

IN THE COURT OF APPEALS OF IOWA

No. 6-917 / 05-2143
Filed January 18, 2007

JOHNNIE M. SMITH KELLY AND KARL KELLY,
as Administrators of THE ESTATE OF ELIJAH KELLY,
and Individually,
Plaintiffs-Appellants,

vs.

MONA AL-QULALI, M.D.,
Defendant-Appellee.

Appeal from the Iowa District Court for Clinton County, David E. Schoenthaler, Judge.

Plaintiffs appeal the district court's denial of their motion for a new trial in this wrongful death action. **AFFIRMED.**

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

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

Heard by Huitink, P.J., and Eisenhauer, J., and Nelson, S.J.*

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

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

Johnnie Kelly, who was pregnant, became a patient of Dr. Mona Al-Qulali, an obstetrician, in April 2002. Johnnie was hospitalized on June 18, 2002, due to preeclampsia, or elevated blood pressure. Johnnie went into labor, and on June 20, 2002, at 4:36 a.m., Dr. Al-Qulali was called to the hospital. At 5:35 a.m., Dr. Al-Qulali began using a vacuum extractor to assist in the birth. The baby's head was delivered, but it had shoulder dystocia, which is where the baby's shoulders get caught in the birth canal. Dr. Al-Qulali tried some maneuvers, but no further progress was made in delivering the baby through the vagina.

At 5:43 a.m., Dr. Al-Qulali decided to do an emergency cesarean section. Dr. Al-Qulali was ready to do the cesarean by 5:53 a.m., but had to wait for Johnnie to be put under anesthesia. The cesarean section started at 6:00 a.m. The baby was delivered at 6:04 a.m., but was stillborn due to asphyxiation caused by compression on the umbilical cord.

Johnnie and her husband, Karl Kelly, filed suit against Dr. Al-Qulali on the following grounds: (1) wrongful death; (2) loss of consortium; and (3) failure to obtain informed consent before using the vacuum extractor. The case proceeded to a jury trial.

Johnnie, Karl, and Johnnie's sister, Vicki Bragg, all testified Dr. Al-Qulali did not seek Johnnie's consent before using the vacuum extractor, and no consent was given. A nurse who was present, Adrianna Rombouts, testified she had no notation in her nurse's notes about consent to use the vacuum extractor. Plaintiffs' expert, Dr. Richard Houk, testified Dr. Al-Qulali should have obtained

Johnnie's consent prior to using the vacuum extractor. He also opined Dr. Al-Qulali improperly used the vacuum extractor.

Dr. Al-Qulali testified Johnnie gave verbal consent to use the vacuum extractor. She stated she attempted to do the cesarean section as quickly as she could once it became apparent the baby had shoulder dystocia. The defense presented the expert testimony of Dr. Robert DeMott, an obstetrician and gynecologist, and Dr. Harry Farb, a specialist in high-risk obstetrics. These doctors gave the opinion that Dr. Al-Qulali acted appropriately in this case.

The jury returned a verdict finding Dr. Al-Qulali was not negligent. Plaintiffs filed a motion for a new trial, claiming the verdict did not serve justice. The district court denied the motion, finding that "Plaintiffs received a fair trial. The jury was not influenced by prejudice." Plaintiffs now appeal.

II. Motion for New Trial

Plaintiffs claim the substantial weight of the evidence shows Dr. Al-Qulali did not obtain informed consent to use the vacuum extractor, or alternatively, she failed to properly use the vacuum extractor. Plaintiffs claim the use of the vacuum extractor caused the shoulder dystocia.

In this law action, our review is for the correction of errors of law. Iowa R. App. P. 6.4. Where a motion for new trial claims a jury's verdict fails to administer substantial justice, we review for an abuse of discretion. *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87-88 (Iowa 2004). An abuse of discretion is shown where a court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Id.* Here, "unreasonable"

means not based on substantial evidence. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001).

The evidence was in conflict in this case. Johnnie, Karl, and Bragg all testified no verbal consent was given for the use of the vacuum extractor. Dr. Al-Qulali testified Johnnie gave verbal consent. Additionally, there was a conflict in the opinions of the experts. Dr. Houk testified Dr. Al-Qulali did not meet the applicable standard of care for using the vacuum extractor, while Drs. DeMott and Farb testified Dr. Al-Qulali acted appropriately.

Where evidence is in conflict, “we entrust the weighing of testimony and decisions about the credibility of witnesses to the jury.” *Biddle v. Sartori Memorial Hosp.*, 518 N.W.2d 795, 800 (Iowa 1994). The reasonableness of Dr. Al-Qulali’s actions was the proper subject of expert testimony and was for the jury to decide. *See Estate of Hagedorn*, 690 N.W.2d at 88. There was substantial evidence in the record to support the jury’s decision. *See Channon*, 629 N.W.2d at 859. We find the district court did not abuse its discretion in denying the motion for a new trial.

III. Evidentiary Rulings

We review the evidentiary rulings made by the district court in this case for an abuse of discretion. *See 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.*

A. Plaintiffs sought to introduce photographs of the dead infant with the parents. Plaintiffs claimed the photographs were relevant to the issues of standard of care, causation, injuries, and loss of consortium. In ruling on

defendant's motion in limine, the court determined the photographs were not admissible:

But I can tell you right now, the Court's ruling on photos 2 through 9 they stay out. Those are pictures of a dead baby in his father's arms. One of them is laying alongside the mother. The baby is dead. They do not help – They would not help this jury address any issue before it, and they are so highly prejudicial and so highly sad that whatever the number is – it used to be Rule 403 – they are just – any help they would do to the jury is substantially outweighed by the prejudicial effect, so photos 2 through 9 stay out.

Dr. Houk used one photograph of the baby during his testimony that the vacuum extractor cup was applied inappropriately, and that photograph was admitted into evidence. The admission or exclusion of photographs rests largely in the discretion of the court, since it has the opportunity to view the photographs and hear the witnesses. *Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 90 (Iowa 2002). We find the district court did not abuse its discretion in determining the other photographs were inadmissible. The photographs were more prejudicial than probative. See Iowa R. Evid. 5.403.

B. During depositions, Vickie Bragg stated she was a pastor. In a motion in limine, plaintiffs sought to preclude defendant from inquiring into the status of Bragg's church. Bragg had no formal training and only eight people attended her church. The district court ruled that if Bragg stated she was a pastor, defendant could inquire about the church. During the trial, Bragg did not state she was a pastor. On appeal, plaintiffs contend the district court abused its discretion in making this ruling.

Plaintiffs contend the status of Bragg's church was irrelevant to any issue in the case, and the district court improperly ruled defendant could inquire into

this matter. We find no abuse of discretion. The district court determined it would unfairly buttress Bragg's credibility for her to state she was a pastor if defendant was not allowed to ask about her training and the number of members in her congregation.

We affirm the decision of the district court.

AFFIRMED.