

IN THE COURT OF APPEALS OF IOWA

No. 6-432 / 05-1670
Filed November 16, 2006

SHARON MOHAMMED AND DORIS WHIGHAM CURRY,
As Co-Administrators of the Estate of JERRY WHIGHAM,
Plaintiffs-Appellants,

vs.

E. ANTHONY OTOADESE, M.D.,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Plaintiffs appeal the jury's verdict for defendant in their medical malpractice action. **REVERSED AND REMANDED.**

D. Raymond Walton of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellants.

Sarah J. Gayer, Connie Alt, and Jennifer E. Rinden, of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Jerry Whigham was referred to Dr. E. Anthony Otoadese for an enlarged thyroid, otherwise known as goiter. Dr. Otoadese specializes in thoracic and cardiovascular surgery. Whigham's thyroid had enlarged to the extent it was pressing on his trachea, right lung, and superior vena cava, a large vein. On February 27, 2001, Dr. Otoadese performed a mediastinotomy, which meant he opened Whigham's chest to remove the enlarged thyroid.

After the surgery Whigham had bilateral paralysis of the recurrent laryngeal nerves, with the result that he was unable to breath normally. A tracheostomy tube was installed which allowed Whigham to breath through the tube. On December 30, 2002, Whigham removed the tube to clean it, and was unable to replace it. Other family members attempted to help him, but were unable to get the tube in. Whigham suffered cardiac arrest and went into a coma.

On February 26, 2003, Sharon Mohammed, who was Whigham's niece and conservator, filed a medical malpractice action against Dr. Otoadese, claiming that during the surgery in 2001 he had negligently damaged Whigham's recurrent laryngeal nerves. Whigham died on September 9, 2003, while the suit was pending. Mohammed and Whigham's sister, Doris Whigham Curry, as co-administrators of Whigham's estate, were substituted as the plaintiffs in the action.

During the trial, plaintiffs presented the expert testimony of Dr. Russell Smith, an ear, nose and throat specialist. Dr. Smith testified that he performed

many surgeries to remove thyroids every year. He testified that an enlarged thyroid should be removed through the neck because there is a better chance of protecting the recurrent laryngeal nerves during surgery. Dr. Smith stated that if an enlarged thyroid extended into the chest, so that it had a substernal component, the incision could be extended, but he did not believe it was proper to enter through the chest to remove an enlarged thyroid. Dr. Smith stated he believed Dr. Otoadese breached the appropriate standard of care.

Plaintiffs also presented the expert testimony of Dr. Richard Waldorf, a retired general surgeon, who testified Dr. Otoadese breached the applicable standard of care due to his failure to identify and protect the recurrent laryngeal nerves during surgery. Dr. Robert Sarsfield testified he examined Whigham prior to surgery, and felt a palpable mass in his neck.

Defendant presented the expert testimony of Dr. Marnix Verhofste, a cardiothoracic surgeon. Dr. Verhofste testified Whigham's enlarged thyroid extended mainly into his chest, and Dr. Otoadese properly removed it through the chest. He stated that during this type of surgery it is very difficult to find the recurrent laryngeal nerves. Dr. Courtney Harris, a retired cardiovascular and thoracic surgeon, testified Whigham's enlarged thyroid was unusually large and mainly extended into the chest, and it was properly removed through the chest. Dr. Louis Alt, a ear, nose and throat specialist, testified Dr. Otoadese acted in a reasonable manner.¹

Dr. Otoadese testified Whigham had a rare type of enlarged thyroid because it was very large and was about ninety-five percent in the chest area.

¹ Dr. Alt is the brother of one of the defense attorneys, Connie M. Alt.

He agreed that most enlarged thyroids can be removed through the neck, but stated that the specific circumstances of this case were such that Whigham's enlarged thyroid had to be removed through the chest. He testified he did not look for the recurrent laryngeal nerves because Whigham was not in very good health, and he wanted to remove the enlarged thyroid as quickly as possible.

The jury returned a verdict for defendant. Plaintiffs filed a motion for new trial, contesting several evidentiary rulings. The district court denied the motion for new trial. Plaintiffs appealed.

II. Standard of Review

In this law action, our review is for the correction of errors of law. Iowa R. App. P. 6.4. We review for an abuse of discretion certain evidentiary rulings made by the district court. *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002). An abuse of discretion exists when the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

III. Prior Suit

Defendant sought to introduce evidence that Whigham had filed a slip-and-fall suit against Hy-Vee Stores in February 2002 based on an incident in 2000. He claimed the evidence was relevant to show Whigham had the ability to file a lawsuit after his surgery, and before he went into a coma, but it was not the present suit. Plaintiffs claimed the evidence was not relevant and was being introduced in an attempt to show Whigham was litigious. The district court determined the evidence was admissible.

During the trial, defense attorneys asked Whigham's sister several questions about the slip-and-fall suit although she stated she had no knowledge

about it. Plaintiffs' counsel objected to the questions, and the objections were overruled. Plaintiffs claim the district court abused its discretion by permitting this line of questioning. On appeal, defendant claims he could properly cross-examine Whigham's sister about her knowledge of Whigham's affairs, including the previous lawsuit.

Generally, under Iowa Rule of Evidence 5.402 all relevant evidence is admissible, while evidence which is not relevant is not admissible. *Graber v. City of Ankeny*, 616 N.W.2d 633, 637 (Iowa 2000). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. A court considers whether a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the proffered evidence. *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000).

We find the evidence of the prior suit is clearly not relevant to any facts of consequence in the present case. Whether Whigham had the ability to file another lawsuit, and whether his sister had any knowledge of his affairs, are not facts of consequence to the present medical malpractice case. We conclude the district court abused its discretion in ruling the evidence was admissible.

Not every ruling admitting irrelevant evidence requires reversal. *Id.* We will reverse only if a district court's erroneous ruling affects the substantial rights of the complaining party. *Graber*, 616 N.W.2d at 638. Although a presumption of prejudice arises when a court receives irrelevant evidence over a proper

objection, the presumption is not sufficient to require reversal if the record shows a lack of prejudice. *Johnson v. Kaster*, 637 N.W.2d 174, 181 (Iowa 2001).

We determine the evidence that Whigham filed a previous lawsuit against Hy-Vee was prejudicial to plaintiffs in this case. It is clear the evidence was designed to show Whigham was litigious. In arguments before the court concerning the admissibility of the evidence, defense counsel stated “[Whigham] had control of his mental capabilities, his faculties, and he was off to the courthouse filing lawsuits.” This evidence, which suggested litigiousness, could have biased the jury against plaintiffs. In this case, the record does not show a lack of prejudice.

We remand for a new trial based on the introduction of this irrelevant evidence. Because certain other evidentiary issues may arise on remand, we will address them at this time.

IV. Medical Bills

Whigham’s medical bills were paid by Medicare and Medicaid. Those amounts would have to be repaid to Medicare and Medicaid out of any recovery made by Whigham’s estate in the present case. Iowa Code section 147.136 (2003) provides:

In an action for damages for personal injury against a physician and surgeon . . . in which liability is admitted or established, the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the person injury . . . to the extent that those losses are replaced or are indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source except the assets of the claimant or of the members of the claimant’s immediate family.

Plaintiffs argued that because Whigham's estate could become responsible for the medical bills, the bills should be admissible under section 147.136. The district court agreed plaintiffs could present evidence of the amount of the medical bills paid by Medicare and Medicaid, but also had to include the fact that the bills had been paid by those entities. The parties entered into a stipulation as to the amount of Whigham's medical expenses. The stipulation then provided:

You are instructed that these medical expenses were paid by Medicare and Medicaid and shall be paid back to Medicare and Medicaid out of any dollar amount awarded by you to his estate only if you should find his estate is entitled to recover monetary damages against the Defendant.

We determine the stipulation sufficiently sets forth the facts in this case, and the law under section 147.136. See *Peters by Peters v. Vander Kooj*, 494 N.W.2d 708, 714 (Iowa 1993) (finding it was permissible under section 147.136 to present evidence of Medicaid benefits to allow jury to make a determination of recovery in light collateral source payments).

V. Treatise

One of plaintiffs' experts, Dr. Smith, was prepared to testify that he had relied upon a treatise, Greg Randolph, M.D., *Surgery of the Thyroid and Parathyroid Glands* (2003), to support his opinion that Dr. Otoadese had breached the reasonable standard of care in treating Whigham's enlarged thyroid. Defendant objected to the use of the treatise because it was published in 2003, and was not available to Dr. Otoadese when the surgery was performed in 2001. The district court determined Dr. Smith could not read from the treatise or testify about it.

Under Iowa Rule of Evidence 5.803(18), learned treatises are excluded from application of the hearsay rule. If a treatise is admitted under the rule, statements from the treatise may be read into evidence, but may not be received as exhibits. *Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 811-12 (Iowa Ct. App. 1995). Whether a treatise should be admissible is left to the sound discretion of the district court. See *Heinz*, 653 N.W.2d at 338 (noting evidentiary rulings are reviewed for an abuse of discretion). We make no decision on appeal as to the admissibility of the treatise evidence because that will depend on whether and how it is offered at the new trial.

VI. Hospital Privileges

Plaintiffs sought to introduce evidence that Dr. Otoadese did not have privileges to perform thyroidectomies at Allen Hospital in Waterloo, where the surgery was performed. The introduction of this evidence would depend upon a showing of relevance. *Graber*, 616 N.W.2d at 637. We make no finding as to the admissibility of this evidence, which would depend upon the evidence presented at the new trial.

VII. Display of Emotion

During the trial, Dr. Otoadese had a brief display of emotion. We believe this incident will not repeat itself, and need not be further addressed.

VIII. Whigham's Noncompliance

Also, during the trial, Dr. Verhofste testified Whigham was not a compliant patient. Plaintiffs' counsel objected, stating he believed defendant was moving into an area of comparative fault, which had not been pled. The district court overruled the objection.

On appeal, plaintiffs contend the evidence of Whigham's compliance should not have been admitted because it was irrelevant to any issue before the court. Although comparative fault was not an issue, the jury could still hear evidence concerning whether Dr. Otoadese's conduct was the *proximate cause* of Whigham's damages. On retrial, evidence of Whigham's noncompliance may be admissible if it is determined to be relevant to the issue of proximate cause.

We reverse the decision of the district court, and remand the case for a new trial.

REVERSED AND REMANDED.