

IN THE COURT OF APPEALS OF IOWA

No. 7-187 / 06-0106
Filed January 30, 2008

**SCOTT J. WATTS and
JACQUELYN ANN WATTS,**
Plaintiffs-Appellants,

vs.

**JENNIE EDMUNDSON HOSPITAL,
A Corporation,**
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

Scott J. Watts and Jacquelyn Ann Watts appeal the adverse judgment in their medical malpractice action against Jennie Edmundson Hospital.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

Patrick Cullan, Daniel Cullan, and Sheldon Gallner, Council Bluffs, and Paul Madgett, Omaha, Nebraska, for appellants.

Michael E. Ellwanger and Maurice B. Nieland of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, L.L.P., Sioux City, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Scott J. Watts and Jacquelyn Ann Watts appeal the adverse judgment in their medical malpractice action against Jennie Edmundson Hospital. The Wattses allege the district court abused its discretion on several rulings. We affirm in part, reverse in part, and remand for a new trial.

This case was previously filed November 15, 2007. Thereafter, the defendant-appellee filed a petition for rehearing, which was granted by the court. The previous decision of this court is vacated and the following decision is filed in its place.

I. Background Facts and Proceedings

Scott Watts was injured in a car accident on May 25, 1997. He was taken to the emergency room at Jennie Edmundson Hospital. Later, physicians determined he needed surgery to repair an injury to his aorta. During surgery, the aorta ruptured, rendering Scott a paraplegic.

The Wattses filed this action on May 22, 1998. The original petition named eight defendants, including the hospital, treating physicians, and the separate employers of some of the treating physicians. Trial was set for March 2000. In pre-trial proceedings, the Wattses designated twenty-six witnesses, including four expert standard-of-care witnesses. The hospital designated Barbara Braafhart, R.N. and cross-designated the experts of the other defendants.

The Wattses dismissed two defendants without prejudice on January 28, 2000. Except for the hospital, the other defendants reached a \$1.5 million settlement with the Wattses sometime in mid-March 2000. On March 22, 2000,

counsel for both parties stipulated the hospital would pay the Wattses \$200,000, and the parties would engage in further mediation. The district court's ruling on the stipulation states that if the case was to be tried, there would be no new issues and no new witnesses. Mediation was unsuccessful. Due to other litigation, this case was stayed until late 2002.¹

On May 16, 2003, the hospital filed a motion for summary judgment. The hospital argued it had no vicarious liability for any alleged negligence of the physician defendants and no liability for negligent credentialing or granting of privileges to any of the physician defendants. In June 2003 the hospital filed three motions in limine and a motion to strike new allegations of negligence. The motions requested the court to (1) prohibit the Wattses from introducing evidence concerning medical expenses not personally paid by them; (2) prevent a treating nurse, Rocco Cardillo, from testifying as an expert witness; (3) prohibit an expert witness from testifying; and (4) strike new allegations of negligence made in supplemental interrogatories and expert witness depositions.

On July 1, 2003, the district court dismissed the two claims identified by the hospital in its motion for summary judgment and the entire case. On July 11, 2003, the Wattses filed a motion to reconsider, arguing the "Court failed to consider that Plaintiffs have independent actions of negligence against the nursing staff of Defendant hospital." The district court affirmed the grant of

¹ The hospital had been insured throughout the proceedings by PHICO Insurance. PHICO went bankrupt and was liquidated in February 2002. The Iowa Insurance Guarantee Association brought suit against the hospital and the Wattses, seeking a declaration that there was no liability coverage afforded the hospital by the association. On October 4, 2002, the district court ruled in favor of the Association, finding no coverage for the hospital.

summary judgment “of claims relating to the hospital’s vicarious liability for the negligence of the doctors, for allowing Dr. Denis-Flowes to practice medicine in its emergency room, and Plaintiff’s earlier settlement with the doctors’ insurance company.” The court reinstated only the following claims against the hospital: The hospital (1) failed to provide an adequate emergency room with appropriate equipment and personnel; (2) permitted Scott to be admitted to a facility which did not have the appropriate equipment and personnel to timely and properly treat Scott’s condition; (3) failed to timely transfer Scott; (4) failed to do blood pressures and pulses in both of Scott’s arms; (5) failed to obtain orthostatic vital signs; and (6) abandoned Scott by failing to insure he was seen by a competent physician for over five and one-half hours after he was admitted to the hospital. Trial was then set for December 7, 2004.

The hospital filed another motion for summary judgment in April 2004. It argued the Wattses failed to present enough evidence to go forward on the nursing negligence claim. The district court denied summary judgment, stating “Plaintiffs have therefore generated a genuine issue as to material fact and the very narrow factual dispute of whether the nurses who treated Scott Watts were guilty of independent acts of negligence.”

On November 2, 2004, the district court sustained the hospital’s motions from June 2003. It reiterated the only issues to be tried were the six issues listed above. The Wattses filed a motion “to return to status quo,” requesting the court to return the case to the state it was in at the time of the March 22, 2000 hearing. The district court overruled the motion. Trial was continued until May 17, 2005.

In December 2004 Scott sought medical treatment for memory problems. A PET scan of his brain indicated “nonspecific abnormalities of brain metabolism supporting the clinical diagnosis of encephalopathy.” The treating physician recommended Scott see a neurologist. On January 19, 2005, the district court entered an order continuing the trial until October 25, 2005. The order also stated in part:

2. Discovery shall be closed as of August 29, 2005. Parties shall schedule all discovery so that responses thereto will be due on or before the deadline.

3. All pleadings shall be closed September 2, 2005. All parties are authorized to amend pleadings without order of court until said closing date.

The Wattses filed an amended petition on April 25, 2005. The district court struck the petition, finding it contained new allegations that included the previously dismissed physician defendants. It also reviewed the history and particular circumstances in the case and reiterated the only issue to be tried was that of nursing negligence. The district court also struck the Wattses’ additional designation of witnesses filed May 17, 2005. That list contained the name of Dr. Abraham Scheer. The court determined its previous rulings had already concluded the parties did not have leave to designate additional expert witnesses. The July 29, 2005 order also stated that the “court also finds that any further amendments to pleadings must be granted prior approval by the court, notwithstanding any prior order of this court to the contrary.”

In May, June, and July 2005 Scott was examined by Dr. Scheer, a neurologist. Dr. Scheer was unable to obtain a pulse in Scott’s lower extremities and opined that Scott has decreased cognition, poor attention, memory

problems, emotional issues, post traumatic stress, sleep disturbance, poor planning, poor judgment, emotional expression, and less inhibition. When the symptoms remained unexplained, Dr. Scheer referred Scott to a cardiothoracic surgeon. The Wattses learned Scott had a coarctation of the aorta, allegedly caused by the wrong graft being used during his 1997 surgery at the hospital.

Both parties filed several motions during the summer of 2005. On September 2, 2005, the Wattses filed a second amended petition. It advanced the theory that the hospital did not use the proper graft during Scott's surgery. On October 12, 2005, however, the district court struck the second amended petition, ruled again that the only allegations proceeding to trial would be of nursing negligence, and admonished that if the Wattses' expert witnesses were going to testify beyond their opinions in previous depositions, those experts had to be made available to the hospital before trial.

Trial commenced October 25, 2005, and proceeded until November 7, 2005. The Wattses attempted to argue the hospital was liable for negligent nursing because it was the wrong hospital and provided the wrong doctor and the wrong equipment to repair Scott's aortic tear. After a relatively short deliberation, the jury determined the hospital was not at fault through its employee nurses. The Wattses filed motions for new trial and judgment notwithstanding the verdict. Both were denied. The Wattses now allege several abuses of discretion pretrial, during trial, and posttrial.

II. Merits

A. Amended Petitions

The Wattses argue the district court abused its discretion in refusing to allow them to file two amended petitions. The first amended petition was filed April 25, 2005. The district court denied the amended petition in an order filed July 29, 2005. The order stated that the Wattses' amended petition sought to introduce the vicarious liability issues again. It also considered the fact that the original petition was filed seven years previously, several trial dates had passed, and two motions for summary judgment had been ruled upon. It further stated no new issues would be introduced and the only issue that remained was nursing negligence. The Wattses' second amended petition was filed September 2, 2005. This new petition alleged new-found facts and issues of negligence, including allegations that the wrong graft had been used, the physicians were not properly licensed to perform the surgery, and the hospital did not have particular equipment or personnel to treat Scott. It also again reiterated the vicarious liability issue. The district court denied the petition, reiterating its previous orders.

Iowa Rule of Civil Procedure 1.402(4) states in part:

Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, *shall be freely given when justice so requires.*

(Emphasis added.)

We review the district court's ruling on whether to allow an amended petition for abuse of discretion. *Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 63

(Iowa 2004). It is generally recognized that courts in this state should be liberal in allowing amendments. See *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767 (Iowa 2002); *Patten v. City of Waterloo*, 260 N.W.2d 840, 842 (Iowa 1977); see also *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004) (holding that a trial is a search for the truth). That does not change the fact, however, that the district court has considerable discretion and may deny the pleading. See *Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996). We must look to the unique facts of this case in order to determine if the court's denial of the amendment of the pleadings was an abuse of discretion.

On January 19, 2005, the district court entered an order continuing trial until October 25, 2005, and setting out deadlines for discovery and amendment of the pleadings. Those deadlines were August 29, 2005, and September 2, 2005, respectively. Pursuant to the January 19, 2005 order, the Wattses filed an amended petition on April 25, 2005. The district court granted the hospital's motion to strike said amended petition on July 29, 2005. The district court also inserted language into the order stating that any further attempts to amend the pleadings would require "prior approval by the court, notwithstanding any prior order of this court to the contrary."

On September 2, 2005, the Wattses filed a second amended petition. The Wattses alleged the hospital failed to use the proper graft and alleged this pleading was the result of newly discovered evidence from Dr. Scheer. The district court struck the second amended petition in an order dated October 11, 2005. The Wattses motion to file additional evidence was also overruled. In addition, the court excluded Dr. Scheer as a witness in an order which states:

Dr. Abe Scheer will not be allowed to testify concerning his testing or opinions as to causation on issues of brain injury for the reasons set out in the motion to limit. It was a new allegation of negligence related to the issue of a wrong graft. The Court previously ruled excluding that theory of negligence.

Further, Dr. Sheer is clearly a retained expert and was not timely designated.

....

Finally, the testimony concerning the wrong graft or brain injury was clearly beyond the clear understanding concerning the limits on the case as described in the hearing before Judge Irvin on March 22, 2000, and subsequent orders of this Court limiting the case to those items set out in Plaintiffs' Supplemental Answers to Interrogatories, previously referred to as paragraphs A, B, C, E, F and G.

We note first of all that the issues in this case are complex. The district court did an admirable job of case management and narrowing of the issues for purposes of trial. The action was filed in May 1998, and trial was originally scheduled for March 2000. On March 21, 2000, the district court stated:

If these settlement negotiations should fall through or this case not be completely resolved and it's necessary that it come back to trial, it goes to trial in the form and shape it was in this morning. There will be no additional issues raised. There would be no new witnesses.

The case did not settle, and other collateral litigation forced a stay until late 2002.

It is clear from the record there was activity in this case during 2003 and 2004. In fact, there was enough activity that the trial date was reset at least twice, the last date being to May 17, 2005.

However, in December 2004 Scott began receiving medical treatment for new symptoms. The January 19, 2005 order continuing trial until October 25, 2005, made it clear the parties could continue discovery and file new pleadings without order of court. A review of the record and analysis of the law leads us to conclude the district court did not abuse its discretion in striking the amended

petition of April 25, 2005. We agree with the district court that this amended petition sought to introduce once again the vicarious liability issues previously decided.

However, we further conclude the district court abused its discretion in striking the amended petition filed on September 2, 2005. Said amended petition advanced the theory that Scott had a “coarctation of the aorta which was caused by the wrong graft being used.” This allegation arose out of treatment for new symptoms discovered in late 2004. The Wattses should be allowed to pursue this sole issue and conduct discovery regarding it.

B. Summary

This case is affirmed with regard to all rulings concerning the April 25, 2005 amended petition. We agree with the district court that this amended petition sought to reintroduce issues previously decided.

This case is reversed with regard to the portion of the September 2, 2005 amended petition that concerns the allegation of a “coarctation of the aorta which was caused by the wrong graft being used.” This sole issue may be pursued by the plaintiffs. The case is not reopened for any other issues, including those concerning the doctors, nurses, or hospital, which have previously been decided or litigated adversely to the plaintiffs.

This case is remanded for new trial on this sole issue. Discovery is opened anew but limited to the allegation that has been allowed to go forth. Expert witnesses shall include Dr. Abraham Scheer, the cardiothoracic surgeon to whom Scott was referred, and any other expert on the issue of the use of a wrong graft. The district court shall be free to impose any reasonable restrictions

and time limits on discovery, including the designation of expert witnesses, in light of the age of this case and the time that has passed since the new allegation of negligence based upon use of a wrong graft.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR
NEW TRIAL.**