# STATE OF MICHIGAN

# COURT OF APPEALS

ROSE ANN OLSZEWSKI,

Plaintiff-Appellant,

v

JOE ANDREW BOYD,

Defendant-Appellee.

UNPUBLISHED
January 9, 2001

No. 212643
Wayne Circuit Court
LC No. 96-611949-NI

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

In this automobile negligence action alleging serious impairment of bodily function, MCL 500.3135(1); MSA 24.13135(1), a jury returned a special verdict finding that plaintiff was injured, but that defendant's negligence was not a proximate cause of her injury. After the trial, but before the judgment was entered, the case was reassigned from Judge Hathaway to Judge Baxter,[1] who subsequently entered a judgment of no cause of action in favor of defendant based on the special verdict. Plaintiff moved for a new trial which was granted on the ground of juror misconduct pursuant to MCR 2.611(A)(1)(a) and (b). Defendant then moved for rehearing, seeking either a reinstatement of the judgment of no cause of action or an evidentiary hearing on plaintiff's motion for new trial. Judge Baxter subsequently granted defendant's motion for rehearing and, on rehearing, vacated the order granting plaintiff's motion for new trial and reinstated the judgment of no cause of action, finding that "any jury misconduct was harmless error." Plaintiff appeals as of right. We affirm.

Plaintiff first argues that defendant's motion for rehearing should have been denied because he failed to meet the "palpable error" standard of MCR 2.119(F)(3). We disagree.

Contrary to plaintiff's contention, MCR 2.119(F)(3) does not limit a trial court's discretion when ruling on motions for rehearing to palpable errors. See *Brown v Northville Regional Psychiatric Hosp*, 153 Mich App 300, 308; 395 NW2d 18 (1986); *Smith v Sinai Hosp*

[1] Although it is not entirely clear from the record, it appears that the case was reassigned to Judge Baxter because Judge Hathaway was assigned to the criminal division of the Wayne Circuit Court.

*of Detroit*, 152 Mich App 716, 722-723; 394 NW2d 82 (1986). Rather, MCR 2.119(F)(3) provides:

> *Generally, and without restricting the discretion of the court*, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. [Emphasis added.]

In *Smith, supra*, this Court upheld a trial court's decision to give a party a "second chance" on a previously denied motion for accelerated judgment. This Court rejected plaintiff's argument that MCR 2.119(F)(3) did not allow the trial court to grant the motion for rehearing because no palpable error was demonstrated, stating:

> The emphasized portion of the court rule clearly illustrates the flaw with plaintiff's argument, mainly that this provision is in no way mandatory. If a trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing. [*Id.* at 722-723.]

Likewise, in *Brown, supra* at 308, this Court upheld a successor judge's grant of an untimely motion for rehearing based on a determination that the predecessor judge made a serious error, noting that MCR 2.119(F)(3) does not restrict the trial court's discretion. Therefore, we reject plaintiff's argument that Judge Baxter was required to summarily deny defendant's motion for rehearing as a matter of law for failure to meet the "palpable error" standard.

Plaintiff next argues that the trial court properly granted her motion for new trial on grounds of juror misconduct, but then erred in vacating the order granting a new trial on rehearing on the ground that any juror misconduct was harmless. Plaintiff lists eleven instances of alleged juror misconduct to support her position that her motion for new trial should have been granted.[2] After reviewing the record, we find that none of plaintiff's allegations of misconduct warrant relief.

A trial court's ruling on a motion for new trial under MCR 2.611 based on juror misconduct is reviewed for an abuse of discretion. *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 130; 523 NW2d 849 (1994).

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[2] A transcript of the trial court proceedings had not been prepared for the trial court's review at the time of the motion for new trial. Thus, plaintiff relied solely upon a juror affidavit to establish the factual basis for her motion for new trial, including several facts that would have been apparent from the trial record had a trial transcript been prepared initially. Under MCR 2.611(D), only those facts not apparent from the record require a supporting affidavit. However, unlike the trial court, we have been provided with a trial transcript to assist us in evaluating plaintiff's claims.

MCR 2.611(A) provides:

> (1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
>
> (a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
>
> (b) Misconduct of the jury or of the prevailing party.

First, plaintiff claims that despite the trial court's instruction to the jury that no notes be taken because of the relatively short length of the trial, the jury foreperson took notes of the trial at the end of each day after the proceedings had concluded on which other jurors relied during deliberations. Our review of the trial transcripts does not reveal any instruction by the trial court preventing jurors from taking notes during the trial or drafting notes after leaving the courtroom.[3] In the absence of any record evidence to support this assertion, plaintiff's claim of juror misconduct premised upon alleged violations of nonexistent instructions must fail. *Great Lakes Division of National Steel Corporation v Ecorse*, 227 Mich App 379; 576 NW2d 667 (1998).

Further, the particular evidence and testimony on which the jurors relied during deliberations is a matter intrinsic to the deliberative process. As a general rule, verdicts may not be impeached by affidavits alleging misconduct in the jury room. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). Once the jury is polled and discharged, misconduct inherent in the verdict may not be challenged. *Id.* Rather, oral testimony or affidavits may only be received on extraneous or outside errors. *Id.*; *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293; 494 NW2d 811 (1992). Errors due to a jury's misunderstanding of legal principles, a verdict form, or faulty reasoning are not susceptible to postdischarge challenge. *Hoffman, supra* at 294-295. Here, the jury was properly instructed only to consider evidence consisting of witness testimony and exhibits offered and received by the parties and to weigh the evidence with an open mind and consideration for each other's opinions. Plaintiff's assertion that other unnamed jurors relied on the jury foreperson's notes during deliberations is a matter intrinsic to the deliberative process and does not form a basis for reversing the trial court's denial of plaintiff's motion for new trial. *Budzyn, supra*; *Hoffman, supra*.

Second, plaintiff claims that the jury foreperson engaged in misconduct by not revealing that he was previously employed by the United Parcel Service (UPS) as an insurance claims representative and, in that capacity, had experience with truck drivers claiming back injuries.

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[3] The only reference to note taking found in the record was the trial court's admonition to prospective jurors at the beginning of voir dire that the jurors on the panel would "have to listen very carefully to the evidence that will be presented in this trial . . . [because] [t]his is a video courtroom and we do not have a court reporter taking notes." The trial court further noted that the trial would probably only last a few days and, therefore, the jurors "won't be taking any of the video into the deliberation room" with them.

Initially, we note that when the juror was added to the prospective jury panel, the trial court asked him for information on his "full name, if you're employed where you work, if you're married, where your spouse is employed and what city you live in." The juror replied that he was self-employed, single, lived in Dearborn, and owned a restaurant in Dearborn Heights. He was not asked about his prior employment. Plaintiff has not cited any authority, and our research has not revealed any, that requires a prospective juror to volunteer information concerning previous employment during voir dire that neither the trial court nor the attorneys for the parties have inquired about. Further, as defendant correctly points out, at the time of voir dire, the prospective jurors had only been told that the case involved a motor vehicle accident and a back injury. Thus, the juror had no way of knowing that his prior employment and experience as an insurance claims representative may be relevant to the case. The juror affirmatively stated his ability to decide the case impartially based on the law and evidence and he denied that he was biased in favor of one party. Counsel for plaintiff was free to inquire into the juror's former employment or potential biases during voir dire if he so desired. We find no error.

Plaintiff's third, fourth and fifth allegations of juror misconduct relate to the foreperson's alleged remarks during deliberations about his UPS background. As noted above, a party's ability to attack a verdict based on allegations that misconduct occurred during deliberations is very limited. A verdict may generally not be impeached by affidavits alleging misconduct in the jury room unless it relates to extraneous or outside errors. *Budzyn, supra* at 91; *Hoffman, supra* at 293. Here, plaintiff has failed to show that the alleged misconduct constituted extraneous or outside influence that affected the no cause of action verdict. Rather, the information allegedly provided by the jury foreperson concerning his experience with truck drivers while he worked as an insurance claims representative was revealed during the deliberative process and constitutes a matter inherent in the verdict that may not be attacked post-discharge. Further, a review of the jury instructions reveals that the jury was allowed to "consider all the evidence in light of your own general knowledge and experience in the affairs of life." Thus, the trial court did not abuse its discretion in denying a new trial on this ground.

Sixth, plaintiff claims that the jury foreperson made comments referring to defendant's attempt to settle the case and plaintiff's refusal to do so, and that the jury foreperson blamed plaintiff for the necessity of a trial. The only factual support in the record for plaintiff's claim is the juror affidavit setting forth her subjective opinion regarding the jury foreperson's comments. Again, matters intrinsic to jury deliberations may not form the basis of a motion for new trial based on alleged juror misconduct. *Budzyn, supra* at 91.

Claims seven, eight and nine are based on plaintiff's allegations that the foreperson improperly considered medical texts to ascertain the extent and nature of plaintiff's injuries and related his findings to the jury during deliberations. We note that the trial court initially granted plaintiff's motion for new trial based on its finding that the jury improperly considered medical texts in reaching the verdict. However, on rehearing, the trial court vacated its order granting the motion for new trial and reinstated the no cause of action judgment, finding that any juror misconduct during deliberations constituted harmless error and did not warrant a new trial. The trial court reasoned that because the jury resolved the case based on the issue of proximate cause, not on whether plaintiff sustained an injury that was a serious impairment of bodily function, the extrinsic medical information purportedly considered by the jury was not relevant to the verdict.

During deliberations, jurors may only consider the evidence that is presented to them in open court. *Budzyn, supra* at 88. Thus, in this case, the jury's consideration of medical texts to ascertain the extent and nature of plaintiff's injuries, if true, would constitute improper extrinsic evidence. However, the jury's consideration of extraneous facts does not automatically warrant a new trial. *Budzyn, supra* at 88-89; *People v Rohrer*, 174 Mich App 732, 740; 436 NW2d 743 (1989). Juror misconduct warranting a new trial

> must be such as to affect the impartiality of the jury or disqualify them [sic] from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the parties seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice. [*Rohrer, supra* at 740.]

In order to establish that the extrinsic influence was error requiring reversal, it must be shown, first, that the jury was indeed exposed to extraneous influences and, second, that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. *Budzyn, supra* at 88-89. This second factor is generally established by showing that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. *Id.* at 89.

In this case, assuming that plaintiff's allegation is true, plaintiff has nonetheless failed to show that the foreperson's consideration of medical texts to ascertain the extent and nature of plaintiff's injuries created a real and substantial possibility that it affected the jury's verdict. *Budzyn, supra*. In other words, plaintiff failed to show that the jury's consideration of the extrinsic information was substantially related to a material aspect of the case, and that there was a direct connection between the extrinsic material and the adverse verdict of no proximate cause. *Budzyn, surpa* at 89. As the trial court noted on rehearing, the jury returned a no cause of action verdict in favor of defendant based on its finding that defendant's negligence was not a proximate cause of plaintiff's injuries. Thus, the jury never reached the question whether plaintiff sustained a serious impairment of bodily function and, if so, the amount of damages. The extrinsic medical evidence allegedly considered by the jury related only to the extent and nature of plaintiff's injuries, a question the jury never decided. Therefore, because there was no connection between the extrinsic evidence and the jury's no cause of action verdict, we conclude that the trial court did not abuse its discretion in vacating the order granting a new trial, on rehearing, on the ground that any alleged juror misconduct was harmless error. MCR 2.611(A), *Budzyn, supra* at 89; *Froede, supra* at 130.

Plaintiff's tenth claim of error alleges that the jury improperly considered the fact that defendant did not have sufficient insurance to cover a verdict in favor of plaintiff. Juror sentiments about insurance and a party's ability to pay a judgment is an intrinsic element of the deliberative process, not an extraneous matter, and a verdict may not be impeached on this basis. See *Budzyn, supra*.

As her final allegation of juror misconduct, plaintiff claims that certain jurors relied on defense counsel's closing argument about plaintiff having a monetary motive for the lawsuit, despite the trial court's instruction that the jury should disregard this statement. A close review of the record reveals that, contrary to plaintiff's contention, the jury was not instructed to

disregard defense counsel's statements concerning plaintiff's financial motivations. Rather, the jury was instructed not to consider defense counsel's latter remarks regarding the suspicious nature of complaints of injuries arising out of automobile accidents. In any event, the jury was instructed on more than one occasion that statements and arguments by the attorneys were not evidence and should not be considered during deliberations.

Further, to the extent that plaintiff argues that a new trial is warranted because defense counsel engaged in misconduct by arguing plaintiff's financial motivations, this argument lacks merit. Evidence of a witness' interest in a case is highly relevant to her credibility, *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990), and an attorney argument on a witness' financial interest is not improper. See *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 107-109; 330 NW2d 638 (1982). Because plaintiff was a witness at trial, her financial motivations and interests were relevant points of inquiry, and defense counsel's closing argument was not improper.

In sum, plaintiff has failed to show that, on rehearing, the trial court abused her discretion by denying a new trial on the grounds alleged, *Froede*, *supra*, or that she is otherwise entitled to reversal of the order reinstating the judgment of no cause of action. MCR 2.613(A).

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder