

IN THE COURT OF APPEALS OF IOWA

No. 8-495 / 08-0022
Filed August 13, 2008

RAYMOND MILLER,
Plaintiff-Appellant/Cross-Appellee,

vs.

**RONALD SHELLBERG, HARVEY'S IOWA
MANAGEMENT CO., INC., a/k/a HARRAH'S
COUNCIL BLUFFS CASINO & HOTEL,**
Defendants-Appellees/Cross-Appellants.

REBECCA MILLER,
Plaintiff-Appellant/Cross-Appellee,

vs.

**RONALD SHELLBERG, HARVEY'S IOWA
MANAGEMENT CO., INC., a/k/a HARRAH'S
COUNCIL BLUFFS CASINO & HOTEL,**
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Plaintiffs appeal a district court ruling granting defendants' motion for a new trial based on the submission to the jury of evidence outside the record.

AFFIRMED.

Patrick J. Cullan of Cullan & Cullan, Omaha, Nebraska, and Robert Laubenthal of Smith Peterson Law Firm, L.L.P., Council Bluffs, for appellants.

Thomas M. Braddy and Timothy M. Morrison of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., Omaha, Nebraska, for appellees.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.**I. Background Facts & Proceedings**

On November 19, 2003, Raymond Miller and Rebecca Miller, husband and wife, were stopped at a red light near Harrah's Council Bluffs Casino, when their vehicle was struck in the rear by a vehicle driven by Ronald Shellberg, an employee of Harrah's Casino, during the course of his employment. The Millers filed suit against Shellberg and Harrah's Casino, alleging they were injured during the accident. Defendants admitted negligence, but disputed that their negligence was the proximate cause of the Millers' damages.

The case proceeded to a jury trial. Both parties presented expert testimony on the issue of whether the accident was the cause of the Millers' claimed medical problems. During closing arguments, defendants objected several times to arguments raised by plaintiffs that they claimed were outside the evidence presented at the trial. The district court admonished plaintiffs' counsel to stick to the evidence.

After closing arguments, the court instructed counsel for both parties to review the exhibits to be given to the jury. Counsel reviewed a loose stack of exhibits and informed the court attendant the exhibits were ready to be taken to the jury. Plaintiffs' counsel then handed the court attendant a black binder of exhibits that had a label stating "RAYMOND MILLER REBECCA MILLER EXHIBITS MASTER COPY." The court attendant took the black binder to the jury room and told the jury, "Here are the exhibits."

During deliberations the jury sent out two questions – "When is the earliest recorded record of when Raymond shows any knee pain?" and "When is the

earliest recorded record of when Rebecca shows signs of shoulder pain or swelling?” The court instructed the jury to review the evidence. The jury returned a verdict awarding Rebecca \$660,500 in total damages. Raymond was awarded \$38,847 in damages.

After the verdict was returned, the court attendant noticed the black binder contained eleven exhibits that had not been admitted during the trial. These exhibits were:

Exhibit 31 Airlite Plastics punchcards for Rebecca Miller from November 1, 2003, to March 31, 2004.

Exhibit 32 Rebecca Miller's Airlite Plastics earning statements from November 20, 2003, to March 11, 2004.

Exhibit 49 Iowa Department of Transportation Investigating Officer's Report of Motor Vehicle Accident dated November 11, 2003.

Exhibit 52 Defendants' answers to plaintiffs' interrogatories dated December 28, 2005.

Exhibit 53 Defendants' responses to plaintiffs' requests for production of documents dated December 28, 2005.

Exhibit 56 Ingenix notice of lien letter for Rebecca Miller dated July 5, 2007.

Exhibit 57 Procure 3 notice of lien letter for Rebecca Miller dated July 10, 2007.

Exhibit 58 Procure 3 notice of lien letter for Raymond Miller dated July 10, 2007.

Exhibit 59 Merchant's Credit Adjusters notice of lien letter regarding Rebecca Miller dated November 2, 2005.

Exhibit 60 Farmers Insurance payment log for Raymond and Rebecca Miller from January 6, 2006, to February 8, 2006.

Exhibit 61 Merchant's Credit Adjusters notice of lien letters regarding Raymond Miller dated September 8, 2005, and September 11, 2006.

Defendants filed a motion for new trial and a motion for mistrial. The Millers presented affidavits from six of the eight jurors. Five of the affidavits stated, "At no time did I, or any member of the jury, view, rely upon, or even

discuss the following documents.”¹ Several affidavits also stated the jurors had considered only the evidence presented in the courtroom, their notes, and medical records, and further stated, “Any item in the binder that did not show the medical history was not taken into account in the decision making.”²

The district court determined defendants were not entitled to a new trial based on misconduct of the Millers’ counsel during the trial. The court ruled:

Defendants are correct that plaintiffs’ counsel skated close to issues that were precluded from mentioning by rulings on the motion in limine. Throughout the trial, plaintiffs’ counsel zealously represented their clients, as did defendants’ counsel. Apparently plaintiffs’ counsel believe that zealous representation means pushing the limits. Nevertheless, defendants made timely and appropriate objections on numerous occasions. When proper objections were made, plaintiffs’ counsel were admonished in accord with pretrial rulings.

The court concluded defendants were not denied a fair trial as a result of improper argument or comments by the Millers’ counsel.

The court determined the jurors’ affidavits could not be considered under Iowa Rule of Evidence 5.606(b) because they concerned matters arising during the course of the jurors’ deliberations. The court found the eleven exhibits contained prejudicial information, including information about insurance and that the Millers were subject to liens for medical payments. The court found, “The documents concerning liens and collection agencies would very likely inflame the passions of a juror who has sympathy for the plaintiffs. The cumulative effect of

¹ The affidavits of Joshua Lydon, Jonathan Savage, Owen Gregg, Sandra Holtorff, and Stephanie Slade contained this language. The affidavit of Daniel Paulson stated, “At no time did I view, rely upon, or even discuss the following documents.”

² The affidavits of Joshua Lydon, Jonathan Savage, Sandra Holtorff, and Stephanie Slade contained this language. The affidavits of Owen Gregg and Daniel Paulson did not discuss the evidence considered by the jury.

these prejudicial documents is to deny defendants a fair trial.” The court granted defendants’ request for a new trial based on the eleven exhibits which were improperly given to the jury. The Millers appealed and defendants cross-appealed.

II. Standard of Review

The scope of our review of a district court’s ruling on a motion for new trial depends upon the grounds raised in the motion. *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007). On claims based on jury misconduct, our review is for an abuse of discretion. *State v. Johnson*, 445 N.W.2d 337, 342 (Iowa 1989); *State v. Jones*, 511 N.W.2d 400, 409 (Iowa Ct. App. 1993). Also, where a request for a new trial is based on claims of misconduct by opposing counsel, we review for an abuse of discretion. *Rosenberger Enters., Inc. v. Ins. Serv. Corp.*, 541 N.W.2d 904, 906 (Iowa Ct. App. 1995).

The district court has considerable discretion in ruling on such motions for new trial. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 543 (Iowa 1996). We will find an abuse of discretion only when the court has exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 6.14(6)(d).

III. Appeal

A. The Millers claim the district court erred by determining the juror affidavits were inadmissible. The district court ruled upon Iowa Rule of Evidence 5.606(b), which provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment as concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The rule precludes consideration of "juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room." *Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988). While a court may accept juror affidavits concerning whether the jury was exposed to extraneous prejudicial information, the court may not consider an affidavit on the issue of whether that information influenced the jury. *See Doe v. Johnston*, 476 N.W.2d 28, 34 (Iowa 1991). The affidavits of jurors "may be used to impeach a verdict by showing that extraneous prejudicial information was improperly brought to the jury's attention but may not be used to establish the effect of this extraneous information on the course of the jury's deliberations." *State v. Henning*, 545 N.W.2d 322, 324 (Iowa 1996).

The affidavits in this case attempted to present evidence on the issue of whether the jury had been influenced by extraneous prejudicial information. Under rule 5.606(b), juror affidavits concerning the jury's deliberations or the influence of any matter on the deliberations is inadmissible. *Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 632 (Iowa 1997). We conclude the

district court properly ruled the juror affidavits in this case were inadmissible under rule 5.606(b).

B. The Millers contend the district court abused its discretion by granting defendants a new trial due to the fact the jurors received eleven exhibits that had not been admitted as evidence during the trial. We first note that the phrase “extraneous prejudicial information” in rule 5.606(b) refers to information that was not part of the record and not presented as evidence in court. *Economy Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 653 (Iowa 1995). Thus, the eleven exhibits in this case would be considered extraneous prejudicial information.

“When there is proof that extraneous material has reached the jury room, the party seeking reversal on a misconduct claim must prove ‘that the misconduct was calculated to, and with reasonable probability did, influence the verdict.’” *Doe*, 476 N.W.2d at 35 (citation omitted). The court employs an objective standard to consider the impact of the misconduct, in light of all the allowable inferences brought to bear on the trial as a whole. *Id.* The court considers “whether the material was of a type more likely than not to implant prejudice of an indelible nature upon the mind.” *Henning*, 545 N.W.2d at 325.

The district court employed an objective standard in considering the eleven exhibits improperly submitted to the jury, and concluded the exhibits were prejudicial to defendants. The exhibits contained information that was irrelevant to the issues before the jurors. The exhibits contained information about insurance, and included information about liens placed on any damages received by the Millers. We note “the trial court is in the best position to objectively assess

the impact of juror misconduct.” *Doe*, 476 N.W.2d at 35. We conclude the district court did not abuse its discretion in granting defendants’ motion for new trial.

IV. Cross-Appeal

A. Defendants claim the district court abused its discretion by not granting their motion for new trial based on misconduct by the Millers’ counsel. We have already affirmed the district court’s grant of a new trial based on the inclusion of eleven improper exhibits in the materials given to the jurors during their deliberations. We find no need to address whether a new trial should be granted on an additional ground.³

B. Defendants also assert the district court should have granted a new trial based on improper jury instructions. Because the issue of jury instructions may arise during a new trial, we will address this issue.

We review a district court’s decision on a claim a jury instruction was not supported by the evidence for the correction of errors at law. *Rowling v. Sims*, 732 N.W.2d 882, 885 (Iowa 2007). We review jury instructions to determine if they are a correct statement of the law and are substantially supported by the evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996).

³ We will point out that a new trial or mistrial may be granted based on the misconduct of an attorney during the course of a trial. *Rosenberger Enters.*, 541 N.W.2d at 906-07. On retrial, counsel should limit argument to the evidence presented in the case. See Iowa R. Prof’l Conduct 32:3.4(e) (providing that during a trial, an attorney shall not allude to any matters not supported by admissible evidence).

Defendants objected to jury instructions No. 13, defining fault, and No. 14, defining negligence.⁴ The district court overruled the objections, stating:

Your objections to instructions 13 and 14 are overruled. This is a negligence case. The jury was instructed that the defendants have admitted to fault and admitted negligence, and I think the jury needs to be instructed as to what those concepts are.

They are also asked to find fault or negligence on Rebecca as far as her failure to mitigate. And, again, those concepts need to be defined for the jury, so your objections to 13 and 14 are overruled.

In considering defendants' motion for a new trial, the district court again overruled defendants' claims concerning the jury instructions.

We conclude defendants have failed to show the district court erred by submitting instructions No. 13 and No. 14 to the jury. By stating the defendants had admitted fault, the jury was entitled to know what defendants had admitted to. Furthermore, defendants claimed Rebecca was negligent for failing to mitigate damages, and the jury was properly instructed on this concept.

C. Defendants have raised other issues in their motion for new trial, including arguments concerning the verdict form and statements made during voir dire. We find it is unlikely these incidents will occur during a retrial, and we do not address them during this appeal.

We affirm the decision of the district court.

AFFIRMED.

⁴ During the trial, defendants additionally objected to other jury instructions. On appeal, however, their argument addresses only the jury instructions defining "fault" and "negligence," and we therefore address only jury instructions No. 13 and No. 14.