IN THE COURT OF APPEALS OF IOWA

No. 0-487 / 99-1539
Filed January 24, 2001

FILED
JAN 24 2001
CLERK SUPREME COURT

ADA WATERMAN and ANDREW WATERMAN, as Guardians and Next Friends of ALEX WATERMAN and ANNETTE WATERMAN,
Plaintiffs-Appellants,

vs.

DONNA MARIE BECKER and VALLEY COMMUNITY SCHOOL DISTRICT,
Defendants-Appellees.

LEONARD R. SOUKUP, Administrator of the Estate of LORIE M. SOUKUP, Deceased,
Plaintiff-Appellant,

vs.

DONNA MARIE BECKER and VALLEY COMMUNITY SCHOOL DISTRICT,
Defendants-Appellees.

ESTATE OF ASHLEY WATERMAN, by ADA WATERMAN, Administrator, ADA WATERMAN and ANDREW WATERMAN,
Plaintiffs-Appellants,

vs.

DONNA MARIE BECKER and VALLEY COMMUNITY SCHOOL DISTRICT,
Defendants-Appellees.

Appeal from the Iowa District Court for Clayton County, Margaret L. Lingreen, Judge.

Plaintiffs appeal following an adverse jury verdict on their negligence action based on an automobile accident in which two people were killed. **AFFIRMED.**

Dale L. Putnam of the Putnam Law Offices, Decorah, for appellant-Watermans.

Mark B. Anderson, Cresco, for appellant-Soukup Estate.

Beth E. Hansen and Jim D. DeKoster of Swisher & Cohrt, P.L.C., Waterloo, for appellees-Donna Marie Becker and Valley Community School District.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

STREIT, P.J.

A jury found a school bus driver was not the proximate cause of the damages that resulted when her bus and a car collided. We affirm the trial court's denial of the plaintiffs' motion for a new trial and its rulings regarding the plaintiffs' attempts to subpoena members of the jury.

I. Background Facts & Proceedings.

In October 1996 a car driven by Lorie Soukup and a Valley Community School District bus driven by Donna Becker collided. The bus was traveling west and Soukup's car had just left a driveway on the south side of the road to travel east. Their vehicles hit at an angle; the bus's maximum impact into the car was near the back of the driver's seat. Soukup and one of her passengers, six-year-old Ashley Waterman were killed. Becker and Soukup's other passengers, four-year-old Alex Waterman and seven-year-old Annette Waterman, were injured.

Soukup's estate, Ashley Waterman's estate, and Alex and Annette Waterman (collectively "plaintiffs") all brought negligence actions against Becker and the Valley Community School District. Their actions were consolidated. The jury found Becker was at fault, but also found her fault was not a proximate cause of the plaintiffs' damages.

The plaintiffs filed a motion for a new trial claiming the verdict failed to effectuate substantial justice, the verdict was not supported by sufficient evidence, the jury had engaged in misconduct, and the jury instructions were confusing. The plaintiffs' claims were based in part on comments some of the jurors had purportedly made following the trial—including that they believed

Becker had been operating the bus over the road's centerline at the time of the collision. Because the jurors refused to provide affidavits relating to these claims, the plaintiffs advised the trial court they intended to subpoena jurors to offer live testimony at the hearing on the motion. The court ruled it would not allow such testimony, but counsel could still contact jurors to ask them for affidavits for use at the hearing. The plaintiffs then attempted to have subpoenas issued compelling several jurors to appear to provide affidavits or be deposed. The court quashed the subpoenas. Seven jurors eventually signed affidavits stating no external matters had been brought into their deliberations.[1] One of the plaintiffs, the plaintiffs' counsel, and a witness from the trial also filed affidavits regarding statements purportedly made by some of the jurors.

The court denied the plaintiffs' motion for a new trial. The plaintiffs appeal the court's denial of their motion and its rulings regarding juror subpoenas.

II. New Trial.

The plaintiffs claim the trial court should not have denied their motion for a new trial. We review for an abuse of discretion. *Johnson v. Knoxville Cmty. Sch. Dist.*, 570 N.W.2d 633, 635 (Iowa 1997). We give the court broad, but not unlimited, discretion in determining whether the verdict effectuated substantial justice between the parties. *See* Iowa R. App. P. 14(f)(3).

The plaintiffs argue the jury's verdict did not effectuate substantial justice because, although the jury purportedly found Becker at fault for operating the bus

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[1] The plaintiffs contend one or more of the jurors may have expressed concerns about missing work and thus unduly hastened the jury's deliberations. The affidavits did not specifically address this issue.

over the centerline, the jury did not find her fault was a proximate cause of the plaintiffs' damages. The plaintiffs acknowledge Soukup's car may have been partially on Becker's side of the road. They assert, however, that because their damages would have been substantially different if Becker had not crossed the centerline[2], Becker's fault must have been a proximate cause of the damages they actually incurred.

To reach this conclusion, of course, the trial court would have had to assume the jury found Becker was at fault because she operated the bus over the centerline. The jury's verdict form did not specify how Becker was at fault. The plaintiffs presented affidavits from three nonjurors stating jurors had told them they found Becker was at fault for the aforementioned reason. However, despite the plaintiffs' arguments to the contrary, these affidavits were "nothing more than an attempt to prove the [jury's] deliberation process and to find out how and why the jury reached its verdict." *See Econ. Roofing & Insulating v. Zumaris Co.*, 538 N.W.2d 641, 653 (Iowa 1995). The affidavits fell within the prohibitions of Iowa Rule of Evidence 606(b)[3], a rule that prohibits a trial court

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[2] Specifically, the plaintiffs assert they would have incurred different damages because the bus would have struck the car at a point closer towards the rear of the car. They have not shown how their damages would have been different.

[3] Rule 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought

from considering "juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room." *See Ryan v. Ameson*, 422 N.W.2d 491, 495 (Iowa 1988); *see also* 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074, at 407-18 (1990). The court properly disregarded the affidavits and refused to assume the jury found Becker was at fault because she had operated the bus over the centerline. Accordingly, the plaintiffs had no basis for arguing this particular act by Becker must have proximately caused their damages.

In the alternative, the plaintiffs argue if Becker was negligent in any one of the five ways[4] listed in the jury instructions, the jury should have found her fault was a proximate cause of the plaintiffs' damages. Even though fault may have been established, it does not necessarily follow that proximate cause exists. *Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988). Questions of fault and questions of proximate cause are generally questions of fact that the jury must separately determine. *Hagen v. DeNooy*, 563 N.W.2d 4, 7 (Iowa App. 1997). When the evidence amply supports a verdict, a trial court abuses its discretion by granting a new trial simply because it would have reached a different result. *Lappe v. Blocker*, 220 N.W.2d 570, 573 (Iowa 1974).

> to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

[4] Those five ways were failing to drive at a reasonable and proper speed; failing to control one's vehicle; failing to yield one-half of the road; failing to maintain a proper lookout; and failing to drive on the right side of the road.

We agree some of the evidence in the record could lead a reasonable juror to conclude Becker's fault—whether it be crossing the centerline, failing to maintain a proper lookout, or one of the other negligent acts listed in the jury instructions—was a proximate cause of the plaintiffs' damages. There is also evidence in the record, however, that could lead a reasonable juror to the opposite conclusion. Becker testified there was nothing she could do to prevent the bus from colliding with Soukup's car. Other evidence, although disputed by the plaintiffs, supports Becker's testimony. The trial court did not abuse its discretion when it denied the plaintiffs' motion for a new trial.

III. Juror Testimony.

The plaintiffs also claim the trial court should not have prevented them from subpoenaing jurors to present live testimony at the hearing on their motion for a new trial. We review for an abuse of discretion. *See In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981).

The plaintiffs argue that, without the jurors' testimony at the hearing on their motion for a new trial, they could not have "a fair and full hearing on the issues" or "create a record in support of their propositions." The plaintiffs propose the jury found Becker was at fault for operating the bus over the centerline. As we discussed previously, rule 606(b) prohibited the trial court from considering nonjuror affidavits concerning the juror's specific findings about Becker's fault. Rule 606(b) prohibited the court from considering the jurors' live testimony concerning these matters as well.

The plaintiffs also propose the jury improperly brought external matters into their deliberations. Specifically, the plaintiffs contend one or more of the jurors may have expressed concerns about missing work and thus unduly hastened the jury's deliberations.[5] Rule 606(b) does allow jurors to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." However, a trial court is not required to allow live juror testimony on such matters where there has not been "a clear showing of some misconduct sufficient to vitiate the verdict if the testimony adduced on hearing substantiates it." *See Jurgens v. Davenport, Rock Island & Northwestern Ry. Co.*, 249 Iowa 711, 722, 88 N.W.2d 797, 804 (Iowa 1958).

In support of their contention the jurors unduly hastened their deliberations, the plaintiffs point to the following evidence: a nonjuror affidavit stating the jury foreman was angry because his employer made him use some of his vacation time to serve on the jury; another nonjuror affidavit stating the affiant heard the foreman proclaim "Let's get back to work!" after the trial was over and the jurors were leaving the jury room; and a poem written by an unidentified juror concerning his or her jury service with lines like "Ten days they figured of our time, per minute we wouldn't be making a dime" and "So let's listen and comprehend what we hear and then get the hell out of here!". This evidence does not reveal possible juror misconduct sufficient to require a new trial. Indeed, we question whether this evidence reveals any juror misconduct at all.

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[5] The trial began on February 17, 1999. The jury deliberated from 3:25 p.m. on March 2, 1999, until 3:00 p.m. on March 3, 1999.

Jurors' statements showing concerns about time and other similar sentiments are expected, and are not misconduct. The trial court did not abuse its discretion when it prevented the plaintiffs from subpoenaing jurors to present live testimony at the hearing on their motion for a new trial.

IV. Compelled Appearance for Affidavits and Depositions.

Finally, the plaintiffs claim the trial court should not have quashed the subpoenas that had been issued pursuant to section 622.87 of the Iowa Code to compel jurors to appear and prepare affidavits or be deposed.[6] The plaintiffs were attempting to gather additional information regarding the two matters discussed above: Becker's fault and juror misconduct.

The plaintiffs argue, for the first time, the court abused its discretion. In their motion to set aside the court's order quashing their subpoenas, the plaintiffs only argued the court had "no jurisdiction to quash a Subpoena issued pursuant to Chapter 622.87 under a separate Petition." We do not consider issues raised for the first time on appeal. *De Bolt v. Daggett*, 416 N.W.2d 102, 106 (Iowa App.

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[6] Section 622.87 states:

> When a person is desirous of obtaining the affidavit of another who is unwilling to make the same fully, the person may apply by petition to any officer competent to take depositions, stating the object for which the person desires the affidavit.

Section 622.88, in turn, states:

> If the officer is satisfied that the object is legal and proper, the officer shall issue a subpoena to bring the witness before the officer, and, if the witness fails then to make a full affidavit of the facts within the witness' knowledge to the extent required of the witness by the officer, the latter may proceed to take the witness' deposition by question and answer in the usual way, which may be used instead of an ordinary affidavit.

1987). In any event, for the reasons we articulated in part III, the court did not abuse its discretion when it quashed the subpoenas.

The plaintiffs also argue the court exceeded its authority. Like the plaintiffs' abuse-of-discretion argument, this argument apparently surfaced for the first time on appeal. It also is not supported by any applicable authority. *See* Iowa R. App. P. 14(a)(3). We affirm the trial court on this issue and all other issues the plaintiffs have presented.

AFFIRMED.