

IN THE COURT OF APPEALS OF IOWA

**ROSADELE GERLOFF, LEANNA
GERLOFF, and GEORGE MAIER,**

Plaintiffs-Appellants,

vs.

**ELDEAN SCHERF and HERBERT
MORLEY,**

Defendants-Appellees.

**ELDEAN SCHERF and HERBERT
MORLEY,**

Counter-Plaintiffs/Appellees,

vs.

GEORGE MAIER,

Third-Party Plaintiff/
Appellant.

GEORGE MAIER,

Third-Party Plaintiff/
Appellant,

vs.

**CLAYTON COUNTY, IOWA and
TERRY GOLTZ,**

Third-Party Defendants/
Appellees.

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85-1790

Appeal from the Iowa District Court for Clayton County (C-2117-0883)

- Peter Van Metre, Judge.

The plaintiffs appeal from judgment upon a jury verdict for the defendants in this lawsuit arising from an automobile accident. The plaintiffs contend

that the jury's verdict is not supported by the evidence and that the trial court improperly communicated with the jury during its deliberations. **AFFIRMED.**

Dennis J. Naughton and Paula M. Stenlund, Dubuque, for plaintiffs-appellants.

Donald R. Breitbach of Reynolds & Kenline, Dubuque, for defendants-appellees Scherf & Morley.

Les V. Reddick & David A. Tank of O'Connor & Thomas, P.C., Dubuque, for third-party defendants-appellees Clayton County and Goltz.

Heard by Oxberger, C.J., Snell and Schlegel, JJ.

OXBERGER, C.J.

This appeal arises out of an automobile accident in which the plaintiffs, George Maier, Rosadele Gerloff, and Leanna Gerloff were injured. An additional passenger in their automobile, Alma Gerloff, was killed in the accident. The record discloses that On December 24, 1981, at approximately 8:00 p.m., Maier was driving the plaintiffs' vehicle southbound on Highway 13 in Clayton County when he came upon a parked pickup truck owned by defendant Eldean Scherf and struck a second parked pickup truck owned by defendant Herbert Morley. Maier and the surviving Gerloffs subsequently commenced the underlying action alleging that the defendants' negligence caused the accident. The jury, however, returned special interrogatories finding Maier wholly responsible and absolving the defendants of any liability.¹ Accordingly, the trial court entered judgments in favor of the defendants and against the plaintiffs. In this appeal, the plaintiffs challenge these judgments, arguing that the trial court erred in refusing to grant their motion for a new trial. In the motion, the plaintiffs alleged: (1) that the jury's verdict was not supported by the evidence; and (2) that the trial court improperly communicated with the jury, resulting in an abuse of its discretion. We conclude that the trial court properly disposed of both contentions, and affirm.

We first consider the plaintiffs' argument that the motion for a new trial should have been granted because the jury's verdict was not supported by sufficient evidence. The principles governing our review of this contention are well established. We have repeatedly recognized that in ruling upon a motion for a new trial, a trial court has broad discretion to determine whether the verdict effectuates substantial justice between the parties. Miller v. AMF

¹The jury apportioned 100% liability to Maier.

Harley-Davidson Motor Co., Inc., 328 N.W.2d 348, 351 (Iowa Ct. App. 1982); see also Iowa R. App. P. 14(f)(3). Accordingly, we will reverse the trial court's decision in this capacity only upon a finding that it has abused its discretion. McConnell v. Aluminum Co. of America, 367 N.W.2d 245, 249 (Iowa 1985); see also Iowa R. App. P. 14(f)(3). In addition, we recognize that, "Generally, questions of negligence, contributory negligence and proximate cause are for the jury; it is only in exceptional cases that they may be decided as matters of law." Iowa R. App. P. 14(f)(10); see also Wirtanen v. Provin, 293 N.W.2d 252, 257 (Iowa 1980).

The plaintiffs argue that the jury's verdict is against the weight of the evidence because the record discloses that the defendants' vehicles were partially upon the highway and were not properly lit; as such, the plaintiffs maintain that the verdict apportioning no fault to the defendants cannot be justified. We disagree.

Although the evidence adduced at trial was somewhat contradictory, we think that the record contains substantial evidence supporting the verdict. See Wirtanen, 293 N.W.2d at 258. The record reveals that at approximately 7 00 p.m., Morley's pickup truck went into the ditch on the west side of the southbound lane of the highway. Morley's wife had been operating the vehicle, and she immediately called her father, defendant Scherf, to ask him what to do. After consulting with the Clayton County Sheriff, Scherf concluded that the pickup should be removed from the ditch. Scherf, Morley, and Morley's wife, Julie, then took Scherf's pickup to the scene in order to pull Morley's truck out. Scherf and Morley affixed chains to the trucks and removed Morley's vehicle from the ditch. During the entire procedure, Julie stood approximately 500 feet north of the site and waved a flashlight in order to warn oncoming

traffic. The record discloses that during this time, four or five vehicles slowed and safely passed the scene; the testimony is uncontradicted that visibility was good and that the site could clearly be observed. After Morley's truck had been removed from the ditch, the plaintiffs' southbound vehicle approached from the north. At that time, Scherf's truck was at a disputed location partially on the west shoulder and partially in the southbound lane of the highway. The truck was facing north with its dim headlights, emergency flashers, and clearing lights on. Morley's vehicle was unlit and was directly behind Scherf's. Again, the evidence is somewhat disputed as to the precise location of the vehicle; apparently, it was also partially on the shoulder and partially on the highway. All of the witnesses present at the scene, including the plaintiffs, testified that Maier did not apply his brakes and never attempted to slow down as he came upon the site. Maier's vehicle passed Scherf's truck but collided with Morley's; the exact manner in which Maier's automobile collided with the truck is uncertain.

After the conclusion of the evidence, the trial court propounded a number of special interrogatories upon the jury. In Interrogatory No. 1, the jury was asked whether the plaintiffs had established that the defendants had been negligent and that their negligence had proximately caused the accident in one or more of the following particulars: leaving an unlighted vehicle partially on the traveled portion of a highway at night; leaving a parked vehicle in the highway with its lights on; moving a combination of vehicles on the highway in an unsafe condition endangering persons lawfully using the highway; or in leaving a vehicle on the main traveled portion of the highway when it was practical to stop off of the highway. The jury answered each question in the negative. By contrast, in Interrogatory No. 2, the jury was asked whether the defendants had established that plaintiff Maier had been negligent and

that his negligence proximately caused the accident because he had: failed to keep a proper lookout; failed to have his car under control; driven at an unreasonable speed in the circumstances; and failed to stop within the assured clear distance ahead. The jury answered each of these questions in the affirmative.

We think that the evidence delineated above supports these findings. The implication from the evidence is that the defendants lit the site and alerted oncoming traffic of the hazard; the sole proximate cause of the accident was Maier's failure to heed to the warnings. In these circumstances, we cannot say that the trial court abused its discretion in overruling the plaintiffs' motion for a new trial as to this ground; the jury's findings were supported by the evidence.

The plaintiffs maintain that the present case cannot be distinguished from Coleman v. Brower Construction Co., 254 Iowa 724, 119 N.W.2d 256 (1963). In Coleman, the supreme court affirmed a trial court's order granting the plaintiff a new trial after the jury returned a verdict in favor of the defendant. Although Coleman involved an automobile accident somewhat similar to that in the instant case, we think that Coleman is factually distinct. The accident in Coleman arose after the plaintiff's decedent's automobile collided with an unlit road construction roller. 254 Iowa at 727-28, 119 N.W.2d at 257. Several witnesses testified that the roller was extremely difficult to see. In answer to the interrogatories submitted by the court, however, the jury found that while the decedent had maintained a proper lookout, he had failed to travel at a speed allowing him to stop at an assured clear distance and did not have his car under control so that he could have stopped with a reasonable degree of celerity. Consequently, the jury found in favor of the defendant. The trial court granted the plaintiff's motion for a new trial, noting the incongruous nature of the jury's responses to the interrogatories; the court expressed

its opinion that the jury had not understood or followed its instructions. Moreover, the record in Coleman disclosed that the testimony of an eyewitness contradicted the jury's findings. 254 Iowa at 726, 119 N.W.2d at 259. Finally, the trial court found that, in failing to have any lights upon the roller, the defendant's negligence was "beyond dispute." 254 Iowa at 732, 119 N.W.2d at 260. By contrast, in the matter sub judice, the jury's findings are supported by the evidence; the record clearly reflects that the scene of the accident was well-lit and observable, and that the plaintiffs were warned of the hazard but failed to slow down or stop. Accordingly, we reiterate our conclusion that the trial court did not abuse its discretion in overruling the plaintiffs' motion as to this ground.

This brings us to the second allegation contained in the plaintiffs' motion. The record discloses that after the jury commenced deliberations, the trial court responded to questions submitted by the jury on two separate occasions. The record further reflects that at this time, neither of the parties' attorneys were present nor were they given notice of the questions or the court's answers. The plaintiffs maintain that when the court responded to the questions, it gave the jury supplemental instructions; the plaintiffs argue that because the court failed to comply with the dictates of Iowa Rule of Civil Procedure 197,² it abused its discretion and deprived them of a fair trial.

On the first occasion when the trial court communicated with the jury, it responded to their question asking whether they should assess any percentage

²Rule 197 provides as follows:

While the jury is deliberating, the court may in its discretion further instruct the jury, in the presence of or after notice to counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record and any objections thereto shall be made in a motion for a new trial.

of liability for an act of negligence which they did not believe was a proximate cause of the accident. Although there is no record of the communication, it appears that the court verbally advised the entire jury to refer back to their instructions, and stated to them that the instructions provided that they were to consider only those acts of negligence which they found in some manner proximately caused the accident.³

The defendants contend that the trial court committed no error in responding to the question despite its noncompliance with rule 197 because its response was not an "instruction" but merely a "general direction." See State v. Fiedler, 260 Iowa 1198, 1206, 152 N.W.2d 236, 242 (1967) (not all communications between court and jury are instructions; "[G]eneral directions to the jurors as to their duty, not having any bearing upon the evidence which they are to consider and the law applicable thereto, are not instructions. . ."). We find it unnecessary to decide whether the communication was an instruction or a general direction because we conclude that the plaintiffs have not demonstrated that they were prejudiced thereby.

While communications between the trial judge and jury are subject to a high degree of scrutiny and circumspection, Daniels v. Bloomquist, 258 Iowa 301, 307, 138 N.W.2d 868, 872 (1965), the courts of this state have consistently recognized that, "[w]hen misconduct is asserted as a ground for a new trial, it must appear from the record that the misconduct caused prejudice to the moving party or that a different result would have been probable but for such misconduct." McConnell v. Aluminum Co. of America, 367 N.W.2d 245, 248 (Iowa 1985). No such showing can be gleaned from the record in the matter

³This information is obtained from the trial court's order which was made part of the record immediately after the court answered the jury's question.

before us. The trial court's "instruction" added nothing to the instructions which had already been submitted without objection to the jury; instructions 11, 12 and 13 explicitly told the jury to allocate percentages of negligence only for those acts which were sole or concurrent proximate causes of the accident. We do not think that the court's mere repetition or affirmation of instructions already before the jury can be said to constitute reversible error. See Breiner v. Olson, 195 Neb. 120, 126, 237 N.W.2d 118, 124 (1975); see also 89 C.J.S Trial §§ 477-78 (1955).

The plaintiffs additionally contend that the trial court erred when it responded in writing to a written question submitted from the jury requesting that the court define the word "celerity" which was used in one of the jury instructions. The record reflects that the court provided a dictionary definition of the word. We think it clear that the trial court's response in this instance was an instruction; communications between the court and jury for which compliance with rule 197 is required include expressions of "the principles of law applicable to the case . . . which the jury [is] bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts" as opposed to "general directions to the jurors as to their duty." Fiedler, 260 Iowa at 1206, 152 N.W.2d at 242. The communication at issue is more aptly placed in the former category. Consequently, the court's failure to notify counsel represented a noncompliance with rule 197, and constituted an error. Nevertheless, we once again conclude that no prejudice has been shown; accordingly, we hold that the error was harmless.

The plaintiffs do not allege that the court provided an erroneous or misleading definition of the term "celerity;" their only contention is that the court committed a reversible error in failing to notify the attorneys. Notably, however, the plaintiffs have provided no indication as to how or if the presence

of counsel would have made any difference. In these circumstances, we cannot conclude that the plaintiffs were denied a fair trial. See Johnson v. St. Charles Municipal Liquor Store, 392 N.W.2d 909, 912 (Minn. Ct. App. 1986) (error found harmless in similar circumstances). We hold that the error was not prejudicial, and that the trial court did not abuse its discretion in denying the plaintiffs' motion for a new trial on this ground.

AFFIRMED.