IN THE COURT OF APPEALS OF IOWA

No. 9-160 / 08-1111
Filed June 17, 2009

LAUREN HERRIG, By her Mother and Next Friend, LAURA HERRIG, and LAURA HERRIG, Individually,
Plaintiffs-Appellants,

vs.

THE DUBUQUE COMMUNITY SCHOOL DISTRICT, DUBUQUE COMMUNITY SCHOOL BOARD, DUBUQUE SENIOR HIGH SCHOOL, and KAREN BLOCKLINGER, Vice Principal,
Defendants/Third-Party Plaintiffs-Appellees.

vs.

DEMETRIUS MINTZ,
Third-Party Defendant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Plaintiffs appeal from a district court ruling denying their motion for new trial following a jury verdict and judgment in defendants' favor in plaintiffs' negligence action. **AFFIRMED.**

David L. Hammer, Angela C. Simon, and Susan M. Hess of Hammer, Simon & Jensen, Dubuque, for appellants.

Danita L. Grant of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Considered by Mahan, P.J., and Miller and Potterfield, JJ.

MILLER, J.

Lauren Herrig and her mother, Laura Herrig, appeal from a district court ruling denying their motion for new trial following a jury verdict and judgment in favor of the Dubuque Community School, the Dubuque Community School Board, and Karen Blockinger, an assistant principal at Dubuque Senior High School, in the Herrigs' negligence action. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

On April 26, 2005, freshman Demetrius Mintz shot his classmate, Lauren Herrig, in the back of her neck with a BB gun on a sidewalk outside of Dubuque Senior High School as school was dismissing for the day. Mintz and two other boys were arrested later that day when they used the same BB gun in a theft-related offense. Mintz told police he accidentally shot Herrig with the BB gun when he "pulled a slide back and the slide released and his finger must have been on the trigger causing the gun to be fired." Mintz was placed in a juvenile detention center and did not return to school for the remainder of the year. He was expelled on May 23, 2005.

Dissatisfied with the school's response to the incident, Lauren's mother, individually and on Lauren's behalf, filed suit against the Dubuque Community School, the Dubuque Community School Board, Dubuque Senior High School,[1] and Blockinger. The Herrigs alleged, among other things, that the defendants were negligent in failing to protect Lauren from Mintz—a student with a history of disciplinary problems.

[1] Dubuque Senior High School was dismissed as a defendant in the lawsuit in a summary judgment ruling that the Herrigs do not challenge on appeal.

Following a trial, the jury returned a verdict in favor of the defendants, finding the Herrigs had not proved the defendants were negligent. The Herrigs filed a motion for new trial, asserting the verdict was contrary to law, not supported by sufficient evidence, and failed to effectuate justice between the parties. The district court denied the motion for new trial.

The Herrigs appeal. They claim the district court erred in denying their motion for new trial because the verdict was "contrary to the evidence presented" and "undermines public policy."[2]

II. SCOPE AND STANDARDS OF REVIEW.

Our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). When the motion and ruling are based on discretionary grounds, our review is for abuse of discretion. *Id.* However, when the motion and ruling are based on a claim the trial court erred on issues of law, our review is for correction of errors at law. *Id.*

If a verdict "is not sustained by sufficient evidence" and the movant's substantial rights have been materially affected, it may be set aside and a new trial granted. Iowa R. Civ. P. 1.1004(6); *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007). "Because the sufficiency of the evidence presents a legal question, we review the trial court's ruling on this ground for the correction of errors at

[2] If there are any error preservation problems with the issues raised by the Herrigs on appeal, as the defendants contend, we elect to bypass them and proceed to the merits. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

law."[3] *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

III. MERITS.

> When a party challenges the sufficiency of evidence to support the jury's factual findings, we examine the record to determine whether those findings are supported by substantial evidence. In so doing, we must view the evidence in the light most favorable to the verdict, taking into consideration all reasonable inferences the jury may have made. The factual issues of negligence and proximate cause are for the jury to resolve, and only in exceptional cases may we decide them as a matter of law.

City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist., 617 N.W.2d 11, 16 (Iowa 2000). The Herrigs claim this is one of those "exceptional cases" in which reasonable minds could come to no other conclusion than that the defendants were negligent as a matter of law. *See Peters v. Howser*, 419 N.W.2d 392, 394 (Iowa 1988) (stating "[i]t is only in the plainest cases, in which reasonable minds could come to no other conclusion," that questions of negligence can be decided as a matter of law); *see also* Iowa R. App. P. 6.14(6)(*j*). We do not agree.

A school has an "affirmative duty to take all reasonable steps to protect its students." *Doe v. Cedar Rapids Cmty. Sch. Dist.*, 652 N.W.2d 439, 446 (Iowa 2002). "In protecting its children, a school must exercise the same care toward them 'as a parent of ordinary prudence would observe in comparable circumstances.'" *Id.* (citation omitted). "Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises,

[3] The defendants assert a ruling on a motion for new trial based on whether the jury's verdict is supported by sufficient evidence is reviewed for abuse of discretion. We believe *Estate of Hagedorn*, 690 N.W.2d at 87, states the correct standard of review applicable to the facts presented by this case. However, our result would be the same even if we reviewed the issue for abuse of discretion.

in short, must be safe and welcoming." *Id.* (citation omitted). The Herrigs argue the evidence presented at trial established the defendants breached their duty to protect Lauren by not removing Mintz from school for his repeated disciplinary violations before the incident with Lauren occurred.

In the month before Mintz shot Lauren with a BB gun, he was involved in three fights at school. On March 29, 2005, Mintz grabbed a classmate around the neck "after an exchange of words" between him and that student. He was referred to the school's "plan room" to develop a "student responsibility plan." Three days later, Mintz punched a fellow student in the face after that student pushed him. He was suspended for three days and charged with disorderly conduct. On April 12, Mintz punched, kicked, and choked two other students. Mintz was again suspended for three days and charged with assault with injury. The school placed him on "full escort" for the remainder of the school year, which meant he was accompanied by a staff member at all times while he was in the school building. Blockinger additionally recommended that Mintz attend an alternative school the following year.

Derrick Fries, Ph.D., the expert witness for the Herrigs, criticized the school's disciplining of Mintz. He opined the defendants should have employed a "progressive discipline approach" and placed Mintz on a ten-day "long term suspension" after his third fight. According to Fries, if the defendants had done that, "Lauren Herrig probably wouldn't have been shot because [Mintz] would have been off on long term suspension and probably would not have come back to school." However, there was evidence present in the record from which the

jury could find the defendants responded appropriately to Mintz's disciplinary infractions before the incident with Lauren. *See Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978) (stating in evaluating sufficiency of evidence, "[w]e need only consider evidence favorable to the judgment, whether or not it is contradicted").

Administrators at the school followed the school district's disciplinary policy in dealing with Mintz's behavior. That policy sets forth a "Menu of Consequences and Interventions" for student behavior violations. The list of consequences and interventions includes detention, community service, denial of privileges, police intervention, suspension, and expulsion. The policy directs school officials to "consider the student's past performance, the circumstances of a specific infraction, and the seriousness of any incident" in choosing a consequence or intervention.

Blockinger testified that she believed the consequences chosen to discipline Mintz were appropriate. She explained Mintz was a "good student in the classroom" with "very few referrals" to her office until March 2005. According to Blockinger, the typical punishment for fighting—and the most an assistant principal could impose—was a three-day suspension. She testified that "in all the years I've been in this job, we have not gone to expulsion on a fight that I know of." Blockinger did not recommend a long-term suspension or expulsion after Mintz's third fight because one of the students involved in the fight was known to make "lots of racial remarks and bully[ ] people in the building." She believed that student initiated the fight by mocking Mintz. Blockinger also explained that

all of the fights Mintz was involved in were "mutual fights," which was a consideration in the discipline she imposed on Mintz.

The school district's superintendent, John Burgart, testified that school officials acted appropriately in disciplining Mintz prior to the incident involving Lauren. He believed they "took each incident as it occurred and attempted to understand each incident thoroughly, investigated . . . what the causes were . . . and gave each incident its own separate consideration in assigning discipline that they believed was appropriate." Burgart testified that "just as teaching is not an exact science, neither is the act of administration of discipline." He explained, "Every student is entitled to be handled individually and every case of misbehavior has a context that the administrator is responsible for investigating and understanding before making a decision about discipline."

Upon considering the record in the light most favorable to the verdict, we believe substantial evidence supports the jury's determination that the Herrigs did not prove that the defendants breached their "affirmative duty to take all reasonable steps to protect its students." *Doe*, 652 N.W.2d at 446; *see also Godar v. Edwards*, 588 N.W.2d 701, 708 (Iowa 1999) ("A school district cannot be held liable for actions that are not foreseeable when reasonable measures of supervision are employed . . . and there is adequate consideration being given for the safety and welfare of all students in the school."). While the Herrigs are able to point to evidence supporting their position, so too can the defendants. *See Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988) ("Evidence is not insubstantial merely because it would have supported contrary

inferences."). We cannot say the defendants' supposed negligence in failing to remove Mintz from school prior to the BB gun incident was "so palpable that reasonable minds could not differ in the conclusion" that the defendants were negligent. *Hines v. Chicago, M. & St. P. Ry. Co.*, 196 Iowa 109, 116, 194 N.W. 188, 191 (1923). The district court thus did not err in denying the Herrigs' motion for new trial and refusing to conclude as a matter of law that defendants were negligent. *See Peters*, 419 N.W.2d at 394.

Along these same lines, we must also deny the Herrigs' claim that the jury's verdict in favor of the defendants was in violation of public policy. The Herrigs argue "if this verdict stands, it will be a risk imposed on all of Iowa's school children, undermining a vital and critical public policy" regarding the "duty imposed on schools for the care and safety of our children." We do not believe this is an assignment of error upon which we can base reversal. *See In re Estate of Willisen*, 251 Iowa 1363, 1376-77, 105 N.W.2d 640, 649 (1960) (rejecting appellants' contention that jury's verdict was against public policy in that it approved bad legal ethics). The question of whether the defendants breached their duty of care to ensure the safety of the students in its charge was a question of fact, properly decided by the jury.

IV. CONCLUSION.

We find sufficient evidence in the record to support the jury's verdict in favor of the defendants. We therefore conclude the district court did not err in denying the motion for new trial. The judgment of the district court is affirmed.

AFFIRMED.