IN THE COURT OF APPEALS OF IOWA

No. 0-419 / 09-0861
Filed October 6, 2010

IN THE MATTER OF THE ESTATE OF BRADLEY JOE GOODEN, by and through its duly appointed Administrators, Jesse Gooden and Connie Gooden,
Plaintiffs-Appellants/Cross-Appellees,

vs.

DAVIS COUNTY, IOWA, A Municipality, and DONNIE GARRETT, an Individual,
Defendants-Appellees/Cross-Appellant.

Appeal from the Iowa District Court for Appanoose County, Daniel P. Wilson, Judge.

The estate of Bradley Joe Gooden appeals from the district court order entering judgment in favor of the defendants following a jury verdict finding the defendants were not at fault for Gooden's death. **AFFIRMED.**

Marc A. Humphrey and Tyler Patrick of Humphrey Law Firm, P.C., Urbandale, and Kurt Swaim and Justin K. Swaim of Swaim Law Firm, Bloomfield, for appellant.

Charles E. Cutler and Rebecca M. Threlkeld, West Des Moines, for appellee Dannie Garrett.

Craig A. Levien and Amanda Richards of Betty, Neuman & McMahon, P.L.C., Davenport, for appellee Davis County.

Heard by Vaitheswaran, P.J., Eisenhauer and Danilson, JJ.

EISENHAUER, J.

The estate of Bradley Joe Gooden appeals from the district court order entering judgment in favor of the defendants, Davis County and Donnie Garrett, following a jury verdict finding the defendants were not at fault for Gooden's death. The estate contends: (1) the court erred in granting the defendants additional peremptory challenges during jury selection, and (2) the jury considered extrinsic evidence during its deliberations, which probably influenced the jury verdict. The estate seeks a new trial.

On cross-appeal, the defendants contend the district court erred in denying their motions for summary judgment and directed verdict. Garrett also contends the court erroneously allowed evidence concerning OSHA investigations and citations.

Because the estate has failed to prove grounds for a new trial, we need not consider the defendants' claims. We affirm the entry of judgment in favor of Davis County and Garrett.

I. Background Facts and Proceedings. This case stems from a construction site accident on April 5, 2004. Bradley Joe Gooden and several other Bloomfield Bridge employees were assembling counterweights onto the back of a crane when Gooden became pinned between an excavator operated by Garrett and the crane's backstay. Gooden died as a result of blunt force injuries to his chest.

Gooden's estate brought suit against Garrett and Davis County. The estate alleged Garrett, as owner of Bloomfield Bridge and a supervisory

employee, was grossly negligent in the manner in which he chose to load the counterweight system and in failing to properly train Gooden. The estate also alleged Davis County, who had contracted with Bloomfield Bridge to construct a bridge on the site in question, was negligent in failing to (1) provide proper supervision, (2) ensure Gooden received adequate training, (3) provide safety training for the loading and unloading of the counterweight system, (5) maintain a safe workplace as required by the Iowa Board of Occupational Safety, and (6) exercise ordinary care.

Following denial of each defendant's motion for summary judgment, the case proceeded to trial in February 2009. In a pretrial ruling, the trial court granted each party four peremptory strikes during jury selection. The estate objected. Following the close of the estate's case, both defendants sought directed verdicts. The court granted Davis County directed verdict for claims of premises liability and any claims relating to its own negligence, but denied directed verdict on the basis of municipal liability, inherently dangerous work, and the precautions required by contract or statute. It denied Garrett's motion for directed verdict in its entirety.

At the close of the defendants' evidence, the case was submitted to the jury. The jury returned a verdict in favor of the defendants and the court entered judgment accordingly. The next day, a court reporter revealed she overheard a juror make the following statement, purportedly about plaintiff's mother, during deliberations: "When she worked at Rubbermaid, she would smoke outside on

her tow-motor and throw her cigarettes down by the propane tank. And that wasn't safe. We all saw her."

The estate filed a motion for new trial based on, among other things, the number of peremptory challenges granted to each of the defendants and the jury's misconduct in considering extrinsic evidence. Following the denial of the motion, the estate appealed.

II. Scope and Standard of Review. The standard of review of a denial of a motion for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the district court. *WSH Prop., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). Decisions regarding the number of peremptory strikes are made in the court's discretion, Iowa Rule of Civil Procedure 1.915, as are decisions regarding whether alleged juror misconduct was prejudicial. *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992). Where the motion and ruling are based on discretionary grounds, the trial court's decision is reviewed on appeal for an abuse of discretion. *Id.* An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree. *Id.*

III. Jury Selection. The estate first contends the trial court erred in denying its motion for new trial because the defendants were each granted four peremptory challenges in impaneling the jury. It argues the defendants should have shared the four strikes. An irregularity in the proceedings of the court or

any abuse of the court's discretion that prevents the movant from having a fair trial is grounds for a new trial. Iowa R. Civ. P. 1.1004(1).

Iowa Rule of Civil Procedure 1.915 governs the procedure for impaneling a jury. Rule 1.915(7) states:

> Each side must strike four jurors. Where there are two or more parties represented by different counsel, the court in its discretion may authorize and fix an additional number of jurors to be impaneled and strikes to be exercised. After all challenges are completed, plaintiff and defendant shall alternately exercise their strikes.

The district court allowed each of the defendants to have four peremptory strikes.

In ruling on the estate's motion to reconsider the earlier ruling, the court stated:

> I think this is a discretionary call. I understand, Mr. Humphrey, your concern here that it seems collectively to give a disproportionate influence to the Defendants if they're treated as one entity. If I give them a total of eight, treating them as two different entities, I think that's the way this case is pled. You pled it. I think that the general rule provides for four apiece, which means four for the Defendant, four for the Plaintiff.

The estate contends the court abused its discretion in allowing each of the defendant's four peremptory strikes.

In arguing the court abused its discretion in granting each defendant four strikes, the estate cites as persuasive authority the Texas case of *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979). In *Patterson Dental*, the court considered the meaning of "party" in its rules of civil procedure, which stated, "Each party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court." *Patterson Dental*, 592 S.W.2d at 917. Concluding the term was not synonymous with "litigant" or

"person," but rather referred to "a litigant or group of litigants having essentially common interests," the court fashioned the following test:

> The threshold question to be answered in allocating strikes when multiple litigants are involved on one side of a lawsuit is whether any of those litigants on the same side are antagonistic with respect to a question that the jury will decide. Where no antagonism exists, each side must receive the same number of strikes.

Id. at 917-18. The estate argues that under this test, the defendants should have shared four peremptory strikes because no antagonism exists with respect to a jury question.

Unlike the rule considered in *Patterson Dental*, our rules of civil procedure allow the court, in its discretion, to grant "parties represented by different counsel" additional peremptory strikes. Iowa R. Civ. P. 1.915(7). There is no question the defendants here were separate parties represented by different counsel. *See id.; Nichols v. Schweitzer*, 472 N.W.2d 266, 273 (Iowa 1991) (noting where each party was represented by separate counsel, they were entitled to four strikes apiece pursuant to our rules of civil procedure). We cannot find the trial court's actions clearly unreasonable.

Furthermore, the estate is unable to show it was prejudiced by the grant of four strikes to each of the defendants. Where one side has been given an excessive number of peremptory strikes, it is incumbent on the other side to show actual prejudice resulted or a clear and convincing probability of prejudice. *Wilson v. Ceretti*, 120 N.W.2d 643, 646 (Iowa 1973). A verdict adverse to the complaining party does not, without more, demonstrate either prejudice or clear and convincing proof of probable prejudice. *Id.* at 647.

IV. Juror Misconduct. The estate also contends it is entitled to new trial based on the jury's misconduct. *See* Iowa R. Civ. P. 1.1004(2).

When there is proof extraneous material was introduced into the jury deliberations, the party seeking new trial based on such misconduct must prove the misconduct was calculated to, and with reasonable probability did, influence the verdict. *In re Estate of Hughbanks*, 506 N.W.2d 451, 453 (Iowa Ct. App. 1993). The impact of the misconduct is to be judged objectively by the trial court in light of all the allowable inferences brought to bear on the trial as a whole. *Id.*

> To obtain a new trial based on allegations of jury misconduct, the complaining party must establish the following: (1) evidence from the juror must consist only of objective facts concerning what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

Ray v. Paul, 563 N.W.2d 635, 639 (Iowa Ct. App. 1997). The trial court has wide discretion in determining whether alleged misconduct of the jurors is prejudicial, and unless an abuse of discretion is clearly shown, its decision should not be reversed. *Giltner v. Stark*, 219 N.W.2d 700, 710 (Iowa 1974). There is no presumption misconduct merits new trial. *Id.*

The jury misconduct alleged was a statement made by a juror during deliberations. The juror was overheard to have said, "When she worked at Rubbermaid, she would smoke outside on her tow-motor and throw her cigarettes down by the propane tank. And that wasn't safe. We all saw her." The statement was presumably made about Gooden's mother.

In its ruling denying the estate's motion for new trial, the district court rejected the claim of jury misconduct as follows:

> The statement allegedly overheard by court attendant Kim Schwieger made by a female juror during jury deliberations in this case, if established in the record, does not exceed the tolerable bounds of jury deliberations under our rules. In addition, the asserted statement by the juror does not rise to the level of misconduct nor inappropriate jury deliberations. In addition, there has been no showing that any such statement was calculated to, and with reasonable probability did, influence the verdict.

A new trial is justified only when it appears the misconduct was calculated to, and with reasonable probability did, influence the verdict. *Riessen v. Neville*, 425 N.W.2d 665, 669 (Iowa Ct. App. 1998). The difference between a possibility and a reasonable probability is significant. *Id.* The reasonable probability requirement is not easy to satisfy. *Id.* Assuming arguendo that the proper bounds of jury deliberations were exceeded, we find the estate cannot show a reasonable probability the mention of any alleged past disregard for safety by the decedent's mother at her workplace had an influence on the jury's verdict regarding the defendants' negligence with regard to safety at the decedent's work site. The evidence was irrelevant to any of the issues before the jury. Accordingly, we conclude the trial court did not exceed its discretion in denying the estate's motion for a new trial premised on jury misconduct.

V. Cross-Appeal. Because we affirm the denial of the estate's motion for new trial, we need not consider the issues brought by Garrett and Davis County on cross-appeal.

AFFIRMED.

Vaitheswaran, J., concurs; Danilson, J., concurs specially.

DANILSON, J. (concurring specially)

I specially concur, as I believe the defendants were granted excessive peremptory challenges, but agree the verdict should be affirmed. I believe the trial judge has an obligation to ascertain whether the defendants have hostile or divergent interests rather than simply look at the pleadings or count the number of counsel. We have no requirement in Iowa to determine sides or align parties by Iowa Rule of Civil Procedure 1.915(7), but the trial court is required to strike a balance in a multi-party action in a manner that is fair to all parties. *See Nichols*, 472 N.W.2d at 273. In this action, there were no cross-claims between the defendants; the defendants cross-designated their respective experts; an indemnification agreement existed between the defendants; and both defendants had insurance coverage from the same insurance company. Although both defendants wanted to escape liability and there was some concern about subsequent insurability, those concerns alone do not give rise to adverse interests. *See Fick v. Wolfinger*, 198 N.W.2d 146, 149-50 (Minn. 1972); *see also Wilson v. Ceretti*, 210 N.W.2d 643, 646 (Iowa 1973) (approving the view taken in *Fick*, 198 N.W.2d at 149-50).

Nonetheless, I agree with the majority that there was competent evidence upon which the jury could rely to reach its verdict, and that prejudice, or a clear and convincing probability of resultant prejudice, does not exist. *Wilson*, 210 N.W.2d at 646.