contend that Pettengill waived his right to an instruction regarding the irrelevance of county finances. Citing our rule of civil procedure 196, the defendants claim that Pettengill failed to request an instruction on this matter, that he failed to formulate a clear, concise, specific instruction, that he did not dictate the requested instruction into the record, and that he did not specify the matter objected to or the grounds upon which the request was made. They claim also that he failed to object to the court's failure to give the instruction he desired.

"The purpose of requiring compliance with rule 196 procedure is to 'fully [alert] the trial court to the point of law and question of fact on which he relies in urging the requested instruction be given.' " State v. Wright, 274 N.W.2d 307, 312 (Iowa 1979), citing State v. Tomlinson, 243 N.W.2d 551, 553 (Iowa 1976). In Wright, defense counsel had said: "However, he [i.e., defense counsel] does have one addition and that is the addition of the eyewitness testimony, personal observation [instruction], which he has provided the Court with a copy of earlier. . . ." He then proceeded to explain to the court why one of the court's instructions did not deal as adequately with a specific area as did his requested instruction. In responding to the State's contention that the defendant had only requested that the instruction be given and had not objected to the court's failure to give it, the supreme court held, referring to this colloquy, that "the record so made was an 'objection' sufficient to preserve the matter for appeal." Id.

The record clearly reveals that Pettengill's counsel requested an instruction relative to the relevance or irrelevance of county finances. The request was quite specific. The reasons for it were also explicit. The court simply said, "I don't think it's necessary to give it, though I'll overrule that." This was sufficient to alert the trial court to the basis for the requested instruction, and is comparable to the situation in Wright, where the court held that although no objection was raised in the usual form, the manner in which the request was made substantially complied with the requirements of rule 196, and error had been preserved. The trial court therefore did not err in considering the court's failure to offer the requested instruction as a basis for a new trial.

III. Abuse of Discretion in Granting a New Trial.

A trial court has broad discretion in ruling on a motion for a new trial. Lappe v. Blocker, 220 N.W.2d 570, 572 (Iowa 1974).

"[T]o justify the granting of a new trial upon a proper motion, the trial court's error need not amount to reversible error. If such were the rule, the trial court's power to correct a failure of justice would be meaningless. [Citations]." Hartford Fire Insurance Company v. Lefler, 257 Iowa 796, 802, 135 N.W.2d 88, 92 (1965). When the trial court exercises its power to grant a new trial because it is convinced that the verdict fails to administer substantial justice to the parties in the case, "appellate tribunals should be slow to interfere." Id., 257 Iowa at 801, 135 N.W.2d at 88. As the supreme court said in Maynard v. Des Moines, 159 Iowa 126, 128 140 N.W. 208 (1913):

[A trial court] is something more than a mere moderator presiding over a contest in which it has no concern. On the contrary, it has a distinct function to perform, and, whenever it is convinced that justice has not been done under the law and the facts, it is its duty to set aside the verdict and grant a new trial. As an appellate court we have a somewhat different function to perform, . . . and we should not interfere with the final order of the trial judge, except in cases where it appears that such judge has abused his discretion and acted in such an arbitrary and capricious manner that, instead of effectuating justice, he has in fact thwarted it.

The trial court found that its failure to give the requested instruction "was such error as denied plaintiff fair trial."

We do not find that the trial court has abused its discretion or acted arbitrarily or capriciously in granting this plaintiff a new trial. The remarks by counsel for the defendants during the course of the trial concerning the alleged insufficiency of funds to maintain the road in question in an acceptable state of repair brought irrelevant matters to the attention of the jury. In the absence of strong evidence to the contrary, we will not attempt to second guess the trial court by assuming that these remarks were not prejudicial and that they should not have been cured by admonishing the jury with an appropriate instruction.

The granting of a new trial is therefore affirmed.

AFFIRMED.