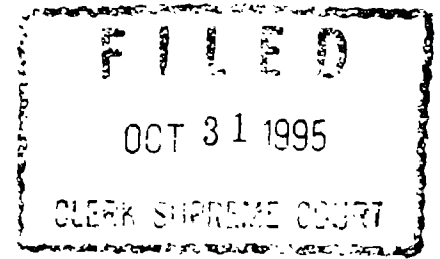


IN THE COURT OF APPEALS OF IOWA

No. 5-460 / 94-0708



**DONALD E. WEATHERWAX, II, Individually and as Administrator of the
Estate of SARA S. WEATHERWAX, and DONALD E. WEATHERWAX, III, by
Donald E. Weatherwax, II, His Father and Next Friend,**
Plaintiffs-Appellants.

vs.

WHEALEN KOONTZ,
Defendant-Appellee,

and

STEVEN H. GRIFFITH,
Defendant.

Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

Weatherwaxes appeal the district court's denial of their motions to reform the
verdict or for new trial. **AFFIRMED IN PART, REVERSED IN PART AND
REMANDED FOR A NEW TRIAL.**

Tom Riley and Charles C. Brown, Jr., of Tom Riley Law Firm, P.C., Cedar
Rapids, for appellants.

Charles Blades and Lawrence E. Blades of Blades, Carmichael, Rosser & Benz,
Cedar Rapids, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HUITINK, J.

The Weatherwaxes appeal the district court's denial of their motion to reform the verdict or for a new trial. We affirm in part, reverse in part and remand for a new trial as to damages.

Donald Weatherwax II and III sued Whealen Koonz and Steven Griffith for the wrongful death of Sara Weatherwax, alleging medical malpractice. The Weatherwaxes settled with Griffith, and their claim against Koontz proceeded to trial. Following several days of testimony and deliberation, the jury returned a verdict finding Koontz ten percent at fault and allocating damages in the amount of \$96,134. The trial judge then reduced this figure by ninety percent to reflect the jury's ten percent fault determination.

Over the weekend immediately following the verdict, jurors were contacted by the Weatherwaxes' attorneys asking them to explain precisely how they arrived at the \$96,134 figure. Each juror indicated that the \$96,134 award reflected a percentage of a larger damage figure. Each juror then signed an affidavit in this regard. On Monday February 14, 1994, the Weatherwaxes filed a motion to reform the verdict to comply with the intent of the jury. This motion was later amended to seek a new trial in the alternative. A hearing was held and jurors were questioned as to their damage calculations. Although juror testimony conflicted as to the specific figure from which the \$96,134 award was determined, each juror testified that \$96,134 is what the jury

intended the Weatherwaxes to receive and that this figure represented what the jury believed was ten percent of larger total damages.

After hearing the testimony, the district court concluded the jury reached no consensus with regard to total damages and accepted the original verdict of \$96,134 total damages and ten percent fault. Judgment was entered against Koontz in the amount of \$9,613.40. The Weatherwaxes appeal.

Our review is for correction of errors of law Iowa R. App. P. 4. On a motion for a new trial where the movant contends the verdict fails to do substantial justice we review for an abuse of discretion. *Julian v. City of Cedar Rapids*, 271 N.W.2d 707, 709 (Iowa 1978). Where the moving party asserts incorrect application of the law, however, the trial court is not awarded such broad discretion. *Id.* Because the Weatherwaxes assert the trial court misapplied law, we look only to the relevant legal principles and determine if they were properly applied. In doing so, we accept the trial court's findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The Weatherwaxes contend the district court erred in reducing the jury's verdict from \$96,134 to \$9,613.40. They assert the jurors' testimony and affidavits establish the jury originally agreed upon a verdict of \$961,340 and ten percent fault but then gratuitously assumed the judicial function of reducing the award to reflect their allocation of fault. They assert the appropriate remedy is a reformation of the jury's

verdict to award plaintiffs \$96,134. In the alternative, the Weatherwaxes request a new trial on the issue of damages.

We look first to admissibility of juror testimony with respect to damage calculations. Iowa Rule of Evidence 606(b) provides:

[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 of indictment or concerning his mental process in connection therewith

While limiting the scope of juror testimony, this language does not suggest that juror testimony which aids in establishing that which was agreed upon by the jury is prohibited. *Prendergast v. Smith Laboratories, Inc.*, 440 N.W.2d 880, 883 (Iowa 1989). Therefore, this testimony is admissible so long as it helps the court determine the amount of the jury's agreed upon damages. Here we determine juror testimony was necessary to establish the total amount of damage agreed upon. Accordingly, the jurors' testimony was admissible.

We next look to the Weatherwaxes' contention the district court erred in reducing the jury's damage award by ninety percent. In making this reduction the district court concluded the jury failed to reach a consensus on the issue of total damages. Although each juror testified that the \$96,134 verdict reflected a reduction from a larger number, it is unclear what this larger figure was or if the jury agreed upon

total damages at all. We accordingly find substantial evidence supports the district court's finding that the jury did not reach an agreement as to total damages.

In *Prendergast v. Smith Laboratories, Inc.*, 440 N.W.2d 880 (Iowa 1989), the supreme court held that this determination precludes reformation of a jury verdict. In the absence of an established jury finding as to total damages, the adjudicative process is incomplete leaving nothing for the court to reform. *Id.* at 884. Once this deficiency in the adjudicative process is established, "the best recourse is to order a new trial on the omitted issue." *Id.*

The district court correctly concluded that its finding of no consensus precluded reformation of the verdict. We, however, find *Prendergast* requires us to remand this case for a new trial as to damages. While there is some indication that the jury may have agreed upon a figure for total damages, it is unclear precisely what that figure was or if the jury actually came to an agreement. The district court erred in denying the Weatherwaxes' motion for a new trial. Accordingly, we reverse the decision of the district court and remand for a new trial as to damages.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR
A NEW TRIAL.**