STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW BRIDGEWATER and ANDREA BRIDGEWATER,

Plaintiffs-Appellants/Cross-Appellees,

v

MOBILE AERIAL TOWERS, INC., BRUCE BREVITZ, d/b/a BREVITZ EQUIPMENT COMPANY, and CITY OF MIDLAND,

Defendants,

and

DANA CORPORATION and HYCO, a division of DANA CORPORATION,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
September 26, 2000

No. 215390
Midland Circuit Court
LC No. 95-004288-NP

CRAIG S. HERZBERG,

Plaintiff-Appellant/Cross-Appellee,

v

MOBILE AERIAL TOWERS, INC., BRUCE BREVITZ, d/b/a BREVITZ EQUIPMENT COMPANY, and CITY OF MIDLAND,

Defendants,

and

DANA CORPORATION and HYCO, a division of

No. 215707
Midland Circuit Court
LC No. 95-004879-NP

DANA CORPORATION,

Defendants-Appellees/Cross-Appellants.

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's denial of their motion for a new trial. The jury rendered a verdict in favor of defendants in this products liability action[1], and plaintiffs moved for a new trial on the basis of juror misconduct. Plaintiffs argued that two jurors improperly conducted experiments to test the evidence presented in the case and that this materially affected plaintiffs' substantial rights. We affirm.

Plaintiffs Matthew Bridgewater and Craig Herzberg were injured while trimming trees in a mobile aerial tower, commonly referred to as a "cherry picker." The men were working in a bucket attached to a boom and were about forty feet above the ground, when the boom collapsed and the bucket fell. Defendants Dana Corporation and Hyco were the manufacturers of the hydraulic cylinder in the boom that collapsed. Plaintiffs argued that a necessary safety device, a "set screw," was never installed on the hydraulic cylinder and that this constituted a manufacturing defect. Plaintiffs' theory was that a nut worked its way loose from a bolt, which caused a loss of hydraulic pressure. Plaintiffs argued that a set screw would have held the nut in place securely and prevented the accident. Defendants maintained that the set screw had been installed, but was likely removed negligently by someone else during maintenance.

The jury found that defendants were not negligent. After the proceedings were concluded, the trial court and the attorneys spoke with members of the jury. During those discussions, two jurors disclosed that they had conducted experiments relating to issues in the case. Plaintiffs moved for a new trial and submitted affidavits of plaintiffs' attorneys, which alleged that the jury foreperson and one other juror both conducted experiments and discussed the results of those experiments with other members of the jury. On the basis of the affidavits, which the trial court recalled as being consistent with information that it heard from the jurors, the trial court ordered an evidentiary hearing for further investigation into the foreperson's experiment.[2]

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[1] Plaintiffs' two actions were consolidated in the trial court, on stipulation of the parties, for discovery purposes only. However, the actions ultimately were tried together and have been consolidated on appeal.

[2] The experiment conducted by the other juror related to causation, not negligence, and therefore could not have affected the jury's verdict on the issue of negligence.

At the evidentiary hearing, the foreperson acknowledged that he conducted an experiment relating to the evidence presented during trial. Plaintiffs' experts testified that they could discern, from inspecting the threaded hole in the nut, that a set screw had never been installed. The foreperson, who had some experience in construction, went to a hardware store after trial that day and inserted bolts into nuts and then checked the threads of the nut to see whether he could determine that a bolt had been inserted. He could not. Later that evening, at home, the foreperson tapped a hole into a block of steel and ran a screw through the hole. He then inspected the hole and could not tell that a screw had been inserted. The foreperson insisted, however, that the experiment did not affect his opinion of the case and was merely to satisfy his own curiosity about his ability to tell whether a screw had been inserted into a threaded hole. He also insisted that he did not inform the other members of the jury about his experiment until after a verdict had been reached and that the experiment played no part in the jury's deliberations.

On the basis of the foreperson's testimony, the trial court denied plaintiffs' motion for a new trial. Plaintiffs argued that the foreperson's testimony was not credible, but the trial court refused to balance the credibility of the foreperson against that of plaintiffs' attorneys in a matter regarding the deliberative process of the jury. The trial court also noted that the foreperson's testimony was not inconsistent with what the foreperson had told the court immediately after the trial. The court stated that its previous belief that the experiment was discussed by the jury was simply an assumption.

We review the trial court's decision whether to grant a motion for a new trial on the basis of juror misconduct for an abuse of discretion. *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 130 (Jansen, P.J.), 141 (Holbrook, Jr., J.); 523 NW2d 849 (1994).

MCR 2.611(A)(1)(b) provides that a new trial may be granted for juror misconduct where that misconduct materially affects the substantial rights of the aggrieved party. Juror misconduct does not require a new trial in every instance. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). Rather, the party seeking a new trial must demonstrate prejudice. *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998); *Phinney v Perlmutter*, 222 Mich App 513, 539; 564 NW2d 532 (1997). In this case, plaintiffs failed to demonstrate that their substantial rights were materially affected.[3]

The foreperson testified that his experiment did not affect his verdict and was not shared with the jury until after the verdict had been reached. In *People v Gayton*, 81 Mich App 390, 396; 265

[3] Defendants argue that the trial court should not have allowed the foreperson to be questioned on the basis of plaintiffs' attorneys' affidavits. Generally, a jury's verdict may not be impeached by affidavits of either jurors or non-jurors. *Mandjiak v Meijer's Super Markets, Inc*, 364 Mich 456, 460-461; 110 NW2d 802 (1961); *Heintz v Akbar*, 161 Mich App 533, 540; 411 NW2d 736 (1987). However, an exception exists where the alleged misconduct involves an extraneous influence. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997); *Hoffman v Monroe Public Schools*, 96 Mich App 256, 261; 292 NW2d 542 (1980). We reject defendants' argument that the experiment was not an extraneous influence simply because it was conducted by a member of the jury and not an outside party. A juror may inject extraneous information into the jury's deliberations. See *Budzyn*, *supra* at 90-92.

NW2d 344 (1978), the defendant alleged that two jurors took materials into the jury room containing the definition of words that were central to the issues litigated. However, after conducting a hearing, the trial court determined that the materials were not considered by the jury during its deliberations. *Id*. at 397. This Court held that the defendant failed to demonstrate prejudice. *Id*. at 398. Here, given the foreperson's testimony that his experiment was not considered by the jury during its deliberations and did not affect his verdict, the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial.

Plaintiffs insist that the foreperson's testimony is not credible, and they rely heavily on the affidavits submitted by plaintiffs' attorneys to support their allegations of misconduct. However, the trial court appropriately declined to entertain a credibility contest between counsel for the losing parties and a juror regarding the jury's deliberations. In *Mandjiak v Meijer's Super Markets, Inc*, 364 Mich 456, 460-461; 110 NW2d 802 (1961), our Supreme Court held that a jury verdict may not be impeached "where the information concerning the juror's alleged misconduct is contained in an unsupported affidavit of the losing party or his attorney and the allegations of misconduct, such as they are, are categorically denied in an answering affidavit of a juror." See also *Shiner v Detroit*, 150 Mich App 420, 425-426; 387 NW2d 872 (1986) (where motion for new trial on basis of juror bias was supported solely on the basis of hearsay affidavits refuted by the juror involved, court abused its discretion in granting new trial). Here, although the foreperson admitted to conducting the experiment, he categorically denied plaintiffs' allegations that he injected that experiment into the jury's deliberations or that he allowed the experiment to affect his impartiality. Because the only evidence of prejudice is contained in hearsay affidavits, which are refuted by the juror in question, a new trial is not warranted.

Defendants argue on cross-appeal that the trial court erred in denying their motion for summary disposition and motion for a directed verdict. However, given our resolution of this case, it is unnecessary to reach this issue. *Kosmyna v Botsford Community Hospital*, 238 Mich App 694, 702; 607 NW2d 134 (1999).

Affirmed.

/s/ Michael J. Kelly
/s/ William C. Whitbeck
/s/ Jeffrey G. Collins