IN THE COURT OF APPEALS OF IOWA

No. 6-738 / 05-1830
Filed November 16, 2006

JOSHUA GRAY, by His Parents and Next Friends, MICHAEL and JOLENE GRAY, and MICHAEL GRAY and JOLENE GRAY, Individually,
Plaintiff-Appellants/Cross-Appellees,

vs.

COUNCIL BLUFFS COMMUNITY SCHOOL DISTRICT and ROSE SCHLEMMER,
Defendant-Appellees/Cross-Appellants.

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

Joshua Gray, by his parents and next friends, Michael and Jolene Gray, appeals following an adverse jury verdict in a nursing malpractice action brought against a school district and its nurse. **AFFIRMED.**

Patrick O'Bryan and Robert Tucker, Des Moines, for appellants/cross-appellees.

Gregory Barntsen and Nathan Watson of Smith Peterson Law Firm, LLP, Council Bluffs, for appellees/cross-appellants.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Joshua Gray, by his parents and next friends, Michael and Jolene Gray, appeals following an adverse jury verdict in a nursing malpractice action brought against a school district and its nurse. The Grays contend: (1) the district court erred in allowing defense counsel to read from a report during his opening statement, (2) the court erred in failing to give an adverse inference instruction based on the school district's alleged failure to turn over some documents, and (3) the court erred in admitting the allegedly unreliable testimony of an expert witness. The school district cross-appeals, claiming the court erred in denying its motion for summary judgment. We affirm.

I. Background Facts & Proceedings

On January 8, 2002, the Grays filed a petition in which they alleged their son, Joshua Gray, suffered a prolonged hypoglycemic episode (hereinafter seizure) at school on January 10, 2000, caused by his diabetes.[1] The Grays alleged the school district's resident nurse failed to properly diagnose and treat the seizure, leading to a permanent decrease in Joshua's cognitive function. The Grays claim Joshua became aggressive, suffered severe behavioral and attitudinal difficulties, regressed in his social skills, and suffered from depression following the alleged seizure on January 10.

The school district filed an answer to the petition denying all the allegations of negligence. The district filed a motion for summary judgment on January 14, 2003, because the Grays had not certified to the district court

[1] A hypoglycemic episode is caused by low blood sugar.

information regarding any expert witnesses within 180 days of the defendants' answer in violation of Iowa Code section 668.11(1) (1999).[2]

The Grays made a motion to extend the expert designation deadline, and they eventually designated their experts on April 1, 2003. The district court granted the Grays' motion and denied the school district's motion for summary judgment in an order filed April 2, 2003.

Jury trial commenced on August 2, 2005, and lasted for approximately four weeks. The Grays presented evidence and expert witness testimony in an attempt to convince the jury the alleged negligence of the school district's nurse, Rose Schlemmer, in responding to a seizure experienced by Joshua on January 10, 2000, was the proximate cause of his alleged subsequent decline in cognitive function. The school district presented evidence Joshua has suffered from a variety of diseases and disorders throughout his life, many since his birth. Joshua has been diagnosed with pariventricular leukomalacia, type-1 diabetes mellitus, a right-hemispheric brain disorder, attention deficit hyperactivity disorder, and asthma. The district offered evidence these diseases and disorders are the likely cause of his current medical condition.

The parties presented conflicting evidence regarding what happened to Joshua on January 10. All the school personnel present at school the day of

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[2] Iowa Code section 668.11(1) states:

> 1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:
>
> a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.

Joshua's alleged seizure testified Joshua returned to class after a routine and successful treatment of his hypoglycemia. The Grays presented testimony that Joshua suffered a prolonged, inappropriately treated seizure at school on January 10, leading to his loss of cognitive function.

Pursuant to his Individual Health Plan (IHP), Joshua had his first blood sugar test of the day at approximately 10:00 a.m. on January 10. Joshua's IHP states a normal blood sugar reading is 80 to 100 mg/dl. Joshua's blood sugar reading at 10:00 a.m. was 40 mg/dl. In compliance with the IHP, the school nurse, Rose Schlemmer, was notified, and Joshua was given a glucose gel tube orally. Although the Grays claim Joshua gagged on the gel tube, Schlemmer testified Joshua never gagged or exhibited an inability to ingest the gel. Schlemmer called Jolene Gray and notified her of the blood sugar reading.[3] Schlemmer observed Joshua's right hand "shaking a little," which she said indicated low blood sugar; Schlemmer testified she saw no symptoms of a seizure.

Joshua was given a snack, one-half cup of milk and thirty goldfish crackers, as an additional measure to raise his blood sugar level. Schlemmer informed Jolene of the measures taken to raise Joshua's blood sugar. By 10:30 a.m., Joshua's blood sugar was 56 mg/dl, and by 10:55, it had risen to 149 mg/dl. According to Schlemmer, Joshua returned to class at 10:55, and she told Jolene about Joshua's successful return to class. Jolene testified she told Schlemmer to call 911, but the school never called 911.

[3] Jolene had previously instructed the school to notify her regarding any blood sugar readings below 80 mg/dl.

Joshua's one-on-one assistant, Karen Anderson, testified Joshua attended school lunch and afternoon classes without incident, and school records reflect Jolene signed Joshua out of school at 2:55 p.m.[4] The Grays contend they picked Joshua up from school around 12:45 p.m., and when they arrived Joshua was being carried with his head down and his arms limp. The Grays maintain Joshua seemed unable to recognize them, was confused, and had urinated and defecated in his pants.

Jolene claimed before she picked Joshua up from school on January 10, she stopped by her husband's workplace to bring him along. However, Michael Gray's timecard for January 10 shows he punched out for lunch at 11:01 a.m., punched back in from lunch at 11:31 a.m., and punched out for the day at 2:32 p.m. Dave Kliegl, Michael's work supervisor, testified he would not have allowed Michael to work off the clock, and he had been instructed to always punch out when leaving a shift.

The Grays also offered testimony that Joshua saw Dr. Peter Daher on January 10 after they picked him up from school. Dr. Daher testified he saw Joshua on January 10; however, he admitted that during a prior deposition, he stated Jolene came to his office alone that day. Dr. Daher's office notes indicate Jolene said Joshua had two seizures at school that day, but his medical records and billing records do not show he saw Joshua on January 10. Furthermore, Dr. Daher testified if he had seen Joshua in a condition where he had urinated and defecated in his pants, that is something he would have written down, which he did not do.

[4] The Grays contend the school district forged Jolene's signature on the sign-out form.

On January 11, the Grays took Joshua to see Dr. Daher, and the doctor rated Joshua's physical condition as normal. According to Jolene, Joshua had experienced multiple seizures before and after January 10, but she has been the only individual to witness those seizures. Johanna Tietsort, a licensed practical nurse who provided full-time in-home nursing services for Joshua from May to August 2001, testified she never saw Joshua have a seizure.

The Grays presented expert medical testimony regarding the disabilities allegedly caused by the seizure on January 10. The Grays claim Joshua is unable to take care of himself and cannot even fasten buttons, use a zipper, or tie his shoes. However, Tietsort testified Joshua is capable of buttoning his shirts and using a zipper. Dr. John Meyers conducted a neuropsychological evaluation of Joshua on December 11, 2001, and he concluded Joshua reported no problems fastening buttons, using a zipper, or tying his shoes. Furthermore, Dr. Meyers observed Joshua "was able to demonstrate adequate fine motor control consistent with being able to perform buttoning." Dr. Meyers concluded the results of his testing were "not consistent with an acquired brain injury."

Dr. Michelle Marsh, a child psychiatrist, testified Joshua's psychological state before and after January 10, 2000, based on records provided by various mental health providers, was unchanged. In addition, Dr. Waldman, a witness for the plaintiffs, testified Jolene kept medical logbooks documenting recurring seizure activity prior to January 10, 2000. Dr. Waldman testified she could not exclude the prior seizures as the cause of Joshua's problems.

The Grays contend Joshua's treating psychiatrist, Dr. James Severa, indicated Joshua should not be in school, so the Grays have home-schooled

Joshua for the past six years with workbooks Jolene purchased at Sam's Club. Tietsort indicated Joshua watched television approximately eighty-five percent of the time when he was at home, and he also played videogames. Dr. Meyers testified Joshua's IQ scores appeared to drop over the years because his peer group was improving, but he was not. He noted there was even a thirteen-point drop in his IQ score between 1997 and 1999 before the seizure the Grays allege resulted in his decreased cognitive function.

The jury returned a verdict on August 29, 2005, finding no negligence on the part of the school district or its nurse. The Grays now appeal, and the school district cross-appeals.

II. Opening Statement

The Grays first contend the district court should have granted their motion for new trial because defense counsel read a statement from a report during his opening statement that was never admitted into evidence. For the reasons which follow, we reject this assignment of error.

During his opening statement, defense counsel briefly mentioned a report prepared by one of the plaintiffs' witnesses, Dr. Joseph Evans. The report indicated Joshua was born prematurely, had a number of severe diabetic reactions throughout his life, and has intellectual deficits. Defense counsel said Dr. Evans concluded it was not possible "to single out any one episode as a cause of his limited intellectual functioning." The report from Dr. Evans was never admitted into evidence, and the plaintiffs contend defense counsel

improperly provided the jury with information regarding causation that the jurors should not have heard.[5]

We review the district court's ruling on allegedly improper comments made by legal counsel during opening statements for abuse of discretion. *Moore v. Vanderloo*, 386 N.W.2d 108, 116 (Iowa 1986). Before we will grant a new trial for misconduct in argument, it must appear that prejudice resulted or a different result would have been probable but for the misconduct. *Id.* at 116-17.

The defendants contend the Grays failed to preserve error regarding this issue. They note that Dr. Evans's report was exchanged by the parties during discovery and was referred to in the doctor's pretrial deposition. They also note the report was listed as a trial exhibit for which foundation was waived, and no objections to the report were made prior to trial. Even if we assume without deciding that the reference to Dr. Evans's report in opening statement was an error which was properly preserved, we conclude the plaintiffs failed to demonstrate any prejudice.

The trial court informed the jury that the statements of the attorneys were not to be considered as evidence. Dr. Evans's report was mentioned briefly at the very beginning of a four-week trial. The report did not come into evidence as an exhibit, so the jury never saw the language of which the plaintiffs complain. In addition, both sides presented several other witnesses in support of their respective positions regarding medical causation. Because the jury found neither defendant was negligent, it did not have to address the issues of causation and

[5] Neither party called Dr. Evans to testify at trial.

damages. Therefore, the mention of Dr. Evans's statement regarding "causation" was irrelevant to the jury's verdict.

III. Jury Instruction

The Grays next argue the court should have given the jury an adverse inference instruction because the school district "failed to turn over requested documents."

We review the failure to give a requested jury instruction for the correction of errors at law. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 867 (Iowa 1989). When a party requests an instruction stating a correct rule of law having application to the facts of the case, and the concept is not otherwise embodied in the court's instructions, that party is entitled to have his or her requested instruction or its substance given. *Adam v. T. I. P. Rural Elec. Co-op*. 271 N.W.2d 896, 901 (Iowa 1978). Error in giving or refusing to give an instruction does not require reversal unless the error is prejudicial. *Stover*, 434 N.W.2d at 868. An adverse inference instruction based on the spoliation of evidence is only appropriate when the destruction of relevant evidence was intentional, as opposed to destruction as the result of routine procedure. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003). A spoliation inference should be utilized prudently and sparingly. *Id.*

One contested issue at trial was the exact timeline of the events on January 10, 2000. The Grays contend they picked Joshua up from school around 12:45 p.m. and discovered he was unable to recognize them, was confused, and had urinated and defecated in his pants. The school district

maintains Joshua returned to lunch and afternoon classes without incident and was signed out of school by Jolene at 2:55 p.m.

During the trial, Joshua's teacher, Susan King, testified about Joshua's recess times. In response to a question from plaintiffs' counsel, King asked counsel if he had a copy of her lesson plans. She stated her schedule would indicate the time Joshua had his two recesses.

Principal Joy Stein testified that all student records, including the lesson plans in question, were destroyed following the end of the school year. However, a secretary at the school testified she believed Stein collected grade books and class lessons and placed them in a storage room in the school's basement for five years.

At the conclusion of trial, the Grays' attorneys requested an adverse inference instruction based on their belief that "there is testimony that certain documents had been turned over to the school system and not seen again."[6] Their proposed jury instruction stated, "When relevant evidence is within the control of a party whose interest is affected, a court may infer that the evidence, if not produced, would be unfavorable to that party."

The court declined to give the requested jury instruction. The court found "especially as to the adverse inference proposal, there is no evidence that would get beyond speculation as to whether or not the defendant does have within their control the evidence alluded to." The court also found that the spoliation of evidence would have to be something outside of the ordinary course of the

[6] The record we have been provided with for purposes of our appellate review does not make clear the district court was referred to specific documents.

school district's business, and the principal indicated it was in the ordinary course of business to destroy some documents.

On appeal, the Grays appear to contend they were entitled to an adverse inference instruction because King's lesson plans or grade books as well Principal Joy Stein's personal calendar should have been produced prior to trial. There are several problems with this argument. First, these documents were never requested by the Grays during the discovery process. Second, nothing in the record suggests the school district intentionally destroyed evidence with knowledge it was relevant to this litigation. Third, the Grays only speculate that Joshua's teacher's lesson plans and grade book and the school principal's day planner contained information relevant to issues of negligence, causation, and damages. We find the district court did not err in refusing to give the Grays' proposed jury instruction under these circumstances.

IV. Expert Testimony

The final argument raised by the Grays is that the court erred in permitting allegedly unreliable testimony by Dr. John Meyers to become part of the record.[7] Dr. Meyers is a board certified neurologist who specializes in diagnosing and treating individuals with brain injury. At trial, the school district elicited testimony from Dr. Meyers about his developmental curve theory. Dr. Meyers attributed all of Joshua's intellectual deficits to injuries he sustained at birth due to the injury to his right brain hemisphere. Dr. Meyers testified Joshua's decline in IQ scores was due to his injury at birth and his slow intellectual development compared to his peers. The Grays contend Dr. Evans discredited Dr. Meyers's report.

[7] The plaintiffs filed a motion in limine prior to trial challenging Dr. Meyers's testimony.

We review the district court's decision regarding the admissibility of expert testimony for the correction of errors of law. *Wheeler v. Dental East, P.C.*, 494 N.W.2d 248, 250 (Iowa Ct. App. 1992). We will not interfere with the court's decision to permit expert testimony unless a manifest abuse of discretion has resulted in prejudice to the complaining party. *Id.* Abuse of discretion is shown only when the party objecting to the ruling proves that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976).

We find no abuse of discretion in the trial court's decision to admit this expert's testimony. Moreover, the Grays were not prejudiced by the admission of Dr. Meyers's testimony regarding his developmental curve theory. The jury found no negligence on the part of the school district or its nurse, and the Grays have not appealed this finding. For that reason, it did not have to decide the issues of causation or damages. The portion of Dr. Meyers's testimony the Grays now find objectionable directly relates to the causation of Joshua's injuries. Causation and damages are irrelevant if the jury fails to find no underlying breach of duty. *Novak Heating & Air Conditioning v. Carrier Corp.*, 622 N.W.2d 495, 497 (Iowa 2001). We reject this assignment of error.

V. Cross-Appeal

The school district filed a motion for summary judgment because the Grays had not certified to the district court information regarding any expert witnesses within 180 days of the defendants' answer in violation of Iowa Code section 668.11(1). The school district now cross-appeals, contending the district court erred in granting the Grays' motion for extension of time to designate

experts and in denying its motion for summary judgment. Our resolution of the issues raised by the Grays makes it unnecessary for us to address the remaining issues presented by this cross-appeal.

VI. Conclusion

Because we find no merit in any of the plaintiffs' appellate claims, we affirm the district court's rulings and the jury's verdict.

AFFIRMED.