IN THE COURT OF APPEALS OF IOWA

No. 6-307 / 05-0788
Filed July 12, 2006

JANET ATKINSON, Executor of the Estate of HELEN BURMEISTER, Deceased, and The Bankruptcy Estate of Janet Atkinson,
Plaintiffs-Appellants,

vs.

MANOR CARE HEALTH SERVICES, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Patrick J. Madden, Judge.

Plaintiffs appeal following a jury verdict in favor of defendant in this action for negligence and loss of consortium. **AFFIRMED.**

Daniel D. Bernstein and William J. Bribriesco of William J. Bribriesco and Associates, Bettendorf, for appellant.

Ralph W. Heninger, Davenport, for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Plaintiffs Janet Atkinson, as executor of the estate of her mother Helen Burmeister, and Janet Atkinson's bankruptcy estate, appeal following a jury verdict in favor of defendant Manor Care Health Services, Inc. on their negligence and loss of consortium claims. We affirm the district court.

I. Background Facts and Proceedings.

On October 13, 2000, Helen Burmeister, a seventy-eight-year-old diabetic with end-stage renal disease and a history of congestive heart failure, was admitted to a skilled nursing home operated by Manor Care Health Services, Inc. (Manor Care). Burmeister received dialysis at the Genesis Medical Center (Genesis) dialysis clinic. She was also seen by the Genesis wound care clinic.

On November 27 the wound care clinic referred Burmeister to Dr. Tuvi Mendel for evaluation of a non-healing left-foot ulcer. On December 4 Dr. Mendel performed a below-the-knee, left-leg amputation. Burmeister was informed that the wound might not heal appropriately. On December 11 Burmeister was discharged from Genesis to Manor Care. The discharge orders directed Manor Care to transport Burmeister to the dialysis clinic three times per week. They did not direct Manor Care to care for the surgical site.

Manor Care transported Burmeister to the clinic as directed, but did not change Burmeister's surgical dressing or provide any care for the surgical site. Manor Care staff testified that they believed such care was being provided by the wound care clinic during Burmeister's dialysis visits at Genesis.

On December 12 Manor Care staff noted some drainage from the surgical site. On Friday, December 15, Manor Care nurse Pat Fenelon attempted to

contact Dr. Mendel, but reached his partner, Dr. Tyson Cobb. Fenelon informed Dr. Cobb that she had unwrapped the surgical dressing and that the surgical staples were still in place and there was some minimal drainage from the wound. Because the drainage was dry and minimal, Dr. Cobb directed Fenelon to rewrap the leg and call Dr. Mendel the following Monday, December 18, regarding the fact the staples remained in the surgical site. Fenelon rewrapped, but did not change, Burmeister's dressing. There is no evidence any follow-up call to Dr. Mendel was ever made.

Burmeister was discharged from Manor Care on January 28, 2001. On January 31 a nurse from the wound care clinic contacted Dr. Mendel and informed him that Burmeister's wound was breaking down. Burmeister, already in a weakened condition, underwent an above-the-knee amputation on February 6. She died on February 12.

Burmeister's daughter, Janet Atkinson, filed suit against Manor Care. She made a claim for negligence in her capacity as executor of Burmeister's estate, which asserted that Manor Care's failure to assess and care for the amputation site and its failure to follow-up with Dr. Mendel as instructed by Dr. Cobb fell below the standard of care required of skilled nursing facilities. She alleged this failure caused a need for the second amputation and, ultimately, Burmeister's death. Atkinson also made a claim for loss of consortium in her individual capacity. After Atkinson filed bankruptcy, her bankruptcy estate was substituted as the plaintiff for the loss of consortium claim.

The matter was tried to a jury. During closing arguments, after counsel had received copies of the final jury instructions and the instructions had been

read, the district court realized the instructions had not defined proximate cause. After closing arguments were concluded, the jury attendant was sworn, and the jury retired,[1] the court informed counsel the proximate cause instruction had been omitted. The court obtained, on the record, the consent of both the plaintiffs' and the defendant's attorneys "to go ahead and submit that jury instruction to the jury, and it will be numbered 24A."

The jury returned a verdict finding Manor Care had been negligent in its care of Burmeister, but that Manor Care's negligence was not a proximate cause of the plaintiffs' damages. The district court accordingly entered judgment in favor of the defendant and against the plaintiffs.

The plaintiffs filed a motion for a new trial. They asserted the court erred when it "failed to read and instruct the jury as to proximate cause" because the proximate cause instruction "was not read to the jury with the other instructions." They asserted the court further erred when it failed to grant various motions in limine that sought to exclude testimony the plaintiffs believed were an attempt to prove the fault of nonparties. The district court denied the motion in total.

Regarding "the issue of the proximate cause instruction not being read to the jury," the court stated,

> [T]he Court recalls the instruction was inadvertently omitted from the packet of instructions considered by the parties. . . . The parties agreed the proximate cause instruction should be included in the packet of instructions sent to the jury room for consideration. . . . The proximate cause instruction was not read to the jury. . . . No request to read the omitted instruction was made by either of the parties. It simply was inserted in the instruction packet sent to

[1] The court retired the jury for deliberation, but as it was nearly 4:30 p.m. on a Friday, immediately released them following an admonishment with instructions to return the following Monday morning.

> the jury room. It was not until after the jury returned its defense verdict that the plaintiffs asserted not reading the instruction constituted error.

The plaintiffs appeal. They contend the court erred "when it neglected to read the proximate cause instruction to the jury along with the rest of the jury instructions and then later submitted that instruction without reading it to the jury." They contend the court further erred by allowing evidence of the comparative fault of nonparties, which, in the case of Janet Atkinson, also improperly implied a duty on behalf of Atkinson to inform Manor Care of an alleged medical complication with her mother's wound site.

II. Proximate Cause Instruction.

We review challenges to jury instructions for the correction of errors at law, but only to the extent they are based on an objection previously raised before the trial court. *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994). "[E]rror in giving or refusing to give a particular instruction does not warrant reversal unless the error is prejudicial." *Smith v. Smithway Motor Xpress, Inc*., 464 N.W.2d 682, 685 (Iowa 1990). Prejudicial error occurs when an instruction confuses or misleads the jury, or is unduly emphasized. *Anderson v. Webster City Cmty. Sch. Dist*., 620 N.W.2d 263, 268 (Iowa 2000).

The crux of the plaintiffs' jury instruction claim is that, because the proximate cause instruction was not read to the jury, its importance was minimized to the point the jury failed to understand and properly apply the concept. To the extent this claim is based upon the fact the instruction was not read to the jury at the same time as the remaining instructions, the plaintiffs have failed to preserve error. They, along with the defendant, were provided with

copies of the instructions to be submitted to the jury. Neither they, nor the defendant, objected to the absence of a proximate cause instruction at the time the instructions were read to the jury, or to the submission of a proximate cause instruction after the remaining instructions had already been read.

Nor have the plaintiffs preserved error to the extent their claim is based on the court's failure to separately read the instruction to the jury after its inadvertent omission came to light. We first note that this specific allegation of error was not raised in the plaintiffs' new trial motion. In addition, the record indicates that the plaintiffs neither requested that the instruction be read to the jury nor objected to the court's decision to submit the written proximate cause instruction within the packet of instructions sent to the jury room. Although the plaintiffs contend "they were not consulted concerning the manner in which the instruction would be submitted," and suggest they were not informed the instruction would be submitted in writing only, this fact does not appear in the record.

The plaintiffs attempt to blame the district court for any gaps in the record. However, it is the plaintiffs' duty, as appellants, to provide this court a record that affirmatively discloses the alleged error relied upon. *In re F.W.S.*, 698 N.W.2d 134, 135 (Iowa 2005). When the record fails to disclose the alleged error, the appellant can remedy the problem through a statement of proceedings approved by the district court. *See* Iowa R. App. P. 6.10(3). They have not done so here, and it is inappropriate for this court to speculate as to what took place before the district court or predicate error on such speculation. *F.W.S.*, 698 N.W.2d at 135. Based on the record before us, the plaintiffs have failed to demonstrate that error has been preserved on this issue.

Moreover, even if error had been preserved, we would find no merit to the plaintiffs' contention. The record indicates the proximate cause instruction was submitted to the jury at the same time the jury received the remainder of the written instructions, which occurred after they retired for deliberations. Iowa Rule of Civil Procedure 1.925 grants the district court discretion to submit additional instructions to a deliberating jury. The instruction must be given in writing, after notice to counsel. Iowa R. Civ. P. 1.925. There is no requirement such an instruction be read to the jury as well. *Id*. Thus, there was no error in the procedure followed by the district court.

Finally, even if the plaintiffs had been able to establish that the proximate cause instruction was submitted to the jury prior to the start of deliberations, we cannot conclude the plaintiffs were prejudiced by the fact the instruction was not also read to the jury. We begin with the presumption that the jury followed the court's instructions, unless the contrary is shown. *Schwennen v. Abell*, 471 N.W.2d 880, 887 (Iowa 1991). The mere fact the jury determined that Manor Care's negligence was not a proximate cause of the plaintiffs' damages is not proof the failure to read the instruction to the jury so minimized its importance or so mislead or confused the jury that the plaintiffs were prejudiced.

Notably, even though the proximate cause instruction had not been read to the jury, the plaintiffs' attorney fully explored the concept during closing arguments. Counsel stated that proximate cause meant "something that is a substantial factor in bringing about the damage" and that "except for [the defendant's] conduct . . . this damage would not occur," which is both an accurate statement of the law and essentially the definition of proximate cause

contained in Instruction 24A.[2] Counsel went on to provide specific argument regarding what acts or omissions of the defendant had proximately caused the need for a second amputation, and ultimately led to Burmeister's death. *Cf. State v. Watkins*, 463 N.W.2d 15, 18 (Iowa 1990) (concluding a defendant was prejudiced by submission of a supplemental instruction because he "was not permitted to address this critical matter of law in his closing argument").

For all the foregoing reasons, we reject the plaintiffs' contention that prejudicial error resulted from the manner in which the proximate cause instruction was submitted the jury.

III. Evidentiary Rulings.

The plaintiffs contend the district court erred in allowing certain evidence into the record. We review evidentiary rulings for an abuse of the court's broad discretion. *Horak v. Argosy Gaming Co*., 648 N.W.2d 137, 149 (Iowa 2002). Reversal is warranted only if the court clearly abused its discretion, to the plaintiffs' prejudice. *Id*. Discretion is abused when it is exercised to a clearly unreasonable extent, or for reasons or on grounds that are clearly untenable. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

The plaintiffs assert the court erred in admitting (1) evidence "of the comparative fault of Janet Atkinson, Tuvi Mendel, M.D., Patricia Jaegle, M.D., nurse Natalie Amhoff, and Genesis Medical Center" as established through the

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[2] Instruction 24A stated:

> The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.
> "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

testimony of various witnesses, and (2) testimony from Atkinson's boyfriend, Gary VanMechelen, regarding a visit he and Atkinson paid to Burmeister on or about December 18, while she was still residing at Manor Care.[3]

Before we turn to the merits, we note the plaintiffs have failed to preserve error on the first claim. Although the plaintiffs assert they preserved error by moving in limine to exclude this evidence, they have failed to refer this court to where in the record such a motion or motions can be found, or any ruling on the same. This alone is sufficient to waive any error. Iowa R. App. P. 6.14(1)(*f*); *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001). Moreover, our independent review of the file has failed to reveal either a request to exclude the evidence or any ruling on that request. It is fundamental that before an issue may be raised and determined on appeal, it must have been raised before and decided by the district court. *Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995).

Although the plaintiffs failed to include it within the appendix, *see* Iowa R. App. P. 6.15(1)(*a*) (requiring party to include within appendix relevant portions of record), a general reference to an in limine request and court ruling does appear in the transcript of a discussion regarding the admissibility of VanMechelen's testimony.[4] Even if we were to conclude this reference adequately demonstrated

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[3] Although VanMechelen was called as a witness, he could not recall details of the visit, and his testimony was presented primarily by the reading of portions of his deposition.

[4] During that discussion, the plaintiffs' attorney stated:

> We made a motion in limine stating that it was unfair to bring in any type of argument or evidence about the fault of another defendant if there is going to be no line at the end of this case for fault assigned to them. . . . As I recall the record, the Court found that it was okay for the issue of

that the plaintiffs did move in limine to exclude the evidence, and the court entered a ruling denying the same, denial of a motion in limine generally does not constitute reversible error. *Tratchel v. Essex Group, Inc*., 452 N.W.2d 171, 178 (Iowa 1990). Unless the court's denial "amounts to an unequivocal holding concerning the issue raised," *Kalell v. Petersen*, 498 N.W.2d 413, 415 (Iowa Ct. App. 1993), error will not be preserved unless the plaintiffs objected when the testimony was offered at trial, *Tratchel*, 452 N.W.2d at 178. No such unequivocal holding appears in the record, and the plaintiffs did not further object to the testimony. Accordingly, error has not been preserved on this claim.[5]

We therefore turn to the plaintiffs' final assignment of error—the court's admission of the testimony of Atkinson's boyfriend, Gary VanMechelen. The plaintiffs contend the district court abused its discretion when it allowed VanMechelen to testify that, during a visit to Burmeister at Manor Care on or about December 18, Atkinson saw that the surgical staples were still in

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> proximate cause to talk about the actions of other people that were not defendants in this case.

He also asserted evidence Dr. Mendel, Genesis, and Atkinson "didn't follow up" came in "based upon the Court's ruling," after which the following exchange occurred:

> The Court: No, no, no, no, no, no. No, the doctor testified. I didn't –
>
> [Defense Counsel]: You didn't object. It all came in.
>
> The Court: It all came in. There was no objection that I recall to that.
>
> [Plaintiffs' Counsel]: Judge, we filed a motion in limine . . . that asked to restrict discussion about anybody's duties. The Court –
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> The Court: But I'm not—but I wouldn't allow that anyway because the—it's not clear, based on the facts of this case, who had the responsibility, ultimately.

[5] We also note that nearly all of the testimony complained of can be fairly characterized as an attempt to justify or explain the defendant's conduct or Burmeister's course of treatment, rather than an attempt to cast fault upon a nonparty. Thus, even if error had been preserved, we would not conclude the district court exercised its discretion to a clearly unreasonable extent, or for reasons or on grounds that are clearly untenable, in admitting such testimony. *Graber*, 616 N.W.2d at 638.

Burmeister's amputation site, yet failed to inform Manor Care of that fact. They assert this testimony impermissibly implied a duty on behalf of Atkinson to "warn Manor Care of their mistakes," and that because Atkinson "had no duty to inform Manor Care of their sloth," this testimony is irrelevant and "the implication [Atkinson] was at fault in some manner led to the danger of unfair prejudice against Ms. Atkinson, confusion of the issues, and misled the jury." They further assert the testimony is an impermissible attempt to introduce Atkinson's comparative fault as an issue at trial.

Manor Care contends the plaintiffs have failed to preserve error on this claim because, even though they filed a motion in limine seeking to exclude VanMechelen's testimony, which was denied by the court, they did not object during VanMechelen's testimony itself. The plaintiffs respond that they were not required to object because the court, in essence, allowed them to make a standing objection to VanMechelen's testimony before he was called and sworn. Once again, the plaintiffs have failed to refer this court to where in the record any standing objection was made or allowed, and no such occurrence appears in the appendix. As previously stated, we could find error has been waived on this basis alone. *See* Iowa Rs. App. P. 6.14(1)(*f*), 6.15(1)(*a*); *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001); *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002) (noting we are not bound to consider a party's position when it fails to comply with our rules of appellate procedure).

A review of the transcript does reveal an in limine ruling by the district court that permitted VanMechelen to testify to (1) attempts by Atkinson to

influence VanMechelen's testimony, which the court found to be relevant to Atkinson's credibility, and (2) Atkinson's knowledge on December 18 that the surgical staples were still present as well as any indication that she would take care of scheduling a follow up appointment for Burmeister "because of the staple issue," which the court concluded "indicates . . . that [Atkinson] didn't think it was Manor Care's responsibility to contact the doctor." The court also stated:

> If on those two issues . . . you fail to object [during VanMechelen's testimony], I would like the record to show that the only reason you don't object is you didn't want to further prejudice your client more than the testimony itself would prejudice her, and so—and I don't know I have this power, but if I have the power, I will allow your objection to be made at this point to . . . those two portions of his testimony so that you don't have to object to them at trial. Quite frankly, . . . what I don't know is whether I have that authority.

The district court's hesitance was well placed. Standing objections are disfavored because they "make[ ] appellate review infinitely more difficult and, for the litigants more uncertain." *Prestype Inc. v. Carr*, 248 N.W.2d 111, 117 (Iowa 1976). Without specific objections during the testimony itself, it is often difficult to ascertain precisely what aspects of the testimony are alleged to be objectionable, much less determine whether any of the allegedly objectionable testimony fell within the parameters of the standing objection.

However, we recognize it was not unreasonable for the plaintiffs to believe, based upon the district court's statement, that they were not required to object to any portion of VanMechelen's testimony that related to Atkinson's attempt to influence his testimony, her knowledge that the surgical staples remained in the wound site, or her intent to arrange a follow-up appointment. Accordingly, we will consider the plaintiffs' assertion that the court abused its

discretion in admitting evidence of Atkinson's knowledge that the staples remained in her mother's leg, and her failure to inform Manor Care of that fact.

We must note, as an initial matter, that the testimony referenced by the plaintiffs does not contain an assertion Atkinson failed to inform Manor Care staff the staples remained in Burmeister's leg. VanMechelen testified that Atkinson had expressed concern about the fact the staples remained in the wound site and the need to have the issue addressed by one of Burmeister's doctors. He further testified that Atkinson informed him she had stopped at the nurses' station to find out when Burmeister's next surgical follow-up appointment would occur, the nurses said they would "let her know" the date of the next appointment, and she would "follow up" by finding out the date of the next appointment and accompanying Burmeister. VanMechelen also stated that Atkinson was the family member responsible for helping Burmeister communicate with her doctors.

Assuming without deciding that the foregoing gives rise to a reasonable inference Atkinson failed to inform the Manor Care staff about the staples, we cannot conclude the district court abused its discretion in admitting the testimony. The plaintiffs assert the only purpose of this testimony was to impermissibly imply a duty on behalf of Atkinson to raise the issue with Manor Care, and to establish that, because Atkinson breached this duty, she bore comparative fault for her mother's injuries. However, the record indicates Manor Care sought admission of this testimony for two other distinct purposes.

First, the testimony was relevant to Manor Care's impeachment of Atkinson's credibility, in that it served as a precursor to evidence Atkinson had told VanMechelen Burmeister's staples had been removed when in fact they had

not. Second, Manor Care sought to demonstrate that it did not breach its duty to Burmeister by failing to call Dr. Mendel on December 18 because it believed Atkinson, who was heavily involved in overseeing and arranging her mother's medical care, had taken responsibility for following up with Dr. Mendel. Under these circumstances, we cannot conclude admission of the testimony was clearly unreasonable, or based on clearly untenable grounds.

In addition, even if admission of the evidence was erroneous, we would not conclude its admission prejudiced the plaintiffs. Prejudice will not be found unless, after considering the record as a whole, it is determined that admission of the evidence affected a substantial right of the plaintiffs, and that justice would not be served by allowing the jury verdict to stand. *See Stumpf v. Reiss*, 502 N.W.2d 620, 623 (Iowa Ct. App. 1993). Any failure to inform Manor Care of the staples would seem to be of limited impact, given that Manor Care staff admitted they were aware the staples remained in the wound even before Atkinson and VanMechelen's visit.

IV. Conclusion.

We have considered the plaintiffs' assignments of error, to the extent they have been preserved for our review. Finding no prejudicial error, we affirm the jury verdict and subsequent district court judgment.

AFFIRMED.