

**IN THE COURT OF APPEALS OF IOWA**

No. 8-276 / 07-1256

Filed May 14, 2008

**AUSTIN REED,**  
Plaintiff-Appellant,

**vs.**

**VAL LYONS, M.D.,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Fayette County, Margaret L. Lingreen, Judge.

Plaintiff appeals from jury verdict claiming the trial court erred in submitting the issue of comparative fault and there was jury misconduct. **AFFIRMED.**

James P. McGuire of McGuire Law Firm, P.C., Mason City, for appellant.

Timothy C. Boller of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

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

**SACKETT, C.J.**

In 2003, Dr. Val Lyons (Lyons) performed two surgeries on Austin Reed's (Reed) right knee. Reed subsequently developed a serious infection in the right leg and was hospitalized for weeks while the infection was treated. Reed filed suit contending Lyons provided negligent medical care which was the proximate cause of Reed's infection and further knee problems. Lyons denied his treatment was a proximate cause of Reed's complications and requested the jury be allowed to consider the issue of comparative fault. The court submitted the issue over Reed's objection and the jury denied relief, finding Reed more at fault than Dr. Lyons for any damage sustained. Reed filed a motion for a new trial claiming the comparative fault instruction should not have been given and there was jury misconduct during deliberations. The court overruled the motion and Reed appeals.

**I. BACKGROUND AND PROCEEDINGS.**

Reed began experiencing knee problems while wrestling in high school and college. At that time he would occasionally have his knee aspirated (drained) by doctors. After subsiding for several years, Reed's knee problems returned in 2003 and he went to the Gundersen Lutheran Clinic in West Union, Iowa, to be treated. Reed reported his knee had been swelling for the past seven to eight months and he would aspirate his own knee two or three times each week. The physician assistant, Steve Greenwaldt (Greenwaldt), advised Reed to stop self-aspirating because it could lead to infection.

Greenwaldt referred Reed to Dr. Lyons. Dr. Lyons diagnosed Reed with chronic synovitis of the knee, a condition where the joint lining becomes

inflamed. Dr. Lyons performed arthroscopic surgery on Reed's right knee on September 3, 2003 and removed parts of the synovium. On September 8, 2003, Reed was seen by Greenwaldt. Reed complained of swelling in a different area of his right knee. Greenwaldt aspirated dark blood from the area and, after consulting with Dr. Lyon, prescribed antibiotics as a precautionary measure against infection. On September 17, 2003, Reed saw Dr. Lyons who diagnosed the new swelling as prepatellar bursitis, the inflammation of a fluid filled sac located above the knee that allows the kneecap to move beneath the skin. Lyons aspirated the swelling, and injected it with medications to treat the inflammation and pain.

On October 8, 2003, Reed saw Dr. Lyons again due to the persistent swelling. Lyons recommended a second surgery to remove the prepatellar bursa. This surgery was performed on October 15, 2003, by making a large incision across the kneecap and removing the bursa. The bursal tissue removed tested negative for infection. Reed had a follow-up appointment with Dr. Lyons on October 29, 2003 during which Lyons aspirated a large hematoma, or blood clot, from the wound. Dr. Lyons did not send the hematoma for lab analysis. Dr. Lyons noted in the medical record there was no evidence of infection during this visit.

On November 3, 2003, Reed visited Mr. Greenwaldt and requested a referral to another orthopedic doctor for a second opinion. Greenwaldt noted the continued swelling of the knee and contacted the University of Iowa Orthopedic department to arrange a referral with another doctor within two weeks. On November 9, before a referral appointment was arranged, Reed's family took him

to the emergency room in West Union after he was found passed out in his home. Reed had symptoms of severe infection in his right knee and leg and was transported to the University of Iowa Hospitals and Clinics by ambulance. Reed was in the hospital for nearly three weeks while the infection was treated with antibiotics and several surgical procedures. Reed reported to the hospital doctors that the symptoms of infection developed November 6 and continued to worsen until he went to the emergency room. Reed received follow-up care at the University of Iowa Hospitals. One physician's notes from a January 10, 2005 appointment state that Reed "admits that on several occasions over the last few months he has self-aspirated the knee joint." However, at trial Reed testified this was incorrect and he did not self-aspirate after July 30, 2003 when Greenwaldt told him to stop.

Reed filed a petition at law in September 2005 alleging Dr. Lyons provided negligent medical care which was a proximate cause of Reed's infection. Lyons denied the allegations and claimed Reed's own conduct contributed to the infection. Over Reed's objection, the court provided the jury with instructions on comparative negligence. The jury found Dr. Lyons was ten percent at fault and Reed was ninety percent at fault. Reed's motion for a new trial was overruled. Reed appeals alleging (1) comparative negligence should not have been submitted to the jury, and (2) there was jury misconduct during deliberations.

## **II. STANDARD OF REVIEW.**

We review claims that the court erred in submitting a specific instruction to a jury for correction of legal error. *Greenwood v. Mitchell*, 621 N.W.2d 200, 204 (Iowa 2001); Iowa R. App. P. 6.4. Our review of a ruling on a motion for a new

trial depends on the grounds asserted in the motion. *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007). If based on a legal issue, we review the ruling for correction of errors at law; but, if the motion and the ruling are based on a discretionary ground, we review the ruling for abuse of discretion.” *Id.* Whether the jury was given an erroneous instruction is a legal question and is therefore reviewed for errors at law. See *id.* at 847-48; *DeMoss v. Hamilton*, 644 N.W.2d 302, 305 (Iowa 2002). A ruling addressing allegations of juror misconduct will not be disturbed absent an abuse of discretion. *Hackaday v. Brackelsburg*, 248 Iowa 1346, 1351, 85 N.W.2d 514, 517 (1957); *Ten Hagen v. DeNooy*, 563 N.W.2d 4, 10 (Iowa Ct. App. 1997). “We will not find abuse of discretion unless it is shown that the trial court’s discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable.” *Ten Hagen*, 563 N.W.2d at 7.

### **III. COMPARATIVE FAULT INSTRUCTION.**

Over Reed’s objection, the jury was provided instructions on comparative fault. The instruction advised the jury that Reed could be apportioned fault if the jury was convinced that Reed was negligent by self-aspirating and this negligence was a proximate cause of the damage. The jury’s verdict found Reed ninety percent at fault. The court denied Reed’s motion for a new trial finding the instruction was properly submitted to the jury. On appeal Reed contends submitting the instruction was error because (1) there was no evidence to support the instruction, and (2) a comparative fault defense is inapplicable when a plaintiff’s negligence occasioned the currently disputed medical treatment.

Lyons argues there was sufficient evidence of Reed’s history of self-aspirating to allow the jury to infer that Reed self-aspirated in early November

and caused or aggravated the infection by his own actions. Lyons claims it is Reed's negligent self-aspirating *after* receiving treatment from Dr. Lyons that caused the infection and is a proper defense in a medical malpractice action. The trial court found substantial evidence supported allowing the jury to determine the issue.

A party is entitled to have a legal theory submitted to the jury "when the instructions expressing those theories correctly state the law, have application to the case, and are not otherwise covered in other instructions." *Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 731-32 (Iowa 2003). Yet, "[a] trial court 'must refuse to instruct on an issue having no substantial evidential support or which rests on speculation.'" *Greenwood*, 621 N.W.2d at 204 (quoting *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997)). There is substantial evidence to support giving an instruction if a reasonable person would find the evidence adequate to reach a conclusion. *Id.* "[W]e give the evidence 'the most favorable construction possible in favor of the party urging submission.'" *Id.* at 205 (quoting *Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100, 108 (Iowa 1986)).

Comparative negligence is applicable in a medical malpractice action under certain conditions.

[A] patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with the negligence of the malpractitioner, must have entered into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based.

*Wolbers*, 673 N.W.2d at 732 (quoting *DeMoss*, 673 N.W.2d at 306). Therefore, if substantial evidence from the pleadings and record allowed a reasonable person

to conclude that Reed's conduct was negligent and a proximate cause of the infection, Lyons was entitled to have the issue submitted to the jury. *See id.*

Viewing the evidence in the light most favorable to the party favoring submission of the comparative fault instruction, in this case Dr. Lyons, we conclude there was substantial evidence to support the instruction. Reed points out there was no direct evidence showing he self-aspirated his knee during the relevant time period when the infection probably developed, between his final visit with Dr. Lyons on October 29, 2003, and when he was admitted into the hospital on November 9, 2003. However, Reed admitted to self-aspirating his knee frequently prior to receiving treatment from Dr. Lyons and medical records from his follow up care in early 2005 indicate Reed may have been self-aspirating again in late 2004. From this evidence, Dr. Lyons argued the jury could infer Reed was also self-aspirating during the critical time when the infection developed.

We do not distinguish between direct and circumstantial evidence. *Spahr v. Kriegel*, 617 N.W.2d 914, 918 (Iowa 2000). Iowa R. App. P. 6.14(6)(p). Although Reed testified the medical record from 2005 is incorrect, he has not self-aspirated since 2003, and he voiced his symptoms of infection to Dr. Lyons and the physician assistant after the surgeries, his testimony conflicted with the medical records. Also, the experts disagreed as to what caused the infection and whether Dr. Lyons should have submitted more fluid and tissue samples to be analyzed for infection. "When evidence is in conflict, such as it was here, we entrust the weighing of testimony and decisions about the credibility of witnesses to the jury." *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 800 (Iowa 1994).

We conclude that a reasonable person could infer that Reed contributed to his knee infection by self-aspirating his knee after his surgeries but before being admitted into the hospital.

Reed also contends the instruction was improper because even if there was proof Reed self-aspirated his knee before being treated by Dr. Lyons or during his follow-up care with the University of Iowa Hospitals physicians, this negligent conduct cannot be used as a defense in a medical malpractice action.

The rule is

in a medical malpractice action, the defense of contributory negligence is inapplicable when a patient's conduct provides the occasion for medical attention, care, or treatment which later is the subject of a medical malpractice claim or when the patient's conduct contributes to an illness or condition for which the patient seeks the medical attention, care or treatment on which a subsequent medical malpractice claim is based.

*Wolbers*, 673 N.W.2d at 732 (quoting *DeMoss*, 673 N.W.2d at 306). A patient that is injured by his or her own negligence is still entitled to subsequent non-negligent medical treatment and recovery should not be diminished if negligent medical care is given. *Id.* Reed's argument fails because he has not identified the relevant time period of conduct under this rule. See *DeMoss*, 644 N.W.2d at 306 ("[T]he question is which conduct is relevant to the cause of action.").

Here defendant Lyons is not arguing Reed's self-aspiration *before* the surgeries contributed to the infection. Instead, Lyons argues the jury could find from circumstantial evidence Reed self-aspirated *after* the surgeries and the follow-up appointment, against medical advice, which caused or exacerbated the infection. The court properly submitted the issue of comparative fault to the jury and correctly overruled Reed's motion for a new trial on this ground.



#### IV. JURY MISCONDUCT.

Reed also contended he was entitled to a new trial because of juror misconduct during deliberations. Reed submitted affidavits relating the beliefs of two jurors that the jury did not find Reed negligent for self-aspirating his knee but instead found him at fault for not seeking medical attention sooner when his knee became infected. One affidavit states the jury relied on other jurors' experiences with infection to reach this conclusion. The instructions to the jury permitted the jury to find Reed negligent for self-aspirating but did not instruct the jury about whether Reed should have sought care for his infection symptoms earlier. A new trial is necessary, Reed argues, because the jury did not follow the instructions and used external evidence of jurors' experience with infection to reach the verdict. Dr. Lyons argued, and the district court found, the affidavits pertained to the internal workings of jury deliberation and could not be considered in a motion for a new trial.

The Iowa Rules of Evidence permit limited inquiry into jury verdicts. Rule 5.606 provides in relevant part,

*b. Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Iowa R. Evid. 5.606(b). The goal of limiting investigation into jury deliberations is to assure finality and prevent “what is intended to be private deliberation, [from becoming] the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.” *Ryan v. Arneson*, 422 N.W.2d 491, 494 (Iowa 1988). Inquiry into all internal components of jury deliberation, including “juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room” is forbidden. *Id.* at 496. A juror’s testimony is admissible to show that “external matters were improperly brought into deliberations” but “cannot be received to show the jury’s thinking processes were incorrect.” *Weatherwax v. Koontz*, 545 N.W.2d 522, 524 (Iowa 1996).

Juror testimony showing the jury misunderstood or misapplied the instructions is considered part of internal deliberations and is inadmissible. See *Dudley v. GMT Corp.*, 541 N.W.2d 259, 260-61 (Iowa 1991) (holding juror affidavits relating that jury misunderstood and misapplied comparative fault instructions inadmissible under Rule 5.606(b)). Furthermore, even if the jury reached its verdict on beliefs outside of the instructions, this is also an internal statement made during deliberations that is inadmissible. See, e.g., *Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 631-32 (Iowa 1997) (finding juror affidavit relating that jury failed to award medical expenses because they believed the expenses had been paid by a third party inadmissible to impeach a verdict under Rule 5.606(b)); *Lund v. McEnerney*, 495 N.W.2d 730, 732-34 (Iowa 1993) (finding juror affidavits inadmissible to show reasons for the verdict because they “relate directly to internal deliberations, discussions, and mental

and emotional reactions that the rule is meant to insulate.”). The statements in the juror affidavits submitted by Reed pertain to how the jury was influenced in reaching their verdict and how they applied the instructions. These are statements regarding internal deliberations and are inadmissible under the rules of evidence to impeach a verdict. There was no abuse of discretion in the court’s refusal to consider the affidavits when ruling on Reed’s motion for a new trial.

**V. CONCLUSION.**

There was substantial evidence to support giving a comparative fault instruction to the jury and the court properly denied Reed’s motion for a new trial.

**AFFIRMED.**