IN THE COURT OF APPEALS OF IOWA

No. 6-531 / 05-1009
Filed September 21, 2006

JIMMY D. MCVAY,
Plaintiff-Appellee,

vs.

RONALD S. BERGMAN, D.O., P.C.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

The defendant appeals from an adverse judgment in this medical malpractice suit. **REVERSED AND REMANDED.**

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

Marc Humphrey of Humphrey Law Firm, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Huitink and Hecht, JJ.

SACKETT, C.J.

Defendant-appellant Ronald S. Bergman, D.O., P.C., appeals from a jury verdict awarding plaintiff-appellee Jimmy D. McVay $750,000 in damages after finding malpractice arising out of breast reconstruction surgery performed by Ronald S. Bergman, D.O. (Dr. Bergman) an employee of defendant. Defendant contends (1) the district court erred in admitting a videotape of a television news story where Dr. Bergman spoke about and illustrated breast reconstruction surgery, and (2) the verdict was excessive.[1] We find that the videotape should not have been admitted. We reverse and remand for a new trial.

BACKGROUND.

Plaintiff contended Dr. Bergman, a plastic and reconstructive surgeon, was negligent in recommending and performing three-stage breast reconstructive surgery in 2000 and 2001 on plaintiff and failing to obtain a proper informed consent. Plaintiff had been diagnosed with breast cancer in 1999 and underwent a modified radical mastectomy on her left breast. She had smoked a package of cigarettes a day for some twenty-six years and continued to smoke after the mastectomy. Following the mastectomy she had both chemotherapy and radiation.

Plaintiff, seeking breast reconstruction, first saw Dr. Bergman on February 1, 2000. Plaintiff's reconstructive surgery would be done in three stages. The first stage done on June 16, 2000, involved placing in plaintiff's left chest bilateral tissue expanders, a device that can be injected with fluid ultimately to expand the

[1] A third issue contending the dismissal of a physician in a medical malpractice action bars a vicarious liability claim against the physician's employer addressed in the briefs was withdrawn from consideration by defendant, Bergman P.C. prior to transfer of the case to this court.

skin. On January 8, 2001, Dr. Bergman performed the second stage and replaced the tissue expander with a breast implant. On June 29, 2001, Dr. Bergman performed the third stage with nipple and areola reconstruction. Plaintiff developed an infection in the area of the implant causing Dr. Bergman to remove the implant on August 27, 2001. The infection resulted in McVay experiencing skin loss and having skin grafting.

It is recognized that infection is a known risk and complication of breast reconstruction surgery. McVay's position at trial was that given her history of chemotherapy, radiation, and cigarette smoking, the three-stage breast reconstruction surgery recommended by Dr. Bergman was below the standard of care in her choice of operation and was not appropriate for her as it carried a dramatically increased risk of infection. Dr. Bergman testified the operation was appropriate for plaintiff. There was conflicting expert testimony on the issue.

At trial the district court allowed plaintiff to introduce into evidence a videotape of a television news story that showed Dr. Bergman doing reconstructive surgery on a mastectomy patient. The videotape included statements by the patient about why she was having the surgery, statements by Dr. Bergman explaining certain risks of the procedures, and statements of the news commentator identified as Katherine Prichard. McVay had earlier testified that on May 16, 2002 she was watching Channel 13 news[2] and saw Dr. Bergman discussing types of reconstruction for women with breast cancer. Plaintiff testified Dr. Bergman said in the segment that women who have had radiation treatments like I had cannot have the three-stage breast reconstruction. It

[2] Channel 13 subsequently was identified as WHO in Des Moines, Iowa.

apparently was this television news story that caused plaintiff to doubt Dr. Bergman and seek legal advice.

Plaintiff ultimately filed this suit and during the process of discovery she sought to obtain a videotape of the news story. Despite a subpoena to the station and other efforts she was unsuccessful. Ultimately on a Friday, some five days into trial with the defendant's case about concluded, plaintiff learned a videotape of the news story was available. A transcript of the program was produced on Friday night and the tape was made available on Sunday.

The portion of the tape that is the primary source of the defendant's objection provides:

> The Patient Sherry speaks: I wanted to make sure that my body had no cancer in it whatsoever before I decided I wanted to have reconstruction.
>
> The reporter Katherine Prichard speaks: Now more than five years after her diagnosis, and years of using prosthesis, Sherry is ready for surgery. The tissue where there is no breast first has to be stretched out. Doctor Ronald Bergman will implant a device called a tissue expander. Over time, it stretches out the skin enough to tolerate an implant. *This technique does not work for women who have gone through radiation.* (emphasis supplied).
>
> Dr. Bergman speaks: What we have to do is take autologous tissue from the body either from the stomach or back and use that to reconstruct the breast.

On Monday plaintiff sought admission of the videotape contending (1) it rebutted Dr. Bergman's testimony that he denied being on WHO TV in May of 2002 to discuss breast reconstruction surgery.

Defendant objected, contending the videotape (1) was hearsay, and lacked foundation, and was inadmissible under Iowa Rule of Evidence 5.802, (2)

was not an admission by Dr. Bergman, (3) was not proper impeachment, and (4) was unreliable as it was put together by a cut and paste process.

Defendant's attorney requested a limiting instruction in the alternative if the court admitted the videotape. He suggested the following instruction:

> A transcript and video of a television appearance were introduced into evidence. You may use the transcript and video for the purpose of finding that the news story occurred but not for the purpose of finding that Doctor Bergman made a statement that a certain surgical technique does not work for women who have gone through radiation.

The district court found the tape admissible determining (1) it was an admission of a party, and (2) it was covered by Iowa Rule of Evidence 5.803(24), the residual hearsay exception, as it addressed a material fact—that being whether plaintiff saw the news story and the contents of it versus Dr. Bergman's denial that it occurred—and was more probative of this issue than any other evidence, and (3) the interest of justice would be best served by the admission of this statement into evidence. The court did not give the requested limiting instruction.

Following an adverse verdict, the defendant moved for a new trial, raising the evidentiary issues among others or seeking remittur. The district court found its evidentiary rulings were correct and denied the motions for new trial or remittur.

STANDARD OF REVIEW. Ordinarily, the district court's evidentiary and trial objection rulings are reviewed for an abuse of discretion. *State v. Tracy*, 482 N.W.2d 675, 680-81 (Iowa 1992). When those decisions are based upon an erroneous interpretation of law, our review is on legal error. *See State v. Kjos*, 524 N.W.2d 195, 196 (Iowa 1994). An abuse of discretion occurs when the trial

court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). We grant the district court wide latitude regarding admissibility and will reverse only where the losing party was prejudiced by an unreasonable decision. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). Generally, hearsay rulings are reviewed for errors at law. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). In hearsay rulings, our review is for correction of errors at law because the admission of hearsay evidence is prejudicial to the party not offering it unless the contrary is shown. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa 2001).

Defendant contends the videotape is inadmissible hearsay. Plaintiff contends the tape is not hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). A videotape offered in evidence to prove the truth of the matter asserted is hearsay and inadmissible as evidence unless it comes within an exception to the hearsay rule or unless it is offered for some other permissible purpose that would remove it from the definition of hearsay. *See Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118 (1985). The general rule is that hearsay is not admissible unless permitted by the constitution, statute or other rule. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 181 (Iowa 2004).

We are dealing with statements made by three persons on the videotape: the patient, the newscaster, and Dr. Bergman.

Statements made by Dr. Bergman, if admissions against his interest, are not hearsay. Iowa Rule of Evid 5.801(d)(2). An "admission against interest" is any statement of fact made by or attributable to a party to an action which constitutes an admission against his or her interest and tends to establish or disprove any material fact in the case. *Hofer v. Bituminous Cas. Corp.*, 260 Iowa 81, 83, 148 N.W.2d 485, 486-487 (Iowa 1967).

Plaintiff contends the videotape was an admission contrary to Dr. Bergman's trial testimony in two ways. First she contends it contradicted his testimony that the surgery done on her was not a departure from the accepted standard of medical care. Secondly, she contends the tape contradicted his trial testimony that he had not appeared on channel 13 and discussed three-stage breast reconstruction surgery. We consider plaintiff's arguments in support of admission separately.

We first address plaintiff's contention the videotape was an admission against Dr. Bergman's interest because it contradicted his testimony that the surgery done on plaintiff was not a departure from the accepted standard of medical care. The contradicting statement, "this technique does not work for women who have gone through radiation," was not made by Dr. Bergman. Rather, that statement was made by the commentator Prichard. Plaintiff contends that Prichard's statement was adopted or authorized by Dr. Bergman.

Iowa Rule of Evidence 5.801(d)(2)(B) provides for adoptive admission where evidence of other conduct of a party manifests circumstantially the party's assent to the truth of a statement made by another person. *See State v. Menke*, 227 N.W. 2d 184, 188 (Iowa 1995). However, to show an adoptive admission the

evidence must show a person clearly and unambiguously assented to the statements of another. *See id*.

In assessing whether Dr. Bergman adopted Prichard's statement we look to see if the record contains a clear and unambiguous assent by Dr. Bergman to the truth of Prichard's statement. Dr. Bergman did appear in the news story and talk about and demonstrate breast reconstruction surgery. Yet he made no reference to whether a patient who had radiation was a candidate for the surgery. Prichard did not attribute her statement to Dr. Bergman nor did she indicate where she received the information that formed the basis of her statement. At the time she made the statement she was not interviewing Dr. Bergman. The transcript shows the news story was put together from portions of tape shot at four different times. There is no evidence that Dr. Bergman was shown the final edited videotape played on channel 13 or that he had any input in the editing process creating the story.

Mere silence by Dr. Bergman at or about the time the challenged statement was made does not, alone, render the statement admissible as to him. *See id*.

There is insufficient evidence to show Dr. Bergman manifested an adoption or belief in the truth of the statement, or that he authorized Prichard to make the statement. The district court, over defendant's timely objection, erroneously considered Prichard's statement as an admission against Dr. Bergman's interest.

We need not decide whether defendant's proposed limiting instruction would have corrected this error, for the instruction was not given.

Having determined the portion of the videotape with Prichard's comments is not admissible we need not necessarily decide whether the videotape impeached Dr. Bergman's testimony that he had not been on channel 13 talking about breast reconstruction surgery. Where part of the evidence in a proffered exhibit is not admissible it is incumbent on the party offering the exhibit to single out the admissible part. *See Brooks v. Holtz*, 661 N.W.2d 526, 529 (Iowa 2003). Plaintiff sought admission of the tape in its entirety. When an exhibit contains both admissible and inadmissible evidence the entire offer may be rejected. *See id.*

We address the second issue, that the videotape impeached Dr. Bergman's testimony he had not been on channel 13 talking about breast reconstruction surgery, because it may come up on retrial.

The attack by prior inconsistent statement is not based on the theory that the present testimony is false and the former statement true, but rather upon the notion that talking one way on the stand and another way previously raises a doubt as to the truthfulness of both statements. *See id.* at 530-31. Because the out-of-court statement is offered to prove the witness's testimony is unreliable rather than to prove the truth of the matter asserted out of court, the prior inconsistent statement is not substantive evidence. *State v. Allen*, 348 N.W.2d 243, 246 (Iowa 1984). Thus, "[a] prior inconsistent out-of-court statement offered for impeachment purposes falls outside of the definition of hearsay." *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995). The foundational basis for admissibility of an out-of-court statement as impeachment is a contradictory statement by the declarant at trial. *Bauer v. Cole*, 467 N.W.2d 221, 225 (Iowa

1991). A previous statement of a witness cannot be used for impeachment unless the present testimony is at material variance with the prior statement. *Brooks*, 661 N.W.2d at 531.

In support of her position that Dr. Bergman testified he was never on channel 13, plaintiff has directed us to the following two portions of the trial transcript where Dr. Bergman answered questions asked on cross examination:

> Q They [refers to plaintiff and her daughter] said that the subject of the segment was that three stage reconstruction should not be performed in patients who had radiated tissue. Do you remember that testimony? .A. I remember the testimony. Q Tell the court and jury whether you made such a statement. A. Absolutely, categorically no.
>
> Q Now Doctor Bergman, I just wanted to clarify a couple of issues. You have unequivocally denied being on Channel 13 and discussing the fact that a woman who is a smoker and has undergone radiation therapy is not an appropriate candidate for the three stage breast reconstruction procedure you did on Jimmy Plaintiff, right? A. Unequivocally, no.

Plaintiff also refers us to portions of Dr. Bergman's discovery deposition but does not reference where in the record this part of the deposition came into the record. We will not assume other testimony exists in the absence of its identification, together with adequate citation to the record. See *Estate of Leonard v. Swift*, 656 N.W.2d 132, 147 n.4 (Iowa 2003).[3] We consider only that evidence actually admitted at trial.

Dr. Bergman's statements on the videotape do not contradict his answers above. We cannot conclude that the videotape is impeaching. We must evaluate the admissibility of it on the basis of the only other purpose for which

[3] That said, we did review the record and were unable to find that the deposition was admitted.

they could be offered—as substantive evidence to prove that the surgery should not have been done on a woman such as plaintiff who had had radiation.

The next question is whether the district court erred in finding the videotape fell under rule 803(24), the "catch-all" exception.

Iowa Rule of Evidence 803(24) states in part:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

It is intended that the residuary hearsay exceptions will be used rarely and only in exceptional circumstances. *See State v. Brown*, 341 N.W.2d 10, 14 (Iowa 1983). It is not a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). *Id.* Before hearsay evidence can be admitted pursuant to this rule, the trial court must determine that the conditions of the rule are met. This requires five specific findings by the trial judge (trustworthiness, materiality, necessity, notice, and service of the interests of justice). *Manno v. McIntosh*, 519 N.W.2d 815, 819 (Iowa Ct. App. 1994). These findings should be made explicitly on the record. *Id.*

The district court found the videotape addressed the material fact of whether plaintiff saw the news story and Dr. Bergman's denial that it occurred and the videotape was more probative on this issue than other evidence and the interests of justice would be best served by admitting the videotape.

We disagree that this is the rare instance when the "catch-all" exception should be utilized. First, there is no way to test the trustworthiness of Prichard's statement. The evidence is minimally material. The primary issue in the case is whether Dr. Bergman committed malpractice, not whether or not plaintiff was truthful when she said she saw Dr. Bergman on television. There is no necessity for the videotape, as that evidence is not needed by plaintiff to make a prima facie case of malpractice. Plaintiff introduced expert testimony supporting her theory that Dr. Bergman committed malpractice. The testimony of plaintiff and her daughter that they saw Dr. Bergman on television and heard him say smokers and those who had radiation should not have the three-stage surgery is as probative or more probative than the videotape.[4] The parties had little notice of the existence of the videotape and neither had an opportunity to investigate the editing process further or whether it was an accurate report. The admission of the videotape did not serve the interests of justice or the general purposes of the rules of evidence. The district court erred admitting the videotape under Iowa Rule of Evidence 803(24).

The last question we must address is whether defendant was prejudiced by the admission. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a). The admission of hearsay evidence "is presumed to be prejudicial error unless the contrary is affirmatively established." *Frunzar v. Allied Prop. & Cas. Ins. Co.*, 548 N.W.2d 880, 887 (Iowa 1996). The issue was whether Dr. Bergman should have done the surgery because plaintiff had had

[4] In fact, the videotape was at variance with their testimony and not as helpful to plaintiff's case as the testimony of the two women as to their memory of the story.

radiation and was a smoker. The statement on the videotape[5] was that the surgery was not appropriate for a woman who had had radiation. A medical opinion was being given without providing the defendant the opportunity to question the basis of the commentator's opinion. The inadmissible hearsay evidence directly addressed whether or not Dr. Bergman committed malpractice. *See Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 183-184 (Iowa 2004). Under these circumstances, admission of the videotape was prejudicial. *See Madison v. Colby*, 348 N.W.2d 202, 204 (Iowa 1984).

Having determined the district court erred in admitting the videotape, we conclude it should have granted the motion for new trial on that ground. We therefore reverse the district court's denial of the defendant's motion for new trial and remand for further proceedings.

Having reversed and remanded we find it unnecessary to address the defendant's contention that the verdict was excessive.

REVERSED AND REMANDED.

Huitink, J., concurs; Hecht, J., dissents.

[5] Prichard did not appear on the screen when the statement was made.

HECHT, J., (dissenting)

I respectfully dissent. I first conclude the videotape was admissible to rebut Bergman's unequivocal denial that he appeared on a television news program that presented information about the type of three-stage breast reconstruction procedure performed by Bergman on McVay. Because the rebuttal evidence was not offered to prove the truth of the matters asserted in the videotape, the presumption of prejudice ordinarily raised by the erroneous admission of hearsay evidence does not arise in this instance. Our review should accordingly determine whether the district court abused its considerable discretion in ruling on the admission of the videotape. *See State v. Bakker*, 262 N.W.2d 538, 543 (Iowa 1978) (noting that a district court's ruling regarding the admissibility of rebuttal evidence will be disturbed on appeal only upon a clear showing of abuse of discretion).

I find no abuse of discretion in this instance. The central substantive issue in this case was whether Bergman violated the applicable standard of care when he performed a three-stage breast reconstruction procedure on McVay, a smoker who had undergone radiation therapy. McVay presented evidence tending to prove the applicable standard of care precludes use of the procedure for patients who have undergone radiation therapy, and Bergman controverted that evidence with his own testimony and other expert testimony. McVay testified she watched and heard Bergman's appearance on a television news program aired after her surgery. She understood the videotape to include Bergman's affirmation that the three-stage breast reconstruction procedure should not be undertaken for patients who have undergone radiation therapy. During cross-examination at

trial, Bergman "unequivocally denied being on Channel 13 and discussing the fact that a woman who is a smoker and has undergone radiation therapy is not an appropriate candidate for [the procedure]."

Proper rebuttal evidence includes any competent evidence that explains, or is a direct reply to, or a contradiction of, material evidence introduced by the accused or brought out on his or her cross-examination. *State v. Nicholson*, 402 N.W.2d 463, 466 (Iowa Ct. App.1987). I believe the district court had discretion either to exclude or receive the videotape under the circumstances of this case. The court could have excluded the evidence on the ground that McVay's understanding was based on a statement ("This technique does not work for women who have gone through radiation.") made by the reporter, not by Bergman. Exclusion of the videotape might therefore have been justified on the theory that the reporter, not Bergman, uttered the statement, and the videotape did not rebut Bergman's testimony. But I also believe the district court had discretion to receive the videotape as rebuttal evidence as it did in this case. A reasonable person could conclude, as the district court did, that Bergman associated himself with and adopted the reporter's statement.

Immediately after the reporter's statement quoted above from the videotape, Bergman is heard to say: "What we have to do is take autougoulous (sic) tissue from the body either from the stomach or back and use that to reconstruct the breast." A reasonable person could understand this statement by Bergman as a reference to an alternative surgical approach (distinct from the standard three-stage reconstructive procedure discussed in the videotape) for patients who, like McVay, have undergone radiation therapy. If understood in

this way, Bergman's videotaped statement may properly be viewed as consistent, coordinated, and connected with the reporter's statement in such a way as to permit an inference of its adoption by Bergman. Such an inference should in my view be deemed within the district court's considerable discretion because Bergman is the only physician who appears and speaks on the videotape. The videotape makes no suggestion that medical sources other than Bergman were consulted in its preparation. Finding no merit in Bergman's claim that he was unfairly surprised by the videotaped evidence, I would therefore hold the district court did not abuse its discretion in receiving the videotape as rebuttal evidence.

I would also affirm the district court's evidentiary ruling because I do not believe Bergman has demonstrated prejudice that would justify reversal as a consequence of the admission of the videotape. In its discussion of the applicability of Iowa Rule of Evidence 5.803(24),[6] the majority notes McVay and her daughter both testified in the plaintiff's case-in-chief that they heard Bergman state on television that smokers and those who had undergone radiation therapy should not have the three-stage reconstructive surgery. The majority observes that the testimony of McVay and her daughter on this point was (1) as probative or more probative than the videotape, and (2) more helpful to the plaintiff's case than the videotape which could be understood to controvert it. For the same reasons, I would hold the district court's ruling allowing the videotape into

[6] I agree with the majority's conclusion that if offered to prove the truth of the matters asserted in the videotape, the evidence was not admissible under Iowa Rule of Evidence 5.803(24). However, because I conclude the admission of the evidence did not result in such prejudice to Bergman as would require reversal, I would hold the failure to give a limiting instruction requested by Bergman under rule 5.105 is of no consequence to the appropriate disposition of this appeal.

evidence was not so prejudicial as to require reversal because it was either cumulative of the testimony of McVay and her daughter (if viewed as an adoption by Bergman of the reporter's statement) or helpful to Bergman (if conversely viewed as a statement by the reporter that was not adopted by Bergman).

Finally, I would reject Bergman's contention that he should be granted a new trial because the verdict was excessive. A damage award "need only bear a 'reasonable relationship to the loss suffered' to be sustained." *Jackson v. Roger*, 507 N.W.2d 585, 589 (Iowa Ct. App. 1993) (quoting *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974)). Although the verdict is substantial in amount, I cannot say on this record that it was clearly the result of passion or prejudice. Accordingly, this court should not substitute its judgment for that of the jury.