IN THE COURT OF APPEALS OF IOWA

No. 3-102 / 12-0498
Filed March 13, 2013

THIENE T. NGUYEN AND KOUANE NGUYEN,
Plaintiffs-Appellees,

vs.

MARC A. EWERS, M.D.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

A defendant appeals the district court's grant of a new trial. **REVERSED.**

Marc A. Humphrey of Humphrey Law Firm, P.C., Des Moines, for plaintiffs appellees.

Barry G. Vermeer and Loree A. Nelson of Gislason & Hunter, L.L.P., Des Moines, for defendant appellant.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

The defendant, Marc A. Ewers, M.D., appeals the district court's decision granting the plaintiffs, Thiene T. Nguyen and Kouane Nguyen, a new trial after a jury verdict for the defense. He argues the district court abused its discretion in granting the new trial because there is no objective evidence or sound judicial reason to overturn the jury verdict. Further, he claims the judge violated Iowa Code of Judicial Conduct 51:2.9 in granting the new trial. The Nguyens respond that the grant of a new trial was appropriate because the verdict did not do substantial justice. Because the record does not support granting a new trial, we reverse.[1]

I. Background Facts and Proceedings

Only July 14, 2006, Thiene Nguyen underwent an exploratory laparoscopic surgical procedure performed by Ewers. While the surgery is normally an outpatient procedure, post-surgical clinical signs necessitated Thiene's admission to the hospital. Her clinical course worsened over the next seventy-two hours, and after an internal medicine consultation, a computed tomography (CT) scan was performed that showed findings consistent with an "infected fluid/large abscess cavity . . . likely secondary to a colonic perforation." A second surgery was performed by Dr. Robert O. Thompson, M.D. Based on the findings of the second surgery, Ewers testified what likely happened in the

[1] We have noticed a trend in the non-compliance with our rules of appellate procedure dealing with appendices. One common error that was present in this appendix was the violation of Iowa R. App. P. 6.905(7)(c), which mandates: "The name of each witness whose testimony is included in the appendix shall be inserted on the top of each appendix page where the witness's testimony appears." Following these rules aids the court in its review of the issues, which ultimately benefits the litigants.

first surgery, when he was separating the adhesions, the diverticulum wall was weakened, causing a perforation, and leakage of bowel contents into the abdominal cavity and starting an inflammatory process resulting in abscess formation.

A petition was filed by the Nguyens alleging medical negligence against Ewers for failing to timely discover and diagnose Thiene's colon perforation either during the first surgery or soon after.[2] A jury trial was held with testimony from seventeen witnesses, including multiple experts, physicians, and nurses. The jury returned a unanimous defense verdict. On December 16, 2011, the Nguyens filed a motion requesting a new trial on the grounds that "the verdict, report or decision is not sustained by sufficient evidence" pursuant to Iowa Rule of Civil Procedure 1.1004(6) and the court should exercise its "inherent power to set aside a verdict which fails to do substantial justice between the parties."[3] The district court granted the motion and found as follows:

> Plaintiffs, wife and husband, came to this country from Laos in 1975. They are not fluent in English, although their two daughters who testified were fluent. Several jurors chose not to pay attention to the evidence or the arguments. One juror repeatedly dozed off, causing the Court to invite the jury and others present to stand and stretch or to call recesses. Another juror took absolutely no notes during the trial. The Court was present throughout the trial and concludes that the verdict was unjust and was likely the result, at least in part, due to Plaintiffs' national origin. See Iowa Rule Civil procedure 1.1004.
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> . . . .
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> All experts testified as to the known risk and symptoms of a nicked bowel. Defendant's experts testified that Dr. Ewers met the standards of care in the surgery and follow-up care and treatment.

[2] It is not disputed by the parties that a bowel perforation is a known risk to this procedure.

[3] The Nguyens's motion for an extension of time to file their motion for a new trial was not resisted.

> Plaintiffs' expert testified he did not meet the standard of care in failing to recognize and treat the bowel damage caused.
>
> The Court was shocked at the jury's verdict. The verdict does not do substantial justice between the parties.
>
> A new trial is granted.

Ewers appeals.

II. Standard of Review

The scope of our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. *Channon v*. *United Parcel Serv*., *Inc*., 629 N.W.2d 835, 859 (Iowa 2001). A claim the verdict fails to effect substantial justice, is reviewed for an abuse of discretion. *Estate of Hagedorn v*. *Peterson*, 690 N.W.2d 84, 87-88 (Iowa 2004); *see also Pavone v*. *Kirke*, 801 N.W.2d 477, 496 (Iowa 2011) ("To the extent the motion [for new trial] is based on a discretionary ground, we review it for an abuse of discretion."). To show an abuse of discretion, the complaining party must show the court exercised its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Hagedorn*, 690 N.W.2d at 88. "We are more reluctant to interfere with a ruling which grants a new trial than one in which it is denied and will do so only upon a clear showing of abuse of discretion." *Lubin v*. *Iowa City*, 131 N.W.2d 765, 767 (Iowa 1964).

III. Sufficiency of the Record as to Jury Misconduct

Ewers's main contention is there is no evidence in the record of juror misconduct or racial bias which would support the district court's grant of a new trial. First he argues it is improper for the district court to sua sponte mention racial bias, and other jury misconduct because the Nguyens did not object to the composition of the jury or bring any concerns regarding the jury to the court's

attention at any time prior to the verdict. Our supreme court has recently addressed the requisite timeliness of lodging an objection to allow a district court to grant a new trial in *Loehr v*. *Mettille*, 806 N.W.2d 270, 278 (Iowa 2011). In *Loehr*, the court determined when a ground for a new trial was not raised at the first available opportunity during trial, the party loses its right to a new trial, but it does not necessarily bar a district court from using its discretion to grant a new trial. *Loehr*, 806 N.W.2d at 278. Ewers relies on *Schmitt v*. *Jenkins Truck Lines*, *Inc*., 170 N.W.2d 632, 660 (Iowa 1969), for the proposition that counsel cannot wait to hear the jury's result and then, after and unfavorable verdict, take advantage of the error which he could have called to the court's attention earlier. In *Loerhr*, our supreme court distinguished *Schmitt*, and found:

> [N]otwithstanding counsel's failure to make a record which would authorize this court to reverse the judgment on appeal, the trial court in its consideration of a motion for new trial is not limited by the status of the record in this respect when it feels the verdict fails to administer substantial justice . . . . [T]he trial court has the inherent right to grant another trial where substantial justice has not been effectuated.

Loehr, 806 N.W.2d at 278. The court in *Schmitt* also held a trial court "in its consideration of a motion for new trial is not limited by the status of the record in this respect when it feels the verdict fails to administer substantial justice or it appears the jury has failed to respond truly to the real merits of the controversy." *Schmitt*, 170 N.W.2d at 660.

It is not invariably an abuse of discretion for a trial judge to grant a motion for new trial based on a matter that could have been raised earlier, but was not. *Id.* Therefore, under *Loehr*, Ewers's argument the Nguyens should have

objected to the composition or conduct of the jury before the verdict does not foreclose the district court's ability to exercise its discretion.

Next, Ewers contends the Nguyens's motion for new trial was not sufficient because the motion did not specifically address racial bias and juror inattententiveness and only made a general juror-misconduct argument. The Nguyens asserted in their motion "the verdict clearly demonstrates that the jury failed to respond truly to the real merits of the case." The motion also asserted prospective jurors' attitudes regarding the civil justice system are influenced by "cable TV, the internet and other extraneous sources," such that "they do not come in open-minded to the claim of a damaged patient like Thiene Nguyen."

The Nguyens moved for a new trial not only under 1.1004(6), but also under the court's inherent power. It is under this inherent, discretionary power the court found the verdict did not do substantial justice. Therefore on our review, we look at the entire picture to determine if it was reasonable for the district court to determine the trial did not do justice between the parties, considering the conduct of the jurors as well as the evidence presented. *See Lehigh Clay Prods., Ltd. v. Iowa Dep't. of Transp.*, 512 N.W.2d 541, 543–44 (Iowa 1994) (explaining the difference between sufficient evidence for the verdict and substantial justice and "[t]he trial court is not limited to the grounds for granting a new trial specified in Iowa Rule of Civil Procedure [1.1004]").

On our review, we find the record is wholly lacking in demonstrating jury misconduct or perceived racial prejudice. While the trial court has broad discretion to grant a new trial based on misconduct, there must have been misconduct, and it must have been prejudicial. *Loehr*, 806 N.W.2d at 279. To

justify a new trial because of juror misconduct, it must appear the misconduct was calculated to, and probably did, influence the verdict. *In re Estate of Hughbanks*, 506 N.W.2d 451, 453 (Iowa Ct. App. 1993). The impact of misconduct is to be judged objectively by the trial court in the light of all allowable inferences brought to bear on the trial as a whole. *Id.* The district court's statement the verdict was "likely the result, at least in part," of prejudice is insufficient to show a reasonably probability of misconduct. Moreover, we find the record is insufficient to show prejudicial misconduct occurred. Merely requesting the jury to stand and stretch, once when the trial was going through the lunch break, and the other after defense counsel's closing argument, is insufficient to show inattentiveness.

Even if we accept the determination jury misconduct occurred, there is no demonstration of how any alleged misconduct caused prejudice to the Nguyens. The district court may have been "shocked" by the outcome, but there is no articulation as to how any perceived racial bias or a dozing juror, in a multi-day trial, influenced the outcome of the trial. Contrary to the Nguyens's assertions, there is not overwhelming evidence to support a verdict for the plaintiffs, and there is no support for the determination any jury misconduct prejudiced the Nguyens's case. Moreover, any claim the Nguyens's national origin was the cause of any misconduct is wholly unsupported by the record. If the district court or the Nguyens had observed signs of misconduct, a record should have been made. We are left with only the court's sua sponte, general statement the plaintiffs came to this country from Laos and are not fluent in English. We have nothing to determine if and how that affected the jury, nor do we know the racial

composition of the seated jury. We therefore find the record reveals nothing for us to accept the district court's opinion the defense verdict was "unjust and was likely the result, at least in part, due to Plaintiffs' national origin."

IV. Evidence Supporting the Verdict

Ewers also claims the district court abused its discretion in granting a new trial because the jury verdict was sustained by sufficient, unchallenged testimony such that a reasonable and impartial jury could find for the defendant.

We keep in mind we are "slower to interfere with the grant of a new trial than its denial." Iowa R. App. P. 6.904(3)(d). Ewers must establish the district court's grant of a new trial rests upon clearly untenable or unreasonable grounds. *See Lawson v*. *Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010) (defining abuse of discretion). An unreasonable decision is one not based on substantial evidence. *Channon*, 629 N.W.2d at 859.

It is not for us to invade the province of the jury. In fact a verdict will not be set aside or altered unless it is (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidential support. *Schmitt*, 170 N.W.2d at 659. If the verdict is the result of passion and prejudice a new trial should be granted. *Id.* We must also give weight to the fact the trial court, with the benefit of seeing and hearing the witnesses, observing the jury and having before it all incidents of the trial, saw fit to interfere. *See id.* at 660.

Even assuming misconduct occurred, there has been no prejudice shown because of the substantial evidence presented to the jury supporting the verdict.

As acknowledged by the district court, there was conflicting testimony from the experts. For example, an expert for Ewers testified between the fourteenth—the day of first surgery—and the afternoon of the seventeenth, there were no indications that a second surgery was needed. Based on his reading of the medical records, Thiene was doing better on the morning of the seventeenth and it wasn't until she worsened on the afternoon of the seventeenth a CT scan was necessary, and there was no indication of a perforation until that time. Five of the six treating nurses testified they did not observe any clinical signs that led them to suspect any abnormality or perforation in the colon before July 17, 2006. Moreover, the jurors heard testimony of other members of the team of physicians treating Theine and their testimony was that a CT scan was not indicated until July 17.

On the other hand, an expert for the Nguyens testified he believed Ewers should have diagnosed Thiene the first evening he saw her in the hospital because of the amount of pain she was having, the drop in hemoglobin, and the abdominal distension. The district court even recognized this split in the expert testimony by finding

> All experts testified as to the known risk and symptoms of a nicked bowel. *Defendant's experts testified that Dr. Ewers met the standards of care in the surgery and follow-up care and treatment*. Plaintiffs' expert testified he did not meet the standard of care in failing to recognize and treat the bowel damage caused. (Emphasis added).

It was properly the jury's duty to reconcile the conflicting testimonies, not the role of the district court. *See Hagedorn*, 690 N.W.2d at 88. Here, there was sufficient evidence to support the jury's verdict. The Nguyens's focus on Ewers's

"near admission" that he likely caused the nick in the bowel. This, however, was not the basis for the negligence claim; the claim was for failure to timely discover and diagnose the post-surgical problem, not for causing this known risk to occur.

The record before us reveals the jury was presented with disputed facts and opinions as testified to by multiple experts. It was for the jury to sort out the opinions and make both factual findings and credibility calls. *See Lantz v*. *Cook*, 127 N.W.2d 675, 676-77 (Iowa 1964). This is not a case wholly lacking evidentiary support, but in fact, sufficient evidence supports the defense verdict. We find Ewers has established the district court's grant of a new trial rested upon clearly untenable or unreasonable grounds, unsupported by the record and we must reverse its grant. *See Loehr*, 806 N.W.2d at 282 (finding reversal of a grant of a new trial is appropriate when the grounds for the grant are "clearly untenable" to amount to an abuse of discretion).[4]

V. Conclusion

As the record is wholly lacking in any demonstration of jury misconduct or racial prejudice, or resulting prejudice, it was an abuse of the district court's discretion to grant a new trial on those grounds. Moreover, we find there was sufficient evidence supporting the verdict in favor of Dr. Ewers, such that the district court's grant of a new trial rested upon clearly untenable grounds and is unsupported by the record. We therefore must reverse.

REVERSED.

Potterfield, J., concurs; Doyle, J., dissents.

[4] Because we find the district court abused its discretion in granting the new trial, we need not address Ewers's alternative argument under the Iowa Code of Judicial Conduct.

DOYLE, J. (dissenting)

I respectfully dissent. It is not often an experienced and well-seasoned trial judge is shocked at a jury's verdict. Having observed the trial proceedings first-hand, the trial judge was in a superior position to sense whether something went awry for reasons that are not readily apparent in a review of the cold trial transcript. We are more reluctant to interfere with a grant of a new trial than a denial. Iowa R. App. P. 6.904(3)(d). I defer to the trial court's judgment that the verdict did not do substantial justice between the parties, and I would affirm the grant of a new trial.