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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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BLUE EARTH ENTERPRISES, INC., and **KEVIN BORES,**

Plaintiffs-Appellants,

vs.

WILLIAM FREDERICK CHAUNCEY and **GLENN LeGRAND,**

Defendants-Appellees.

9-64
88-453

Appeal from the Iowa District Court for Woodbury County (94187), Dewie J. Gaul, Judge.

Plaintiffs appeal an order granting a new trial. **AFFIRMED.**

William Schade, of New Ulm, Minnesota, and Gene A. Wickey, Sioux City, for the plaintiffs-appellants.

Timothy S. Bottaro, of Kindig, Beebe, Rawlings, Nieland, Probasco & Killinger, Sioux City, for the defendants-appellees.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

The question we address is whether the trial court abused its discretion in granting a new trial after a jury returned a verdict for plaintiffs-appellants Blue Earth Enterprises and Kevin Bores in a suit on a commercial lease.

Plaintiffs-appellants are Blue Earth Enterprises, Inc., and its president and majority stockholder Kevin Bores. Plaintiffs operate Domino's Pizza franchises. Defendants-appellees are realtor William Frederick Chauncey and his broker Glenn LeGrand. Plaintiffs hired defendants to find real estate suitable for the operation of plaintiffs' Domino's Pizza franchise. The site defendants found was owned by David Davenport. Davenport[1] built a building on the site for Domino's Pizza establishment and plaintiffs entered into a lease with Davenport. The property was not suitable for a Domino's Pizza business because of zoning restrictions on the hours of operation and the number of delivery vehicles. Plaintiffs sued defendants alleging negligence, misrepresentation, and breach of contract.

The case was tried on the theories of both negligence and breach of contract. The trial court refused defendants' request to instruct the jury on possible fault of David Davenport, the lessor, who was not a party to the

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1. David owned the property with others who we need not name.

suit. The jury returned verdicts in favor of plaintiffs. Two special verdicts were returned. The jury found defendants were at fault, their fault was a proximate cause of damage to plaintiffs, the plaintiffs were not at fault, and the total amount of damages sustained by plaintiffs was $71,872.72. The jury found in favor of plaintiffs on the ground of breach of contract and fixed the amount of recovery against the defendants at $71,872.72.

David L. Davenport had commenced a lawsuit against plaintiffs for plaintiffs' failure to pay the rent. Plaintiffs counterclaimed. The counterclaim was based on the same allegations made against these defendants. That lawsuit was settled by plaintiffs paying Davenport one year's rent on the 10-year lease.

Defendants moved for a new trial asserting, among other things, error in refusing to instruct the jury to consider fault of David Davenport, who had been released by plaintiffs in a settlement of the previous breach of lease. The trial court sustained the defendants' motion for new trial on the ground the court had erred in failing to instruct the jury about allocating fault to David Davenport. The court found its failure to submit the issue of Davenport's negligence had a significant impact on the jury's decision. The trial court granted a new trial on the contract count and negligence count. Plaintiffs contend the trial court erred in granting a new trial.

Plaintiffs first argue it was not error for the trial court to refuse to instruct on Davenport's negligence because defendants never made an affirmative allegation in their answer the negligence of Davenport was a proximate cause of plaintiffs' damages. Defendants in their answer denied they were negligent. Defendants contend such a denial is sufficient and they did not have to affirmatively allege Davenport's negligence to be entitled to have the jury instructed on it if there was substantial evidence to support submission of the issue.

When a trial court orders a new trial because of its belief it gave an erroneous jury instruction, we review the order like any other alleged error and reverse the order if it is erroneous. Harris v. Clark, 251 Iowa 807, 809, 103 N.W.2d 215, 216 (1960). A defendant can urge a nonparty's negligence is a proximate cause without pleading it as an affirmative defense. Sponsler v. Clarke Electric Cooperative, Inc., 329 N.W.2d 663, 665 (Iowa 1983); Adam v. T.I.P. Rural Elec. Co-op, 271 N.W.2d 896, 902 (Iowa 1978); Kuehn v. Jenkens, 251 Iowa 718, 728-29, 100 N.W.2d 610, 616 (1960). The reason for not requiring it to be pled is it seeks to negate an element in the defendant's case instead of asserting new fact in avoidance of the claim. Adam v. Rural Elec., 271 N.W.2d at 902.

The defendants' failure to raise in their answer Davenport's negligence as an affirmative defense does not

preclude them from having an instruction on Davenport's negligence given if they are otherwise entitled to it.

The next question is whether there is substantial evidence to support the instruction. To have a legal theory submitted to the jury it must be supported by both the pleadings and substantial evidence. Carter v. Wiese Corp., 360 N.W.2d 122, 132 (Iowa App. 1984). Davenport sued plaintiffs for rents and plaintiffs counterclaimed. Plaintiffs' counterclaim against Davenport raised the same allegations of negligence against Davenport as raised against plaintiffs in this case.

To allocate fault to Davenport he must meet the definition of a party under Iowa Code section 668.2 (1987) which states in relevant part:

> As used in this chapter, unless otherwise required, "party" means any of the following:
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> * * *
>
> 3. A person who has been released pursuant to section 668.7.
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> * * *

Section 668.7 provides:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, as determined in section 668.3, subsection 4.

The Iowa court has adopted a strict definition of "party" as used in section 668.2. See Selchert v. State,

420 N.W.2d 816, 819 (Iowa 1988); Renze Hybrids Inc. v. Shell Oil Co., 418 N.W.2d 634, 641 (Iowa 1988); Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986); Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Trading, Inc., 382 N.W.2d 156, 159 (Iowa 1986).

We determine there is evidence plaintiffs had a claim against Davenport based on misrepresentation as to zoning arising from the same transaction and claiming the same damages plaintiffs now claim against defendants in this litigation. We determine Davenport met the definition of party as contemplated by the act. We agree with the trial court the instruction should have been given.

Plaintiffs next contend any error was harmless because the jury found for plaintiffs on the breach of contract claim and because comparative negligence concepts do not apply to contract claims. Plaintiffs contend even if the negligence verdict is set aside, they are entitled to prevail on the contract theory. We agree comparative fault should not apply when plaintiffs seek solely to recover that which they contracted to receive.

We look to the comments of the uniform comparative fault act which provided a pattern for our act. See Selchert Baldwin v. City of Waterloo, 372 N.W.2d 486, (Iowa 1985). Within the commission's comments to section 1 is the following sentence:

> There is no interest to include in the coverage of the Act actions that are fully

> contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. 12 U.L.A. 35 (Supp. 1982).

See also Lesmeister v. Dilly, 330 N.W.2d 95, 101-02 (Minn. 1983), and Steenson, The Anatomy of Products Liability in Minnesota: Principles of Loss Allocation, 6 Wm. Mitchell L.Rev. 243, 334 (1980).

We note too, contract law is generally based on recovery of what was contracted and contract law does not determine fault. See Lesmeister, 330 N.W.2d at 101. However, we do not find the issue to be whether plaintiffs could have prevailed on the contract theory. The question instead is whether when a case is submitted under two theories and the trial court errs in the submission of one theory, does the trial court abuse its discretion in setting aside both verdicts. The district court in ruling on the motion for new trial said:

> Technically, I do not believe the court's error dictates a grant of a new trial. But practically speaking the court believes the failure to submit the issue of David Davenport's negligence had a significant impact on the jury's decision, and that the jury's primary attention was effectually centered on the negligence claim, and the breach of contract claim was decided so as to be in harmony with the result on the negligence claim. (emphasis supplied).

In ruling upon a motion for new trial, broad but not unlimited discretion is vested in the trial court. We are slower to interfere with the grant of that relief than with its denial. The discretion so accorded must have some support in the record. Lappe v. Blocker, 220 N.W.2d 570,

572 (Iowa 1974); Hardy v. Britt-Tech Corp., 378 N.W.2d 307, 310 (Iowa App. 1985). We interfere reluctantly and infrequently with a grant of new trial and only upon a clear showing of abuse of discretion. We do not disturb such an order unless we can say there was no reasonable ground for the trial court to believe the jury reached an erroneous verdict which may be obviated upon a second trial. Kracht v. Hoeppner, 258 Iowa 912, 915, 140 N.W.2d 913, 915 (1966).

Having examined the findings of the trial court and having reviewed the record, we determine there is support for the trial court's decision to grant a new trial. The trial court did not abuse its discretion. Hardy, 378 N.W.2d at 311.

Defendants contend plaintiffs' appeal was not timely. A motion to dismiss the appeal as untimely has previously been overruled without prejudice by three Justices of the Supreme Court. We find no reason to reconsider the supreme court's ruling.

AFFIRMED.