**IN THE COURT OF APPEALS OF IOWA**

No. 3-1056 / 13-0257
Filed January 23, 2014

**MARY E. JACK, Individually and as Parent and Next Friend of ELLA JACK and OWEN JACK, and LAWRENCE LAIRD JACK III, Individually,**
Plaintiffs-Appellants,

**vs.**

**JENNIFER R. BOOTH, M.D., and JOHN GERRAD SWEETMAN, M.D.,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

The plaintiffs appeal denial of their motions for mistrial and new trial after one of the defendant doctors in a medical malpractice suit rendered aid to a juror who fainted during trial. **REVERSED AND REMANDED.**

Eric M. Updegraff of Stolze & Updegraff, P.C., Des Moines, for appellants.

Robert C. Rouwenhorst of Rouwenhorst & Rouwenhorst, P.C., West Des Moines, for appellee Sweetman.

Thomas J. Shomaker and Mary M. Schott of Sodoro Daly Shomaker & Selde, PC, LLO, Omaha, Nebraska, for appellee Booth.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

**DOYLE, P.J.**

The plaintiffs appeal the district court's denial of their motions for mistrial and new trial after one of the defendant doctors in this medical malpractice suit rendered aid to a juror who fainted during trial, and the jury ultimately rendered a defense verdict. We reverse and remand for retrial.

***I. Background Facts and Proceedings*.**

Mary Jack, individually and as parent and next friend of her minor children, Ella and Owen, and Mary's husband, Lawrence, brought a medical malpractice action against Drs. Booth and Sweetman.[1] The case went to trial before a Polk County jury in November 2012. Two days into the trial a juror fainted. The district court described the incident as follows:

> I just want to make the record clear as to exactly what happened . . . . What occurred was one of the jurors fainted while she was sitting in her chair in the jury box, and it wasn't noticed immediately by the court when it [happened]. The juror next to her was trying to, you know, revive her, wake her up, so to speak.
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> At that point everyone in the courtroom noticed what was going on. Dr. Sweetman got up from where he's sitting in the gallery and went over into the jury box and began treating, so to speak, the juror. And he was talking to her . . . .
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> . . . .
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> And, you know, [Dr. Sweetman] was assessing [the juror's] condition, and she clearly had fainted and was ill. And she eventually laid down on one of the pews in the courtroom, and within the next [fifteen] or [twenty] minutes, she was okay, and we took our lunch break. When this happened, the rest of the jurors were obviously all present . . . standing and sitting in the jury box, obviously observing what was going on. But within two or three minutes of this beginning, the court directed the rest of the jurors to go to their lounge and they did. So they did not observe the entire—or were not in the courtroom during the entire episode.

Thereafter, Jack moved for a mistrial, stating in part:

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[1] We will refer to the plaintiffs collectively as "Jack."

> Personally I'm not trying to criticize Dr. Sweetman. He did exactly what I would hope he would do in that circumstance. Obviously, the juror's health and well-being is much more important than this jury trial, and we're glad that he did that. But it does create a problem for our case where we don't think that jurors who have witnessed him in action, for lack of a better term, are going to be able to be unbiased or unprejudiced by that when considering a medical malpractice action against him.

The doctors resisted the motion, citing the considerable time and effort put into the case up to that point, as well as the doctors' desire for timely closure of the matter. They suggested the court instead give a cautionary instruction or some kind of admonition to the jury. Noting mistrial is an extreme remedy, the district court concluded that a fair remedy would be to excuse the juror that fainted and then proceed with the trial with the remaining jurors. The court also stated it would inquire of the jurors as to whether the incident would prevent any of them from remaining impartial.

After the juror was excused, each remaining juror was individually brought back to the courtroom and polled by the judge and by the parties' counsel. Basically, the jurors were asked if they could be a fair and impartial juror after witnessing the incident and whether anything about the incident would affect their decision. All the jurors answered that they could still be fair and impartial and that Dr. Sweetman's aid to the stricken juror would not prejudice them in any way. The trial then resumed.

Jack renewed her motion for mistrial prior to the end of the trial. The court affirmed its previous ruling, stating:

> The court believes the steps it took by removing the juror that Dr. Sweetman attended to and in individually voir diring the other jurors indicated that proceeding with the trial with the remaining jurors would not prejudice the plaintiffs.

> Had the court granted a mistrial, there would have been a retrial of this case, and if the plaintiffs are unsuccessful on appeal and the appellate court said I was wrong on that, it will be retried as well. So either way there would be a retrial.

The case was submitted to the jury, and a verdict in favor of the doctors was returned. The court entered judgment dismissing Jack's petition.

Jack filed a motion for new trial based on the district court's denial of a mistrial. The doctors vigorously resisted the motion. The court denied the motion, summarizing its thoughts as follows:

> [T]he incident that occurred in this case did not involve the degree of drama and apparent heroics by a physician-defendant as did the cases cited by the plaintiffs. If, as one could reasonably argue, those cases establish a bright-line rule that should be adapted and applied in Iowa entitling the plaintiff in a medical malpractice case to a new trial whenever a physician-defendant is observed by jurors rendering aid to an ill juror, an admittedly rare occurrence, then this court's judgment should be reversed and the plaintiffs granted a new trial, at least as to Dr. Sweetman. However, if, as the court understands the current state of the law, this is a matter that rests in the exercise of the trial court's discretion, then, in this court's judgment, this incident was simply not so dramatic as to compel the conclusion that it would deflect jurors—unconsciously or otherwise—from deciding the case on the basis of their evaluation of the evidence. In addition, even considering the concept of unconscious influence, in making its judgment the court gives substantial weight to the remaining jurors' responses, in substance, tone and appearance, when asked about the effect the incident may have had on them. Finally, there is nothing about the jury's verdict that leads the court to believe it was influenced by this incident. As the court stated earlier, the decision the jurors faced as it related to Dr. Sweetman was not complicated, it was simply which expert witness to believe. The court does not believe the incident in question caused them to believe Dr. Sweetman's expert witness when they would not have otherwise.
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> Jack now appeals.

***II. Standard of Review.***

"Trial courts are vested with broad discretion in determining whether to grant a mistrial." *Yeager v. Durflinger*, 280 N.W.2d 1, 7 (Iowa 1979). This discretion "is recognition of the trial court's better position to appraise the situation in the context of the full trial." *Id*. Therefore, we review for an abuse of discretion. *Id*.

"The scope of 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) (internal quotation marks and citation omitted). If the motion was "based on a discretionary ground, we review it for an abuse of discretion." *Id*. "A ruling on a motion for new trial following a jury verdict is a matter for the trial court's discretion." *Condon Auto Sales & Serv.*, *Inc. v. Crick*, 604 N.W.2d 587, 594 (Iowa 1999). A claim the verdict failed to effect substantial justice is reviewed for an abuse of discretion. *See Estate of Hagedorn ex rel. Hagedorn v*. *Peterson*, 690 N.W.2d 84, 87-88 (Iowa 2004). "To show an abuse of discretion, the complaining party must show the court exercised its discretion on grounds clearly untenable or to an extent clearly unreasonable." *Id*. at 88 (internal quotation marks and citation omitted). "We are more reluctant to interfere with a ruling which grants a new trial than one in which it is denied and will do so only upon a clear showing of abuse of discretion." *Lubin v*. *Iowa City*, 131 N.W.2d 765, 767 (Iowa 1964).

***III. Discussion.***

There is no doubt the trial court was confronted with extraordinarily rare circumstances. *See*, *e.g.*, *Heidt v. Argani*, 214 P.3d 1255, 1258 (Mont. 2009) ("The events at issue in this case are unique to medical malpractice claims and appear to be rare occurrences."). The parties cite to a trio of cases dealing with similar facts where, during a medical malpractice trial, a defendant doctor attended to a sick juror in the presence of the other jurors.

In *Campbell v. Fox*, 498 N.E.2d 1145, 1146 (Ill. 1986), a juror in a medical malpractice trial seemed to lose consciousness during opening statements. The juror was administered to by the defendant doctor, "who carried her from . . . her place in the jury box to counsel table, at which point she seemed to regain consciousness and no further aid was administered at that time. The jury was removed from the courtroom and an ambulance was called." *Campbell*, 498 N.E.2d at 1146. After the trial judge indicated he did not believe a mistrial was warranted and that he intended to proceed with the trial, the plaintiff moved for a mistrial. *Id*. The trial judge denied the motion, an alternate juror was seated, and the jurors were questioned regarding their ability to remain fair and impartial. *Id*. at 1146-47. All the jurors stated they could be fair and impartial and that the defendant doctor's treatment would not prejudice them in any way. *Id*. at 1147. "The trial then resumed, resulting in a verdict for the defendant." *Id*.

On appeal, the Illinois Supreme Court found the effect of the unusual events was "so apparent as to have unquestioned influence upon the jury's ability to try the issues in controversy fairly." *Id*. The court reasoned the defendant doctor's aid to the stricken juror "presented the defendant to the jury in a

favorable light" with the likely effect "to predispose the jury" in the doctor's favor, and the jurors' assertions to the contrary were not dispositive. *Id*. The court concluded the district court should have granted the mistrial, reversing and remanding the case for a new trial. *Id*. at 1147-48.

A similar situation arose in *Reome v. Cortland Memorial Hospital*, 543 N.Y.S.2d 552, 553 (App. Div. 1986). In that case, the plaintiffs moved for a mistrial after a juror collapsed during a medical malpractice trial and was resuscitated by a defendant doctor. *Reome*, 543 N.Y.S.2d at 553. The plaintiffs' motion was denied, and the trial resumed after an alternate juror was seated. *Id*. Although the jury returned a verdict in favor of the plaintiffs as to one defendant, the plaintiffs' award was "unconscionably low." *Id*. The plaintiffs appealed, and the appeals court found:

> The likely conclusion to be drawn by the jurors was that [the defendant doctor] had competently administered emergency medical care, possibly saving their fellow juror's life. While the jurors manifested that they harbored no bias as a result of the unfortunate occurrence and indeed found [the defendant doctor] liable for damages, the unconscionably low award suggests that the jury was subliminally influenced to view [the defendant doctor] favorably at [the] plaintiffs' expense.

*Id*. The appeals court reversed the trial court and ordered a new trial, reasoning:

> Here, the probability of injustice was more than substantial, it was virtually inevitable. The favorable bias that [the defendant doctor's] admirably humanitarian efforts created could not have been displaced by curative instructions however conscientiously given by [the trial court] and earnestly sought to be adhered to by the jury.

*Id*. Furthermore, recognizing a decision to grant a mistrial is ordinarily a discretionary matter for the trial court, the appeals court noted "certain events are

so extraordinarily prejudicial that a mistrial is required as a matter of law and that the instant trial contained one of those events." *Id*. (internal citation omitted).

In *Heidt v. Argani*, a juror announced she was "not okay" and thought she was going to pass out during closing arguments in a medical malpractice trial. 214 P.3d at 1257. A recess was called, and the jury was taken to another room. *Id*. The ill juror was taken to the jury room where she was attended to by the defendant doctor; the plaintiffs' co-counsel, who was also a physician; and, with the trial court's permission, three jurors, who were nurses. *Id*. After the stricken juror was taken to the hospital:

> The parties re-convened without the jury and provided an account on the record as to what had happened. [The plaintiffs] moved for a mistrial, and the [trial court] took the motion under advisement. The [trial court] admonished the jury not to let the events with the ill juror affect their deliberations on the case. The [trial court] also asked the jurors as a group whether they could set aside what had happened and render a verdict based solely on the evidence. No juror expressed any problem, and the alternate juror was seated. Closing arguments continued and after deliberation the jury returned a defense verdict.

*Id*. The parties presented post-trial briefs on the mistrial issue, and the district court denied the motion for mistrial and entered judgment for defendants. *Id*. The plaintiffs appealed. *Id*.

On review by the Montana Supreme Court, the court agreed with the *Campbell* and *Reome* courts, concluding: "Based upon the extraordinary events observed by the jury, . . . a mistrial should have been granted or, failing that, a new trial should have been granted after the verdict." *Id*. at 1259. In reaching its conclusion, the court reasoned:

> The situations in *Campbell*, *Reome*[,] and in this case arose in a unique situation—a medical malpractice trial in which the jury

> gets to see the defendant doctor reacting to a real-life situation and apparently successfully delivering life-saving care. The effect of this on the jury is immeasurable, whether or not individual jurors admit it or even consciously know it. We agree with the courts in *Campbell* and *Reome* and their assessment of the substantial impact on the jury of observing the actual drama in the courtroom, when compared to listening to testimony describing past events during the trial itself.

*Id*. at 1258-59.

Through the modern miracle of electronic legal research, we were able to discover two more similar cases, one published and one unpublished. During the course of a malpractice trial in the first case, a juror fainted in a courtroom hallway. *Viviano v. Moan*, 93-1368 (La. App. 4 Cir. 11/17/94); 645 So.2d 1301, 1303. Dr. Stewart, a defendant in the lawsuit, rendered aid to this juror in the presence of several other jurors. *Id*.

> The record reflects that when court reconvened following this incident the trial judge advised the parties and the jury that the juror would not be returning and that an alternate juror would take her place. The trial judge also stated that he wanted the "thank everyone" who rendered aid to the stricken juror. Outside the presence of the jury plaintiffs' counsel asked that the court question each juror in chambers "to assure that they will not allow this incident to unfairly prejudice them in favor of Dr. Stewart." Counsel was only aware of four jurors who were present when Dr. Stewart helped a deputy sheriff turn the woman on her side and took her pulse.
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> Counsel for Dr. Stewart and Dr. Moan opposed plaintiffs' request, arguing that such a procedure would have the effect of blowing the incident out of proportion. Dr. Stewart's counsel suggested that it might have the effect of causing jurors to act adverse to Dr. Stewart. The trial court stated that it would not "insult the integrity" of the jury by asking if witnessing those events would affect their judgment in any way. The trial court also stated that it did not want to emphasize the incident. Counsel for plaintiffs objected, but specifically stated that they were not asking for a mistrial.

*Id*. at 1303-04. The Louisiana appellate court concluded the trial court did not abuse its discretion in declining to question the jurors. *Id*. at 1304. Whether or not a mistrial should have been granted was not an issue raised on appeal.

In *Haukedahl v. St. Luke's Hospital*, No. L-92-011, 1993 WL 496681, at *1 (Ohio Ct. App. Dec. 3, 1993), a juror collapsed during opening statements in a medical malpractice trial. At least five individuals went to the aid of the juror, including two of the defendant doctors; defense counsel, who was a physician; a juror, who was a nurse; and a court security officer. *Haukedahl*, 1993 WL 496681, at *1. Emergency medical personnel arrived, and the juror regained consciousness. *Id*. The court recessed, and the juror was excused. *Id*. The plaintiffs' counsel made a motion for mistrial asserting the defendant doctors' responses to the incident "would have a prejudicial effect on the jury's ability to be fair and impartial in rendering a verdict in the case." *Id*,

Before ruling on the motion, the court reconvened in the courtroom with the parties and their counsel. *Id*. at *2. Jury members were brought in one at a time to the courtroom, and the judge questioned each individually. *Id*. Each juror was asked whether the incident would in any way interfere with their ability to proceed and try the case to its conclusion. *Id*. They were also asked if they realized the incident was entirely unrelated to the merits of the case. *Id*. "All of the jurors stated that they would be able to proceed and agreed that any assistance of [the juror] was unrelated to this case of medical malpractice." *Id*. Once the questioning was completed, and after hearing arguments from the parties, the court overruled the plaintiffs' motion for mistrial. *Id*. The trial

continued, and the jury ultimately rendered a verdict in favor of the defendants. *Id*. The plaintiffs appealed. *Id*. at *3.

On appeal, the Ohio Court of Appeals applied the same reasoning found in *Campbell*, concluding: "A likely effect of [the defendant doctors'] subsequent response[s] to [the stricken juror] was to predispose the jury in their favor. Therefore, we cannot say from the record before us that the jury verdict was not influenced by these unusual events." *Id*. at *2-3. Furthermore, the court did "not believe the jurors' responses to the limited voir dire conducted by the trial judge [were] dispositive of the case." *Id*. at *3. The court of appeals held the trial court abused its discretion in failing to grant a mistrial, and it reversed and remanded for a new trial. *Id*.

In the appeal before us, the doctors do not direct us to any contrary case law, but they argue *Campbell*, *Reome*, and *Heidt* are factually distinguishable. We agree that no case is factually identical to the facts presented here. Nevertheless, we find the reasoning in these cases to be persuasive and dispositive as to the issue presented to us. We cannot say that the jury was not influenced by this extraordinarily rare event—medical assistance furnished to a juror in the presence of the jury by a defendant doctor in a medical malpractice trial. Such an event seriously undermines the integrity of the trial itself. *See Reome*, 543 N.Y.S.2d at 553. We agree with the *Reome* court that "certain events are so extraordinarily prejudicial that a mistrial is required as a matter of law and that the instant trial contained one of those events." *Id*.

Additionally, the circumstances cast the jurors with dual roles: jurors and character witnesses. The crux of the problem is that the jurors undoubtedly

considered Dr. Sweetman's aid to a fellow juror as evidence. Once the jury observed the doctor in action with their own eyes, there was no way the proverbial bell could be unrung. And, such evidence would have a substantially greater impact on the jury as compared to listening to testimony during the trial itself. *See Heidt*, 214 P.3d at 1259 ("We agree with the courts in *Campbell* and *Reome* and their assessment of the substantial impact on the jury of observing the actual drama in the courtroom, when compared to listening to testimony describing past events during the trial itself."). Had the jurors witnessed those events in the morning before voir dire, or similar events in the courthouse parking lot before the first day of trial, there is little doubt the jurors would have been excused from service. *See Reome*, 543 N.Y.S.2d at 553 ("Certainly, if the jurors had seen [defendant doctor] render such emergency services prior to the trial they would have been dismissed out of hand during jury selection.").

Based upon the unusual event observed by the jury, we believe the integrity of the jury was compromised because of the inherent prejudice resulting from the incident. We therefore conclude that a mistrial should have been granted, and it should have been granted when first requested by the plaintiffs. Consequently, we reverse the trial court and remand for a new trial. But this does not end our inquiry.

Dr. Booth argues that if a new trial is granted, a new trial should not be ordered against her because she did not provide medical aid to the ill juror. "At most she got a glass of water for the juror, and it is not even clear that the rest of the jury was present when that happened. Nothing she did would cause the jury to be swayed in her favor, or cast her in a heroic light." She suggests that if

sentiments are to be attributed to the jury, those sentiments should not be limited to favorable impressions of Dr. Sweetman. She suggests that sentiments toward her should be hypothesized in a neutral, or perhaps even negative light, as she did not rush to the aid of the juror as Dr. Sweetman did.

Certainly there is authority to grant a new trial as to some but not all parties. *See Houvenagle v. Wright*, 340 N.W.2d 783, 786 (Iowa Ct. App. 1983) ("In general, a new trial may be granted in favor of any of the parties where that can be done without affecting the rights of the other parties. If it appears, as a matter of law, that there is no liability on the part of one defendant, a new trial as to him should not be granted."). But, we believe the *Reome*, *Heidt*, and *Haukedahl* cases provide us the proper guidance under the rare circumstances presented in the instant appeal.

*Reome* was a medical malpractice action against a hospital and two doctors. *See* 543 N.Y.S.2d at 553. The stricken juror was administered aid by only one of the defendant doctors. *Id*. However, a new trial was ordered with respect to both doctors. *Id*.

*Heidt* was a medical malpractice action against a doctor and a clinic. *See* 214 P.3d at 1255. A new trial was ordered with respect to both defendants. *Id*. at 1259-60.

*Haukedahl* was a medical malpractice action against several doctors and others. *See* 1993 WL 496681, at *1. Two of the defendant doctors came to the aid of the stricken juror. *Id*. Yet, a new trial was granted as to all defendants. *Id*. at *3.

We conclude that medical assistance furnished by a doctor, who is a party in a medical malpractice case, to a juror in the presence of the jury seriously compromises the integrity of the trial. Such compromise to the integrity of the trial cannot be cured by retrial against some, but not all, defendants. We therefore reject Dr. Booth's request that a new trial should not be ordered against her.

Even though we reverse the trial court, we are not critical of anyone involved. All involved responded admirably. This was clearly an event that could not have been planned for or guarded against. Dr. Sweetman appropriately tended to the ill juror. Judge Staskal, an experienced and well-seasoned trial judge, was confronted with extraordinarily rare and difficult circumstances. We commend him in his responsive efforts to maintain a trial fair for the litigants. Within two or three minutes of the incident's beginning, the court directed the remaining jurors to go to the jury lounge. The trial was then recessed for the noon-hour, giving the plaintiffs' counsel an opportunity to collect his thoughts and formulate a course of action in response to the incident. The stricken juror was excused. The court made a contemporaneous record of what happened. Although the court denied the plaintiffs' motion for mistrial, it stated it would inquire of the remaining jurors as to whether the incident would affect any of their abilities to remain neutral and fair. At the request of the plaintiffs' counsel, the court agreed to poll the jurors individually, and did so. The parties' counsel were also given the opportunity to voir dire the jurors, and did so. When questioned, each juror stated nothing about the incident had any effect upon his or her ability to be a fair and impartial juror. The jurors' assurances that they could be fair

were no doubt heartfelt. After the trial was over, the parties were able to flesh out, fully brief, and argue the issues concerning mistrial; now with references to the *Campbell*, *Reome*, and *Heidt* cases. In considering Jack's motion for new trial, the court entered uncharted waters without the navigational aids of any Iowa statute, rule, or case law. In ruling on Jack's motion for new trial, the court found the *Campbell*, *Reome*, and *Heidt* cases factually distinguishable, and therefore not persuasive under the circumstances. We disagree, but we do not fault the court in not foreseeing our opinion. It is well established that we do not require counsel to be clairvoyant. *See Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981) ("Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future . . . ."). If counsel is not required to be a soothsayer, neither should a trial judge.

**REVERSED AND REMANDED.**