IN THE COURT OF APPEALS OF IOWA

No. 1-078 / 00-0214
Filed April 27, 2001

MARGARET BAUX and MARY BAUX,
Plaintiffs-Appellants,

vs.

AUGUSTINE R. BICKEL, JR., and SCHNEIDER NATIONAL CARRIERS, INC., and/or SCHNEIDER NATIONAL LEASING, INC.,
Defendants-Appellees.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Plaintiffs appeal a district court ruling denying their motion for new trial following a jury verdict in their action to recover for personal injuries sustained in a motor vehicle accident. Plaintiffs contend a new trial was required because eleven of plaintiffs' exhibits admitted into evidence did not go with the jury to the jury room. **AFFIRMED.**

James W. Carney and George W. Appleby of Carney, Appleby, Brewick & Nielsen, P.L.C., Des Moines, for appellant.

Dennis P. Ogden of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellees.

Heard by Sackett, C.J., Huitink and Streit, JJ.

SACKETT, C.J.

In this personal injury action the jury deliberated without the benefits of eleven medical bills of plaintiffs that had been marked as exhibits and admitted into evidence. After the jury's return the missing exhibits were found in the file of plaintiffs' attorney. Plaintiffs filed a motion contending they should have a new trial because the jury did not have these exhibits during its deliberations. The district court denied the motion and this appeal follows. We affirm.

Plaintiffs Margaret Baux and Mary Baux brought suit seeking damages from defendants that plaintiffs contend resulted from a collision between a automobile owned by Mary Baux and driven by Margaret Baux and a tractor-trailer driven by Augustine Bickel and owned by Schneider National Carriers, Inc. and Schneider National Leasing, Inc. Following a trial the jury found defendant Bickel seventy-five percent at fault and plaintiff Margaret Baux twenty-five percent at fault.

The jury found Margaret Baux's damages to be $51,922, which included $8,647 in past medical expenses. Plaintiff Margaret Baux contends she proved past medical expense of about $20,667. The jury found Mary Baux's damages to be $44,521, which included $14,105 in past medical expenses. Mary Baux claims she proved past medical expenses of about $15,171. By plaintiffs' calculations Margaret should have had an additional $12,020 in past medical expenses and Mary an additional $1,066.

Plaintiffs filed a motion for a new trial claiming there was an irregularity in the proceedings in that the eleven exhibits representing past medical bills in the amount of $31,973.82 did not go to the jury when it retired to deliberate. Plaintiff

contended in the alternative the jury should be brought back to deliberate and be provided the exhibits not sent to them at the time of the initial deliberations.

Defendants resisted the motion and the district court overruled plaintiffs' motion in its entirety without additional comment. Plaintiffs asked that the court reconsider its ruling. The district court in addressing this request found it did nothing to prevent the jurors from taking all the exhibits and indicated it gave counsel an opportunity to go through their exhibits prior to their being delivered to the jury to ascertain that all admitted exhibits were in the jury's hands. The court further said when it was called to its attention that two numbered exhibits were missing, plaintiffs' attorney was given an opportunity to get them to the court, and they were given to the jury. The court said it had no way of knowing the jury did not have all the exhibits "until it was brought to the undersigned's [judge's] attention by the jury and counsel." After making these findings the district court again overruled the motion for new trial.

Plaintiffs contend this was error because Iowa Rule of Civil Procedure 198(b) requires that the jury take all the exhibits admitted into evidence with them to the jury room unless otherwise ordered. We agree with plaintiffs that all exhibits should go with the jury to the jury room unless the district court exercises its discretion to order otherwise. *See State v. Coburn*, 315 N.W. 2d 742, 747 (Iowa 1982); *Heth v. Iowa City*, 206 N.W. 2d 299, 303 (Iowa 1973). The district court not having ordered otherwise, all the exhibits admitted at trial including the eleven missing exhibits should have been sent with the jury when they retired to the jury room to deliberate. While not disagreeing that the exhibits should have gone to the jury room with the jury the defendants contend (1) plaintiffs did not

preserve error; and (2) there was no basis for a new trial because the error was that of plaintiffs' attorney and the error of a party's attorney does not provide a basis to award them a new trial, and further, that the plaintiffs have failed to show they are prejudiced.

Plaintiffs contend error was preserved by their filing a motion for new trial. The defendants claim the objection could have been raised earlier, and because plaintiffs have failed to do so, we cannot address the claim on appeal.

During the course of deliberations the jury sent the judge three notes to the court.

The first note said:

> "We are looking for total medical bills for Mary and Lori summary. —16 or 22 exhibit."

The second note said:

> "We do not have all medical billings summaries? —So far we have: 16, 16A, and 22."

The third note said:

> "If we do not award past medical do they have to pay back insurance out of settlement she gets otherwise. Randy"

After receiving the notes the district court had a telephone conference with the attorneys for all parties. The telephone conference was not reported. After the telephone call plaintiffs' attorney faxed two exhibits to the district court and these exhibits were delivered to the jury. Additionally the district court responded to the jury in writing telling them they had all the exhibits, and there was no summary of the total medical bills admitted through exhibit. Exhibit 16, the court said, was a partial summary and it directed the jury to please review the instructions.

Defendants contend during the telephone conference plaintiffs had the opportunity to call the problem raised in the motion for new trial to the district court's attention. Plaintiffs contend there is no merit to this argument because the record shows no one was aware the jury did not have the missing eleven exhibits until after the jury had returned its verdict; consequently, their motion for new trial presented their first opportunity to call the omission to the district court's attention.

We agree with plaintiffs that they brought the claimed error to the district court's attention when they first became aware of the fact. While claiming that this issue should have been called to the court's attention in the telephone call between the district court and counsel, defendants have failed to show that plaintiffs were aware the jury was missing eleven exhibits at the time of the call. Furthermore in *Erickson v. Thompson*, 257 Iowa 781, 790-91, 135 N.W.2d 107, 112-13 (1965), the court held that the failure to object to an erroneous instruction did not preclude the appellate court from reviewing the trial court's decision to determine if it abused its discretion in granting a new trial where there was a failure to achieve substantial justice. *See also Peterson v. First Nat. Bank of Iowa*, 392 N.W.2d 158, 161, 162 (Iowa Ct. App. 1986). Preservation of error is not a prerequisite to reviewing the trial court's decision to grant a new trial, when the grant of a new trial is based upon the reason that the verdict did not achieve substantial justice or when the verdict is contrary to the evidence. *Id.* at 162.

In ruling upon motions for new trial the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial

justice. Iowa R. App. P. 14(f)(3). We are more reluctant to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

The plaintiffs contend the language of Iowa Rule of Civil Procedure 198(b) is mandatory and requires the jury review all exhibits introduced into evidence. They argue that the rule does not appear to contemplate the inadvertent failure of the jury to have all the exhibits as an exception to this requirement. They further argue this is true even if the exhibits were not taken to the jury room because of a mistake.

In material part Iowa R. Civ. P. 198 provides: "When retiring to deliberate, the jury shall take with them all exhibits in evidence except as otherwise ordered." *Heth*, 206 N.W.2d at 303. As a general rule submission of exhibits to the jury is a matter resting in trial court's sound discretion. *State v. Shea*, 218 N.W.2d 610, 615 (Iowa 1974); *see also Heth*, 206 N.W.2d at 303.

Neither party has provided authority that directly addresses the issue before us, nor do we find any Iowa case on point. Iowa Rule of Civil Procedure 198(b) does not specify who is responsible for seeing that the jury has all the exhibits. Nor have the parties cited or can we find any Iowa case law establishing who is responsible for assuring that the jury has all exhibits before deliberation. The basic responsibility for assuring the jury has the exhibits should lie with the district court. Here the district court delegated that responsibility to the attorneys for the parties, and there is no record of any objections having been made to the delegation.

This brings us to the question of whether the fact plaintiffs' attorney had the eleven exhibits was his mistake and consequently, as defendants argue,

cannot form the basis for a new trial. "The law regards the neglect of an attorney as the client's own neglect, and will give no relief from the consequences thereof." *Jones v. Leech*, 46 Iowa 186, 187 (1877). The general rule in civil cases is a claim of inadequate representation is not a sufficient basis for granting a new trial. *In re Marriage of Johnson*, 499 N.W.2d 326, 327 (Iowa Ct. App. 1993) citing *Jones*, 46 Iowa 187; *see also Ware v. Eckman*, 224 Iowa 783, 787, 277 N.W. 725, 727-28 (1938); *Iowa Cord Tire Co. v. Babbitt*, 195 Iowa 922, 929-30, 192 N.W. 431, 434 (1923); *McCormick v. McCormick*, 109 Iowa 700, 703, 81 N.W. 172, 173 (1899). "It is a rule well settled, and necessary for the orderly and timely discharge of the business of the courts, that a client be charged with the neglect of his attorney." *Babbitt*, 195 Iowa at 929-30, 192 N.W. at 434. On this basis we affirm the district court.

AFFIRMED.