IN THE COURT OF APPEALS OF IOWA

No. 1-123 / 10-1207
Filed April 27, 2011

CRAIG RETTENMAIER, JANET RETTENMAIER and CRAIG RETTENMAIER on behalf of RANDI JO RETTENMAIER, a Minor and JAMES RETTENMAIER, a Minor,
Plaintiffs-Appellants,

vs.

THE FINLEY HOSPITAL,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

The Rettenmaiers appeal from the denial of their motion for new trial following a jury verdict in favor of Finley Hospital on their medical malpractice claim. **AFFIRMED.**

Martin A. Diaz and Elizabeth Craig of Martin Diaz Law Firm, Iowa City, for appellants.

Robert D. Houghton, Jennifer E. Rinden, and Nancy J. Penner of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee.

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

EISENHAUER, P.J.

The Rettenmaiers appeal from the denial of their motion for new trial following a jury verdict in favor of Finley Hospital on their medical malpractice claim. They contend new trial is warranted because they were not allowed to pursue an ostensible agency theory. They also contend there were errors in jury selection and in allowing Dr. Paul Manternach to sit at counsel table. Because the district court did not abuse its discretion in its rulings, we affirm.

I. Background Facts and Proceedings. Craig Rettenmaier sought treatment at Finley Hospital on April 17, 2006. He arrived at the emergency room complaining of lightheadedness, blurred vision in his left eye, and a headache. He was treated by Dr. Manternach, who performed a physical examination and ordered lab tests. The results of the examination and tests were normal.

Dr. Manternach also ordered a CT scan. The results of the CT scan were interpreted by Dr. Gregory Grotz, a radiologist employed by Dubuque Radiological Associates. Dr. Grotz discussed the results of the CT scan over the telephone with Dr. Manternach. In Rettenmaier's medical chart, Dr. Manternach wrote, "CT head, atrophy [-] white matter changes [- ?] demyelinating disease." Dr. Grotz also included in the CT scan report, "Other causes for this appearance include white matter ischemic changes." There is a factual dispute over whether Dr. Grotz relayed the information about ischemic changes to Dr. Manternach. This dispute is the root of the arguments regarding ostensible agency.

Dr. Manternach discharged Rettenmaier with the impression Rettenmaier was in the beginning stages of a degenerative or demyelinating disease. Rettenmaier declined Dr. Manternach's offer to set up an appointment with a neurologist for him. He then instructed Rettenmaier to follow up with a neurologist within the week. However, on August 21, Rettenmaier suffered a severe stroke. He required full-time medical care and rehabilitation for approximately one year and is disabled.

On April 16, 2008, Rettenmaier, along with his wife and children, filed a medical malpractice claim against Finley Hospital.[1] Their claim was premised on the theory Finley Hospital was vicariously liable under the doctrine of respondeat superior for the alleged negligence of its employees.

Although they had not previously alleged any negligence by Dr. Grotz, the plaintiffs argued in their trial brief, filed three weeks before scheduled trial, for a jury instruction stating Dr. Grotz was an agent of Finley Hospital under the doctrine of ostensible agency. Finley Hospital then moved in limine to exclude any evidence or argument that it could be held liable for Dr. Grotz's conduct under the ostensible agency theory. Following a hearing, the district court indicated it viewed the issue in terms of plaintiffs' obligations under the rules of discovery as opposed to the rules of evidence. It ordered, "Plaintiffs shall be precluded from offering any evidence or argument suggesting that Defendant is

[1] Three Finley Hospital doctors, including Dr. Manternach, were also named as defendants, along with Dubuque Neurology and Neurodiagnostic Center, P.C. By trial, all the other defendants had been dismissed except Finley Hospital.

responsible for any negligent acts or omissions by Dr. Gortz without first obtaining Court approval outside the presence of the jury."

Trial began on April 6, 2010. Although Dr. Manternach was no longer a party to the lawsuit and no longer employed by the hospital, he was allowed, over the plaintiffs' objection, to sit at counsels' table during trial as Finley Hospital's corporate representative.

During jury selection, one of the potential jurors stated his belief that he could not be impartial and follow the instructions given in the case. After the plaintiff challenged the juror for cause, the court followed up with additional questions and the juror indicated he would follow the instructions given and render a verdict according to the law rather than his opinions. The court denied the challenge to the juror. The plaintiffs used a peremptory strike on the potential juror. The Clerk of Court also provided the wrong juror questionnaire for another juror, who acted as foreperson.

At the close of trial, the jury returned a verdict in favor of Finley Hospital finding Dr. Manternach was not negligent. The district court entered judgment in favor of the hospital and the plaintiffs filed a motion for new trial. The district court denied the motion in its entirety and the plaintiffs appeal.

II. Scope and Standard of Review. Our review of the denial of a motion for new trial depends on the grounds asserted in the motion. *WSH Prop., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). If the motion is based on a discretionary ground, we review the trial court's decision 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 exercises its discretion to a clearly unreasonable degree. *Id.*

Evidentiary rulings are reviewed for an abuse of discretion, *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000), as are claims the court should have given a requested instruction. *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006). The trial court is also given broad discretion in acting on challenges for cause in jury selection, *Nichols v. Schweitzer*, 472 N.W.2d 266, 273 (Iowa 1991), and in deciding who sits at counsel table. *State v. Pardock*, 215 N.W.2d 344, 347 (Iowa 1974).

III. Doctrine of Ostensible Agency. The plaintiffs contend the court erred in denying their motion for new trial because it was error to exclude evidence and argument regarding whether Finley Hospital could be held liable for Dr. Grotz's negligence under an ostensible agency theory. They also sought a jury instruction on this theory.

Dr. Grotz was not an agent of Finley Hospital; he was not employed by the hospital, but by Dubuque Radiological Associates who held a contract with the hospital. However, a hospital impliedly holds out to patients seeking care that its emergency-response staff will competently handle emergency situations in the absence of their personal physicians. *Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 734 (Iowa 2003). Accordingly,

> [a] hospital has an absolute duty to its emergency-room patients to provide competent medical care, a duty which cannot be delegated. Thus, a hospital may be vicariously liable for the negligence of its emergency-room caregivers, even if they are designated as independent contractors. This liability arises from an ostensible agency, in that an emergency-room patient looks to the hospital for

> care, and not to the individual physician—the patient goes to the emergency room for services, and accepts those services from whichever physician is assigned his or her case.

Id. (quoting 40A Am. Jur. 2d *Hospitals & Asylums* § 48, at 460 (1999)).

Dr. Grotz was never named as a defendant in this lawsuit, nor did the plaintiffs ever allege he was negligent prior to filing their trial brief in March 2010. In its order granting Finley Hospital's motion in limine, the court held that although Iowa is a notice pleading state, the plaintiffs were asked in discovery to state "each and every fact of care, treatment, or other act of commission or omission" they alleged was negligent. The district court found failure to identify Dr. Gortz's negligence prohibited Finley Hospital from conducting the discovery necessary to defend against the claim and, therefore, the hospital would be unfairly prejudiced if the plaintiffs were allowed to pursue recovery under the theory.

The plaintiffs contend the court erred in disallowing evidence and argument concerning Dr. Grotz's negligence as an ostensible agent of Finley Hospital. They argue they did not need to specify the ostensible agency theory with regard to Dr. Gortz in their discovery answers because the theory was only raised in response to Finley Hospital's defense strategy, which suggested Dr. Gortz was negligent in failing to convey the information regarding the ischemic changes to Dr. Manternach.

We conclude the district court was within its discretion to disallow evidence and argument regarding Dr. Grotz's alleged negligence and the ostensible agency theory. The plaintiffs knew Dr. Manternach alleged Dr. Grotz

had not informed Dr. Manternach of the ischemic changes as early as January 2009, when he was deposed. The plaintiffs never supplemented their discovery responses to allege Dr. Grotz's negligence. Under these facts, any claim against Dr. Grotz could properly be barred. *See Biddle v. Sartori Memorial Hosp.*, 518 N.W.2d 795, 797 (Iowa 1994) (declining to dismiss a claim of vicarious liability under the doctrine of respondeat superior where it was not alleged in the petition or discovery documents, but noting even liberal notice pleading rules require a statement of the prima facie elements of a claim and other jurisdictions have dismissed similar claims for such failure).

Even if the claim was allowed, we conclude the plaintiffs cannot show they were prejudiced. Dr. Manternach testified he would not have changed his opinion on treatment even had he known about the ischemic changes Dr. Grotz observed on the CT scan. Accordingly, the alleged failure by Dr. Grotz to relay the information did not affect the outcome and could not have been a proximate cause of Rettenmaier's damages.

The plaintiffs further contend the court erred in failing to instruct the jury Dr. Grotz was an agent of Finley Hospital. Because we have already concluded the theory of ostensible agency as it relates to Dr. Grotz was not properly before the jury, the trial court did not err in denying the requested jury instruction be given.

IV. Jury Selection. The plaintiffs assign two errors in the jury's selection. First they contend the court abused its discretion in denying their challenge for cause of one prospective juror. They also contend new trial is warranted

because the Clerk of Court's office provided the wrong juror questionnaire for another prospective juror who became a member of the jury and its foreperson.

During jury selection, one potential juror indicated he had a negative view of medical malpractice cases, which he stated were strongly held and probably could not be talked out of. The juror recognized there were "obviously" occasions where medical malpractice claims are valid, and stated he would "try to keep an open mind and be fair" but stated "I can't promise it because it's in there." After the plaintiffs asked the court to dismiss the juror for cause, the district court engaged in the following colloquy with him:

> THE COURT: Regardless of your views that you may have about lawsuits of this nature, are you able to read instructions, follow the instructions and set aside any opinions that you have or views that you have in order to do justice according to the instructions that are given to you?
>
> JUROR: That's an interesting question. I'd probably say no.
>
> THE COURT: Okay. So you are telling me that even if I instruct you at the end of the case that this is the law and that the law needs to be followed, regardless of any of your personal views or opinions, that you, notwithstanding your oath, could not follow those instructions and apply the law?
>
> JUROR: No. That's not what I'm saying. What I am saying is I would—I think just as everybody's gone through their experiences, I think in the back of your mind it will play—it does play a role in everything. Not that I won't do my best, but they're just—again, as he said, they're opinions, beliefs, so I'll do my best.
>
> THE COURT: This is the bottom line question that I have for you, and I understand that everyone brings views and opinions into this courtroom. We're all human beings. Everyone that is sitting out there and sitting on the jury panel has life experiences that give them opinions and views coming to this courtroom. There's nothing wrong with that. The question that I need to determine is if we get to the end of this case and you have heard evidence in the case and you have a set of instructions on the law that I will give you, and your conclusion, your verdict, after reading those instructions is different than what you think it should be or what it ought to be, will you follow those instructions and render the verdict according to the law as opposed to your opinions?

> JUROR: That I would do.
> THE COURT: Okay, all right. I'm going to overrule the objection for cause.

We first note the court's participation in voir dire is appropriate. Iowa Rule of Civil Procedure 1.915(2) provides: "The court may conduct such examination as it deems proper."

Iowa Rule of Civil Procedure 1.915(6)(*j*) states a juror may be challenged for cause where "it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows a state of mind which will prevent the juror from rendering a just verdict." Here, the juror expressed an ability to set aside his personal prejudices about medical malpractice cases and follow the law as given in the jury instructions. Given the juror's answers to the court's questions, we conclude the court did not abuse its discretion in denying the plaintiffs' request to remove him for cause.

The plaintiffs also contend the court erred in failing to grant them new trial because the Clerk of Court's office inadvertently supplied the parties with the wrong juror questionnaire for B. Westhoff. The clerk's office provided the parties with a copy of a juror questionnaire for R. Westhoff instead. They argue their rights were materially affected because Westhoff may not have been eligible for jury service, their right to voir dire Westhoff was impacted, and they were misled.

The plaintiffs note R. Westhoff circled both "yes" and "no" to the question about whether he was able to understand written, spoken, or manually signed English. When the mistake in juror questionnaires was discovered, the court conducted a hearing without the parties present and asked if Westhoff was able

to understand English. The plaintiffs argue that although their concern about his ability to understand English was relieved by the hearing, they should have been able to inquire about his answer. They also note there were differences between R. Westhoff and B. Westhoff's questionnaire answers regarding marital status, children, and education, and argue these differences would have led to different questions during voir dire and may have changed their decision regarding which jurors to strike from the panel.

We conclude the district court acted within its discretion to deny the plaintiffs a new trial based on receipt of the wrong juror questionnaire. The claim the plaintiffs were prejudiced by the mistake is purely speculative. It presumes the parties would have asked significantly different questions of Westhoff, that his answers would have led them to strike him from the panel, and that Westhoff's activities as a juror and foreperson so significantly swayed the jury as to render a different verdict than otherwise would have been reached. The court acted properly in denying the motion.

V. Presence of Dr. Manternach. Finally the plaintiffs contend the court erred in allowing Dr. Manternach to sit at counsel table during the trial, even though he was no longer an agent of Finley Hospital. Although Plaintiffs now contend the court erred in not sequestering Dr. Manternach as a witness, this claim was not made at trial and is not preserved for our review. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998).

The sole argument made to the trial court was whether Dr. Manternach could sit at counsel table as a representative of Finley Hospital. At the time

plaintiffs objected to Dr. Manternach's presence the court asked the plaintiffs for any authority prohibiting his ability to be the designee for the defendant Finley Hospital. They cited none and do not on appeal. We find no abuse of discretion.

Finding no merit in any of the plaintiffs' assignments of error, we affirm.

AFFIRMED.