NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

BRYAN GILLIAM and JESSICA GILLIAM, as Parents and Next Friends of S.G. a Minor; and DERRICK MARSHALL and JANICE MARSHALL, as Parents and Next Friends of S.M., a Minor,

Plaintiffs/Appellants,

vs.

INDIANOLA PUBLIC SCHOOLS and GARY L. GUNCKEL,

Defendants/Appellees.

Case No. 121,404

APPEAL FROM THE DISTRICT COURT OF
PITTSBURG COUNTY, OKLAHOMA

HONORABLE MIKE HOGAN, DISTRICT JUDGE

AFFIRMED

Tod Mercer
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and

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For Plaintiffs/Appellants

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For Defendants/Appellees

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The plaintiffs appeal the court's denial of their motion for new trial made on the basis of alleged juror misconduct. We find that the plaintiffs waived the issue by not moving for a mistrial or taking other appropriate action prior to the return of the jury's verdict. As such, we affirm.

BACKGROUND

In September 2018, the two minor plaintiffs—fifth graders at the time—were involved in a playground argument at school. The boys were sent to the office of then principal of Indianola Public Schools, Gary Gunckel, who informed the boys that they could receive in-school detention (three days and two days, respectively) or corporal punishment (three "swats" and two "swats," respectively). Both boys opted for corporal punishment. Gunckel called each boy's mother and explained that they had asked for corporal punishment in lieu of detention. Both mothers consented to corporal punishment, which Gunckel subsequently administered. He used a wooden paddle to strike the boys on their bottoms, which allegedly resulted in significant bruising on both boys.[1] Each boy returned to class after receiving the punishment and remained at school for the rest of the day. The boys' parents later discovered the bruising, which was significant, and were distraught. A criminal report was made to the Pittsburg County Sheriff and Gunckel was arrested and charged with felony child abuse.

[1] Gunckel denies the bruising was the result of the swatting.

However, the charges were later dismissed. This information was not part of the evidence at trial.

The parents also filed this civil suit against Gunckel and Indianola Public Schools. In their petition, they alleged negligence against the school, and assault and battery and intentional infliction of emotional distress against Gunckel. Gunckel filed a motion for summary judgment, alleging that because he admitted and Indianola stipulated that he was acting within the scope of his employment when administering the corporal punishment, he was immune as a matter of law. The court agreed and granted summary judgment in favor of Gunckel.

The plaintiffs and the school proceeded to trial, which was held in January 2023. The plaintiffs presented several witnesses, both parties gave closing arguments, and jury instructions were given. Roughly forty minutes into the jury's deliberation, the court received a question from the jury.[2] It was: "Mr. Gunckels [sic] trial results came out in our discussion. Is this a problem?" After consulting with counsel, all of whom agreed with the following action, the court responded: "You have been given all of the instructions needed to reach a decision in this case. Consider only those instructions provided to you by the Court." The jury returned a verdict of nine to three in favor of the school. The court entered a journal entry of judgment reflecting the jury's verdict.

The plaintiffs filed a motion for new trial, alleging jury misconduct after the jury had apparently discussed Mr. Gunckel's dismissal from both the prior

[2] A second question was also asked by the jury but it does not have any relevance to this appeal.

criminal case and the present civil suit during their deliberations. Attached to the motion was an affidavit of a juror that detailed the alleged misconduct that took place during jury deliberations. The focus was on alleged discussions between jurors of a newspaper article that was published during the trial and which contained the referenced information.[3] The school responded to the motion and moved to strike the affidavit. An argument-only hearing was held on the issue and the court ultimately found that there was insufficient evidence to grant a new trial and the jurors' allegedly inappropriate conduct did not amount to discussion of "extraneous prejudicial information which will lead to further inquiry." The plaintiffs appeal.

STANDARD OF REVIEW

We review a trial court's decision denying a motion for new trial for an abuse of discretion. *Jones, Givens, Gotcher & Bogan v. Berger,* 2002 OK 31, ¶ 5, 46 P.3d 698. A court abuses its discretion "when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Patel v. OMH Medical Center, Inc.,* 1999 OK 33, ¶ 20, 987 P.2d 1185. "It is discretion employed on untenable grounds or for untenable reasons, or a discretionary act which is manifestly unreasonable." *Id.*

ANALYSIS

Through several propositions of error, the plaintiffs present one basic argument on appeal: that the trial erred in failing to grant a new trial due to

[3] The court had, of course, instructed the jury not to review such information.

alleged juror misconduct.[4] The school responded by arguing, among other things, that the plaintiffs waived the issue because they failed to move for a mistrial when the court informed them about the jury's question. Upon review, we agree with the school and find that the plaintiffs were required to have moved for a mistrial—or at least sought to make further inquiry related to the jury's question—in order to preserve the allegation of error. Instead, as discussed below, the plaintiffs affirmed the trial court's proposed response to the jury's question and sought no further action. Having never objected to—indeed, having fully ratified—the trial court's proposed solution, the plaintiffs were foreclosed from seeking a new trial on the issue. Accordingly, the trial court's denial of the motion for new trial was not an abuse of discretion.

Oklahoma caselaw clearly prohibits a party from lying in wait, hoping for a favorable verdict, before making a motion relating to juror misconduct with the court. The Oklahoma Supreme Court first addressed this issue in *Harris v. Boggess*, 1927 OK 80, 255 P. 685. The Court stated:

> 'Misconduct of a juror, if known before the trial closes, must then be brought to the attention of the court; otherwise, it is waived. Accordingly, an objection to the misconduct of a juror in expressing an opinion or prejudice during the trial, if known to the party at the time of its occurrence and not made a subject of a motion to the court, is waived.'

Id. ¶ 8 (emphasis supplied) (quoting 16 R. C. L., page 313, section 120).

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[4] In their petition in error, the plaintiffs also appealed the court's pretrial grant of summary judgment to Gunckel and raised the specter of fundamental error for the trial court's apparent failure to give a respondeat superior jury instruction. However, the plaintiffs explicitly withdrew the former issue in their brief-in-chief and failed to brief the latter issue. Both claims of error are thereby waived. Okla.Sup.Ct.R. 1.11(k)(1) ("Issues raised in the petition in error but omitted from the brief may be deemed waived.").

Recently, in *Gowens v. Barstow*, 2015 OK 85, 364 P.3d 644, a case involving judicial bias, the Court revisited its prior holding in *Harris*, noting that the plaintiff in *Harris* appealed the court's decision overruling his motion for new trial based on alleged juror bias during the progress of trial. The Court in *Gowens* acknowledged that the defendant in *Harris* argued that the plaintiff knew of the juror's purportedly biased statements prior to the close of trial and therefore, the plaintiff should not have been allowed to "remain silent and speculate on the verdict of the jury and after an adverse verdict raise the objection in a motion for new trial." *Id.* ¶ 40. The *Gowens* Court added that in *Harris*,

> [b]ecause the motion for new trial was ultimately decided in favor of defendant this Court did not disturb it. *Id.* However, a rule was set in this Court's syllabus stating if alleged misconduct of a juror is discovered prior to the close of the trial it is the duty of the complaining party to call it to the attention of the trial court by proper motion; if it is discovered after the close of the trial then it is appropriate to present the claim in a motion for new trial.

Id. The Court ultimately held that it would treat matters relating to judicial bias as it did juror misconduct, finding that the party was aware of the judge's biased comments on the first day of a two-day trial and should have timely objected and moved for a mistrial, "rather than wait to assert bias for the first time in a motion for new trial." *Id.* ¶ 42.

Oklahoma case law is thus clear: when alleged misconduct of a juror is discovered before trial ends, the complaining party must call it to the court's attention by proper motion. It is only when the alleged misconduct is discovered *after* trial ends that it is appropriate to raise the issue for the first time in a motion for new trial. Here, plaintiffs knew that the jury had discussed Gunckel's

criminal trial or the fact that he had been dismissed from the civil suit when the jury asked its question. The judge brought the parties into the courtroom and, on the record, asked if they had any objection to the court's response to the jury. Tr. (January 18, 2023), pg. 193. The plaintiffs stated that they had no objection. *Id.* The court then asked if the parties had any more issues they needed to address on the record, and neither party indicated that they had any. *Id.* The plaintiffs, at that time, had knowledge of the alleged misconduct, and were required to either move for a mistrial, or at least seek to inquire further, in order to preserve the issue.[5] Instead, the plaintiffs sat silent and hoped for a verdict in their favor. When an adverse verdict was issued, they raised the issue for the first time in a motion for new trial. Such a procedure is foreclosed by the rule set forth in *Gowens.*

Although the trial court denied the motion for new trial on the basis that the discussion of trial results was not extraneous prejudicial information, we hold that the trial court's judgment denying the new trial was correct. It must stand even if it is based on a different rationale. *See G. A. Mosites Co. of Ft. Worth,*

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[5] We do not decide here the precise course of action the plaintiffs were required to have taken to have preserved the issue. While a motion for mistrial would have certainly been sufficient, lesser action, such as seeking to inquire of the jury or foreperson would have also likely have been sufficient under the circumstances. *See McLaughlin v. Union Transp. Co.*, 1936 OK 280, 57 P.2d 868, 870 (finding waiver of a claim of juror misconduct where "there was no motion made for a mistrial, *nor any other action taken by the attorney for the plaintiff* until after the jury had returned a verdict against the plaintiff ...") (emphasis supplied)). We hold only that, under the facts of this case, where there was cause for some action but none was taken until after the return of the jury's verdict, the issue of juror misconduct was waived.

Inc. v. Aetna Cas. & Sur. Co., 1976 OK 7, ¶ 28, 545 P.2d 746, 752. We thereby affirm the court's decision to deny the motion for new trial.

AFFIRMED.

HUBER, P.J., and HIXON, J., concur.

November 18, 2024