IN THE COURT OF APPEALS OF IOWA

No. 1-036 / 10-1171
Filed April 27, 2011

KENNETH CONN, As Next Best Friend and Natural Father of BRITTANY and KELLY CONN, minors,
Plaintiffs-Appellees,

vs.

DAVID ALFSTAD and KRIS ALFSTAD,
Defendants-Appellants.

Appeal from the Iowa District Court for Warren County, Gregory A. Hulse, Judge.

Appellants appeal the district court's grant of a new trial. **AFFIRMED.**

John M. Wharton and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., West Des Moines, for appellants.

Marc A. Humphrey and Tyler C. Patrick, Urbandale, for appellees.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

The owner of a golden retriever that bit an eleven-year-old girl on the face appeals from the district court's grant of a new trial to the girl's father who filed suit on her behalf. The court granted a new trial after finding that the jury's verdict was tainted by three objectionable statements made during closing arguments by the attorney for the dog owner. Because we agree that the attorney's remarks constituted misconduct and resulted in prejudice, we affirm the grant of the new trial.

I. Background Facts and Proceedings

On August 12, 2004, Brittany Conn and her twelve-year-old sister, Kelly, asked their sixteen-year-old sister, Nikki, if they could take the family dogs for a walk in their Indianola neighborhood. The Conns owned two dogs, Brownie and Max; each was a beagle and basset hound mix.

The Conns' neighbor, six-year-old Cassie Alfstad, asked to go along on the walk. Nikki did not care if Cassie accompanied them, but told her to make sure she had her father's permission. Cassie ran into her house and asked her father, Dave Alfstad, not only if she could join the neighbors, but also if she could take the family's golden retriever, Buddy, on the outing. Cassie came back outside crying, having been told by her father she was not big enough to hold Buddy's leash. Buddy weighed about eighty pounds. Nikki told Dave Alfstad that it was alright with her if Buddy came along, and that one of the Conn girls could help Cassie hold his leash. Having heard Nikki's assurances, Dave Alfstad capitulated to his daughter's request and allowed her to take Buddy.

The four girls and three dogs set out for a neighborhood park. Brittany ended up holding onto Buddy's leash. After a brief stop to sit down in the grass, Buddy's leash became tangled around his left front leg. Brittany told the rest of the group to "hang on" and bent down close to Buddy's leg to unwrap the leash. Buddy turned toward Brittany and "clenched onto her face." Nikki and Kelly both recalled the dog biting their sister's face for "a couple of minutes." The girls reacted by screaming and the Conns' dogs "started freaking out" and jumped onto Buddy's back until he let go of Brittany's face.

Nikki told her bleeding sister to "run to Dave" for help, while Nikki tried to put her foot down on Buddy's leash to waylay his progress as he chased Brittany. Dave soon saw the girls and dogs converging on his yard and ran outside to see what happened. When he heard that Buddy bit Brittany, he put the dog in the house and grabbed a towel for Brittany's face. Nikki called her own father, who was en route to Des Moines.

Kenneth Conn immediately returned home and took Brittany to the emergency room. Brittany suffered multiple wounds to the right side of her face, including two-to-three centimeter deep lacerations to her cheek, upper lip, and canthal region, where the eyelids join. The lacerations were so deep that the plastic surgeon was required to use two layers of sutures. Brittany did not incur nerve damage, but the dog bite left facial scars. She and her father testified at trial that she anticipated having additional plastic surgery to minimize the appearance of the scarring after she stopped growing.

Kenneth and Nikki Conn both testified that Brittany's personality changed after the dog-bite incident. She became more reserved and often stayed in her room because she "didn't want anybody making fun of her scars." She was more self conscious and found it more difficult to reach out to friends and family. Brittany also testified that she developed a persistent fear of dogs and even stopped interacting with the family's own pets. In an effort to make Brittany feel safe in the neighborhood, the Alfstad family had Buddy euthanized.

On May 5, 2008, Kenneth Conn, as next friend of his daughter Brittany, filed a petition at law and jury demand. The petition alleged that Buddy's owners, Dave and Chris Alfstad, were strictly liable for Brittany's damages suffered as a result of the dog bite. A second count of the petition alleged the Alfstads were negligent. A third count of the petition asserted bystander liability and serious emotional-distress damages on behalf of Kelly Conn, who witnessed the attack on her sister. The Alfstads' answer admitted that the Conns' claims arose from an incident where their dog bit Brittany, but denied the remaining claims.

A jury heard the matter on February 24 and 25, 2010. Brittany, her two sisters, and her father testified for the plaintiff's side. The defense called Cassie, Dave, and Chris Alfstad. The district court entered a directed verdict against the Conns on the bystander claim.

The parties opted not to have closing arguments reported, but midway through defense counsel's remarks, the Conns' attorney asked to be heard outside the presence of the jury. He moved for a mistrial based on two lines of argument pursued by the Alfstads' attorney. First, he objected that counsel

"analogized bringing a case like this in our court system . . . as going to the casino and hitting a jackpot." Second, the plaintiffs complained that defense counsel referred to the more than $600,000 sought for Brittany's damages and told the jurors: "It would change the lives of you and me or anybody in this courtroom to receive that kind of money." The court agreed that the remarks were improper, and also admonished defense counsel for telling the jurors that "everyone around the state" and around "the world is watching them" as they decide on a verdict.

The district court did not grant the mistrial, but gave the jury a cautionary instruction to disregard the objectionable statements. Defense counsel resumed his closing argument by apologizing to the jury, saying: "I got a little carried away, and you should do exactly what Judge Hulse just told you you should do, and I'm going to move on." During their deliberations, the jurors sent a note to the judge, posing the following question: "Can items b. c. d.[1] be put into a trust until Brittany is 18 years of age or made available when she determines to have surgery?" The court responded: "Iowa has laws which govern distribution of money to minors. In any event, how plaintiff's money is managed should not be considered by you in answering the questions on the verdict form."

The jurors returned a verdict finding that the Alfstads' dog bit Brittany and that the bite caused her harm. They awarded damages in the amount of $37,761.95, including $2,761.95 in past medical expenses; $9000 in future medical expenses; $20,000 for past pain and suffering; and $6000 for future pain

[1] On the verdict form, items b., c., and d. were damage categories for future medical expenses; physical pain and suffering – past; and physical pain and suffering – future.

and suffering. On March 24, 2010, the Conns moved for a new trial, alleging their substantial rights were materially affected by misconduct from the prevailing party and inadequate damages appeared to be influenced by passion or prejudice.[2] Iowa Rs. Civ. P. 1.1004(2), 1.1004(4). The motion claimed it was more than likely the jury would have reached a different verdict but for the impermissible comments made by defense counsel in closing argument. The Alfstads resisted, asserting that counsel's statements were responsive to plaintiffs' arguments and did not rise to the level of misconduct, and alternatively contesting that any prejudice resulted from counsel's disputed remarks.

On June 24, 2010, the district court granted the Conns' motion for a new trial, concluding:

> The defense portrayed this case as Kenneth Conn's way of obtaining a jury-awarded jackpot and not a case brought by a father on behalf of a minor daughter who suffered serious injuries. However well intentioned [counsel's] remarks may have been, they more than likely influenced the jury to return a verdict in an amount less than what they would have determined absent his prejudicial comments.

The Alfstads now appeal.

II. Scope of Review/Preservation of Error

Rulings on new-trial motions are highly discretionary, and we review them only for abuse of that discretion. *McGough v. Gabus*, 526 N.W.2d 328, 333 (Iowa 1995). "Before a new trial will be granted for misconduct in argument it must appear prejudice resulted or a different result could have been probable

[2] The new-trial motion also alleged that the district court erred in failing to instruct the jury on Kelly Conn's bystander claim. The court concluded that the bystander claim could be retried based on the record made in the new trial. Neither party argues the bystander issue on appeal.

but for such misconduct." *Rasmussen v. Thilges*, 174 N.W.2d 384, 391 (Iowa 1970). It is "well established" that we are "slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.904(3)(*d*).

The Alfstads contend the Conns did not preserve error on one of the three disputed statements cited in the district court's order granting a new trial. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (holding that both the appellant and appellee are bound by the rules of error preservation). Specifically, they argue that the Conns did not mention in the motion for mistrial defense counsel's statement to the jurors that the State of Iowa and the entire world was watching them as they reached a verdict. The Alfstads assert it was too late to raise that argument in the motion for new trial. *See Connelly v. Nolte*, 237 Iowa 114, 126, 21 N.W.2d 311, 317 (1946). While the Conns did not cite that passage from defense counsel's summation in his motion for mistrial, the district court flagged it as a problem on its own accord:

> I further believe that it's improper for you to bring undue influence upon this jury by telling them that the world is watching them and everyone around the state is watching them. I am going to give a cautionary instruction to this jury, and my direction is, you stay away from that. You move on to something else.

Our supreme court has long recognized that "misconduct in argument may be so flagrantly improper and evidently prejudicial" that it may be a ground for new trial even though counsel did not take exception when the argument was made. *Id.* Because the district court identified the prejudicial nature of counsel's people-are-watching-you reference and admonished the jury to disregard it, that statement is properly raised on appeal.

III. Analysis

When faced with a motion for new trial premised on alleged misconduct by counsel, courts must undertake a two-step inquiry. *See Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 802–03 (Iowa 1992). First, the court must determine whether counsel violated a motion in limine or otherwise made improper statements to the jury. *Id*. If the court finds the attorney engaged in misconduct, the general rule is that a new trial will be granted only if the objectionable conduct resulted in prejudice to the complaining party. *Id.* at 803. "'[U]nless it appears probable a different result would have been reached but for the claimed misconduct of counsel for the prevailing party,'" the court is not warranted in granting a new trial. *Id*. (citations omitted).

A. Were defense counsel's remarks impermissible?

Closing argument is an opportunity for counsel to ask the jury to reach a certain verdict based on the evidence presented at trial. Counsel may not use closing arguments to appeal to the passions or prejudices of the jurors. *See Rosenberger Enters., Inc., v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 908 (Iowa Ct. App. 1995). The district court determined that defense counsel overstepped the bounds of permissible argument in three separate instances. On appeal, the Alfstads claim that their attorney's remarks did not rise to the level of misconduct. We will examine each alleged instance of misconduct in turn.

1. Did counsel's reference to a "life-changing sum" of money violate the prohibition on golden-rule arguments?

The Conns' attorney argued in closing that the jury should award Brittany more than $600,000 in damages, almost all of which would be to compensate past and future physical and mental pain and suffering. In response, the Alfstads' counsel told the jury: "It would change the lives of you or me or anybody in this courtroom to receive that kind of money." The Conns argue defense counsel violated the "golden rule" prohibition.

Our supreme court first recognized the impropriety of a do-unto-others supplication to the jury more than fifty years ago:

> Direct appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries are condemned by the courts.

Russell v. Chi., Rock Island & Pac. R.R. Co., 249 Iowa 664, 672, 86 N.W.2d 843, 848 (1957). The rationale for the golden-rule doctrine is to discourage improper arguments that play on jurors' emotions and sympathies. *See Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir. 1976).

On appeal, the Alfstads contend counsel's statement that the award sought by the plaintiffs would be a "life-changing" sum of money was "a fair and reasonable observation" that the amount of money requested was "not compensatory in nature but was an amount that would be intended to change Brittany Conn's life." The Conns counter that defense counsel "explicitly placed the jury panel into the position of the plaintiffs should [the jury] award damages in the amount sought." The Conns contend this argument technique was

impermissible even if it was intended to achieve the opposite effect as hoped for in the *Russell* case.

We conclude defense counsel's suggestion to the jurors that their lives would be changed by receiving an award of more than $600,000 was an impermissible argument because it encouraged them to decide damages based on their personal interest rather than on the evidence. Advocating for jurors to put themselves into the shoes of a party is improper whether it is done by plaintiff's counsel or defense counsel. *See Edwards v. City of Phila.*, 860 F.2d 568, 574 n.6 (3rd Cir. 1988) (rejecting position that golden-rule argument is only improper when used by plaintiff with respect to damages and not when used by defense with respect to liability). By asking the jurors to envision how their lives would change if they received the amount of damages requested by the Conns, defense counsel appealed to their emotions and passions. Defense counsel violated the prohibition against making a "golden rule" argument.

2. Did counsel's analogy to hitting the jackpot at the casino interject his personal opinion of the lawsuit?

The next disputed statement was defense counsel's analogy between Kenneth Conn bringing this lawsuit on behalf of his daughter and the act of going to the casino and hitting a jackpot. The district court concluded that defense counsel was denigrating Conn's motivation for bringing the suit as an effort to obtain a large windfall rather than to fairly compensate his daughter for her actual injuries. The court determined that by comparing Conn's case to "jackpot justice," defense counsel was essentially "offering a personal opinion about the

merits of the case," which is not acceptable argument. *See Rosenberger Enters., Inc*., 541 N.W.2d at 908 (holding counsel may not interject personal beliefs into argument). The Alfstads argue on appeal that counsel did not use the term "jackpot justice" in front of the jury, and the statement regarding a trip to the casino was an inference that plaintiffs were seeking an excessive amount of damages.

It does not matter to our analysis whether counsel used the term "jackpot justice" or merely compared filing this lawsuit to hitting the jackpot at the casino. Either way, the statement was aimed at inflaming the passions of the jurors to think Kenneth Conn was trying to get a substantial verdict without an evidentiary basis for the amount sought. While it would be expected for defense counsel to argue that the damages sought by the plaintiff exceeded the proof of injury, comparing the lawsuit to a lucky break while gambling casts the plaintiffs' action in an unfair light and interjects counsel's personal views regarding the legitimacy of the Conns' suit. We agree with the district court's assessment that this reference was impermissible argument.

3. Did counsel's suggestion to the jurors that the public was watching them exert improper pressure on the panel?

It is impermissible for counsel to use closing arguments to divert the jury from its duty to decide the case solely on the evidence and suggest that the jury is answerable to the public for its verdict. *See State v. Musser*, 721 N.W.2d 734, 755–56 (Iowa 2006) (citing with approval *Lisle v. State,* 937 P.2d 473, 482 (Nev. 1997) which found impropriety in telling jury that it must be "accountable" for its

verdict). In this case, defense counsel advised the jurors that "the world is watching them and everyone around the state is watching them." The district court concluded this statement was clearly intended "to suggest that the amount of damages awarded by the jury would be critiqued by the public and might expose the jurors to criticism."

The Alfstads argue on appeal that this statement was "relatively innocuous" and would not be expected to inflame the passion of a jury. They point out that "jury trials are not held in secret" and "[a] simple comment to a jury that their verdict will be seen by the public at large merely states the obvious." The Conns respond that the comment was "meant to create an atmosphere of undue pressure and influence on the jury."

We agree with the district court that counsel overstepped the bounds of proper argument when he told the jurors that people around the state and around the world were watching them. Counsel should not be permitted to advance arguments that could reasonably intimidate jurors into thinking that their verdict will subject them to public disapproval. A jury must decide the case based on the applicable law and evidence presented, not on how the average citizen may view the size of the damage award. *Cf. State v. Delaney*, 973 S.W.2d 152, 157 (Mo. Ct. App. 1998) (finding it improper for a prosecutor to suggest in closing argument that the community was watching the jurors to see if they would convict: "The jury should not be encouraged to decide the guilt of a defendant on whether the citizenry of a community will approve of the verdict.").

B. Did plaintiffs suffer prejudice as a result of the remarks?

Even when a court decides that counsel's statements during closing argument were improper, a new trial is warranted only when the misconduct resulted in prejudice to the other party or a different result would have been probable but for the alleged misconduct. *See Smith v. Haugland*, 762 N.W.2d 890, 900 (Iowa Ct. App. 2009). In determining prejudice, we consider whether a curative instruction was requested or given. *See id*. at 900–01. We also look to the cumulative effect of counsel's impermissible statements. *See Rosenberger Enters., Inc.*, 541 N.W.2d at 908–09. A court also may grant a new trial when the jury awards "inadequate damages appearing to have been influenced by passion or prejudice." Iowa R. Civ. P. 1.1004(4); *see Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 162 (Iowa 2004).

The Alfstads argue their attorney's alleged misconduct did not result in prejudice, primarily because the district court cautioned the jury to disregard the three objectionable lines of argument. Moreover, counsel apologized for the remarks, telling the jurors he "got carried away." Iowa courts have long been "reluctant to interfere" with jury verdicts where there was a similar withdrawal and admonishment. *See Cardamon v. Iowa Lutheran Hosp.*, 256 Iowa 506, 512, 128 N.W.2d 226, 230 (1964); *Evans v. Roberts*, 172 Iowa 653, 666, 154 N.W. 923, 928 (1915); *White v. Chi. & Nw. Ry. Co.*, 145 Iowa 408, 416, 124 N.W. 309, 312 (1910); *Lange v. City of Des Moines*, 404 N.W.2d 585, 587 (Iowa Ct. App. 1987). But the question remains whether "[t]he error in the argument was . . . so serious as to prevent the cure." *See Cardamon*, 254 Iowa at 512, 128 N.W.2d at 230.

"There are certainly matters occasionally put before a jury which are so prejudicial that no admonition can erase them." *Schroedl v. McTague*, 259 Iowa 627, 644, 145 N.W.2d 48, 58 (1966). The district court is in "a much better position" than we are to determine whether the improper remarks resulted in prejudice, having been present during the argument. *James v. Winifred Coal Co.*, 184 Iowa 619, 629, 169 N.W. 121, 125 (1918).

The new-trial order concluded "that in spite of the court's cautionary instruction, a different result would have been probable" but for the improper remarks. The district court found it significant that the jury asked a question during its deliberations about placing any damage award into a trust for Brittany. The court interpreted the jury's inquiry as follows:

> Put simply, the question was in regard to whether Kenneth Conn, Brittany's father, would be able to access the money that the jury would be awarding in this case. In light of [defense counsel's] argument that Kenneth Conn was playing the judicial system in hopes of some "jackpot justice" when viewed in conjunction with his statements regarding the amount of money being sought by Plaintiffs, it is clear from this question that the jurors openly deliberated about who will manage the money awarded and further how it will be spent.

The court went on to deduce that defense counsel's remarks "more than likely influenced the jury to return a verdict in an amount less than what they would have determined absent his prejudicial comments." The Alfstads contend the judge "unduly focused on the question submitted by the jury, even though there is no logical inference the question itself or the answer from the Court had any effect at all on the amounts awarded by the jury."

We defer to the district court's finding of prejudice on this record. The Conns asked for a damage award of more than $600,000 to compensate for Brittany's pain and suffering; the jury returned a verdict of $26,000 for the categories of past and future pain and suffering damages. The district court could reasonably view the cumulative impact of counsel's aspersions about Kenneth Conn's motivations, the suggestion that plaintiffs were seeking a sum of money that would change the lives of any juror, and the threat of a negative public reaction to a sizeable award as unduly influencing the verdict. The jury's question provided an additional clue that the panel discussed how a damage award would be managed by the Conn family. We do not believe that the district court abused its discretion in classifying this case as one of the rare instances where a curative instruction could not erase the taint caused by the impermissible statements.

Given our hesitance to interfere with the grant of a new trial in the absence of a clear abuse of discretion, we affirm.

AFFIRMED.