IN THE COURT OF APPEALS OF IOWA

No. 3-415 / 12-1710
Filed July 10, 2013

KATHRYN RUTH FOLKERS,
Plaintiff-Appellant,

vs.

VALERIE KAY KOUNKEL and
PHYSICIANS EYE CLINIC,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Kathryn Folkers appeals a jury verdict finding her eye doctor was not negligent in performing cataract surgery. **AFFIRMED.**

Eric M. Updegraff of Stoltze & Updegraff, P.C., Des Moines, for appellant.

Thomas J. Joensen and Matthew R. Phillips of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

Heard by Eisenhauer, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

Plaintiff Kathryn Folkers appeals a jury verdict finding her eye doctor was not negligent in performing cataract surgery. Plaintiff's counsel argues the district court abused its discretion in allowing the doctor to submit an excerpt of Folkers's deposition during cross-examination and improperly instructed the jury regarding impeachment evidence. Because Folkers cannot show she was prejudiced by the impeachment evidence or the instruction, we affirm.

I. Background Facts and Proceedings

Folkers, a retired bookkeeper, began wearing corrective lenses in her fifties to help her see better up close. Folkers received treatment at Physicians Eye Clinic in Des Moines where Dr. Valerie Kounkel worked. Folkers visited Dr. Kounkel in March 2007 after Folkers poked herself in the eye with her finger. She next visited Dr. Kounkel on June 3, 2008, for a checkup prompted by her decreased vision and inability to read fine print.

During the June 3, 2008 appointment, Folkers and Dr. Kounkel discussed whether Folkers should undergo cataract surgery. During the visit Folkers consented to surgery on her right eye. Folkers signed a form entitled "Consent For Cataract Surgery with Lens Implant," which described a cataract, explained the procedure to surgically remove it, and confirmed the doctor explained the procedure to the patient. The consent form detailed the risks and benefits (RBs) of the surgery. Paragraph 3 summarized the particular risks:

> Complications of surgery may make my vision worse. In some cases, complications may occur weeks, months, or even years later. Complications include, but are not limited to, bleeding, infection, loss of corneal clarity, retinal detachment, glaucoma,

> double vision, retinal swelling, total loss of vision and loss of the eye. Rarely the implanted lens may need to be repositioned or removed.

Handwritten in the medical notes from the visit was the phrase: "discussed RBs, questions answered."

On July 9, 2008, Dr. Kounkel performed cataract removal surgery on Folkers's right eye. Folkers was largely satisfied with the results.

On July 17, 2008, Folkers signed an identical informed consent form—this time for surgery on her left eye. On July 23, 2008, Dr. Kounkel performed surgery on Folkers's left eye.

Folkers returned to Dr. Kounkel two days later, complaining of pain persisting since the surgery. Dr. Kounkel referred her to Dr. Christopher Haubert, who performed an "emergency retina surgery" that same day. Folkers learned her complications were caused by a lens fragment that entered the vitreous material of her eye during the left eye surgery.

Because the pain in Folkers's left eye continued, in October 2008, she consulted with Dr. Michael Sarno at Des Moines Eye Surgeons. Dr. Sarno treated her for inflammation and glaucoma, conditions she had not experienced before her left eye surgery. He also referred her to the University of Iowa Hospitals and Clinics, where she underwent two surgeries in 2010.

On July 8, 2010, Folkers filed suit against Dr. Kounkel and others, alleging negligence, breach of contract, and res ipsa loquitur.[1] Dr. Kounkel deposed

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[1] Folkers initially named as defendants Dr. Kounkel, Dr. Haupert, Iowa Retina Consultants, and Physicians Eye Clinic, but dismissed Dr. Haupert and Iowa Retina

Folkers on May 4, 2012. During the deposition, Folkers testified to her discussion with Dr. Kounkel regarding the risks associated with surgery:

> Q. But if we take the time machine back to that time, July 9, and your subsequent visit, do you feel that Dr. Kounkel was attentive to you during the procedure and afterwards? A. On the right eye?
> Q. Yes. A. I think so.
> Q. Did you have any questions for her at that time that weren't answered by Dr. Kounkel? A. No. I don't think so.
> Q. So you were satisfied with the whole process with regard to the right eye; correct? A. Except for the fog thing.

The district court held trial from August 20-22, 2012. On direct examination Folkers testified Dr. Kounkel did not explain the risks and benefits of surgery. Folkers denied the parties substantively discussed the surgery, alternatives, or potential complications. Folkers claimed the choice to proceed with the surgery was less her own desire than Dr. Kounkel's decision. On cross-examination defense counsel revisited with Folkers whether Dr. Kounkel explained the risks and benefits of cataract surgery at any time.

Defense counsel first read the June 3 medical notes indicating the doctor discussed the risks and benefits of surgery with Folkers. When Folkers denied the discussion took place, the attorney read the deposition excerpt in which Folkers testified that as of her July 9 surgery, she believed Dr. Kounkel was attentive and left no question unanswered during and after the right eye procedure. Plaintiff's counsel objected on the basis that the passage regarding the July 9 surgery could not be used to impeach Folkers's testimony regarding the June 3 appointment. The district court overruled the plaintiff's objection.

Consultants three months after. For purposes of this appeal, we will refer to Dr. Kounkel and Physicians Eye Clinic collectively as Dr. Kounkel.

Folkers then called one of her neighbors, Arlene Freder, to testify, and played the video deposition of her expert, Dr. Lance Turkish. At the close of Folkers's evidence, Dr. Kounkel moved for a directed verdict on all three claims in the petition. Folkers conceded the breach of contract and res ipsa loquitur claims should not be presented to the jury. The district court held sufficient evidence created an issue for the jury on medical negligence.

Dr. Kounkel testified how she routinely explained to a patient the various types of cataracts, the difference between needing glasses and the effect of a cataract, and her cataract surgical procedure. She also described how she discussed the risks and benefits of a cataract surgery. The defense then called Dr. James Davison as its expert witness.

At the close of evidence, the district court prepared instructions to submit to the jury. Over an objection from plaintiff's counsel, the court submitted a jury instruction relating to out-of-court admissions. The jury returned a defense verdict. On August 23, 2012, the court entered judgment in favor of Dr. Kounkel, dismissing the case. Folkers timely appealed.

II. Scope and Standards of Review

We review most evidentiary rulings for an abuse of discretion. *Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012). A court abuses its discretion when it rules on admissibility "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Rowedder v. Anderson*, 814 N.W.2d 585, 589 (Iowa 2012). "A ground or reason is untenable when it is

not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). Even if a statement is inadmissible, the evidence must be prejudicial to the complaining party's interest to require reversal. *Mohammed v. Otoadese*, 738 N.W.2d 628, 633 (Iowa 2007); *see* Iowa R. Evid. 5.103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.").

We review instruction issues for correction of legal error. *Pavone v. Kirke*, 801 N.W.2d 477, 494 (Iowa 2011). An erroneously given jury instruction does not warrant reversal unless it prejudices the complaining party. *Schmitt v. Koehring Cranes, Inc.*, 798 N.W.2d 491, 496 (Iowa Ct. App. 2011).

III. Analysis

A. Did Admission of Folkers's Deposition Excerpt Constitute Reversible Error?

Folkers acknowledges Iowa Rule of Civil Procedure 1.704(2) anticipates the use of deposition testimony to impeach or contradict in-court testimony by the deponent. But she contends defense counsel should not have been allowed to use the deposition excerpt—relating to her July 9, 2008 conversation with Dr. Kounkel—to impeach her testimony concerning the June 3, 2008 visit. She asserts she introduced the June 3 conversation to rebut Dr. Kounkel's theory the patient was merely experiencing "buyer's remorse." Folkers reasons she could not have buyer's remorse without being fully informed and only the June 3 conversation could show what she knew before the first surgery. She claims her

testimony regarding the July 9 conversation could not be compared to her statements regarding the June 3 appointment. Folkers concludes admission of the impeachment evidence resulted in prejudice because it improperly impugned her credibility.

Dr. Kounkel responds that Folkers's deposition testimony actually referred to care provided before and after the right eye surgery, and was not limited to the July 9 exchange, as Folkers suggests. The doctor contends the content of both appointments broached the issue of informed consent, and because Folkers's responses materially varied from each other, the deposition testimony served as viable impeachment evidence.[2] As a fall-back, Dr. Kounkel argues even if the district court abused its discretion in allowing the impeachment under rule 1.704, reversal is not required because the evidence did not prejudice Folkers.

A witness's prior inconsistent statements are admissible for impeachment purposes. *Grocers Wholesale Co-op. v. Nussberger Trucking Co.*, 12 N.W.2d 753, 755 (Iowa 1971). At trial, a party may use any part of a testifying witness's deposition "[t]o impeach or contradict deponent's testimony as a witness." Iowa R. Civ. P. 1.704(1).

A prior inconsistent statement, when offered for impeachment purposes, falls outside the hearsay definition. *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995); *see* Iowa R. Evid. 5.801(d)(1). The evidence is not used for substantive purposes, but to call the witness's credibility into question:

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[2] Dr. Kounkel also argues the transcript could be alternatively admitted as a statement against her interest. Because we resolve the appeal based on harmless error, we do not address her alternative argument.

> "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 is blowing hot and cold, raising a doubt as to the truthfulness of both statements."

Brooks v. Holtz, 661 N.W.2d 526, 530–31 (Iowa 2003) (quoting *McCormick on Evidence* § 34, at 126 (5th ed. 1999) and explaining why such statement falls outside the definition of hearsay).

For impeachment purposes, the witness's statement must be (1) material to the issue, and (2) at least inconsistent. *French v. Universal C.I.T. Credit Corp.*, 120 N.W.2d 476, 480 (Iowa 1963).

> "To constitute a self-contradiction it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done. . . . The inconsistency may be found expressed, not in words, but in conduct indicating a different belief."

State v. Hephner, 161 N.W.2d 714, 719 (Iowa 1968) (quoting 3 Wigmore, Evidence 725, § 1040 in reference to a defendant who denied he knew where weapon came from when receipt for weapon was found on him) (alterations omitted). The testimony must be "at material variance" with the depositional statement. *See Bauer v. Cole*, 476 N.W.2d 221, 225 (Iowa 1991).

Defense counsel asked Folkers on cross-examination what symptoms led to her initial June 3 appointment. Folkers testified she scheduled the check-up because she was not seeing well and could not see "up close," but that she "did not have any knowledge of the fact that [she] had cataracts at [the June 3

appointment]." Defense counsel then read aloud the June 3 medical note: "Patient here for update, question if cataracts are ready."

Defense counsel then asked, "[n]ow, your previous testimony I believe was that Doctor Kounkel never talked to you about cataract surgery. She just signed you up, is that correct?" Folkers said after Dr. Kounkel "decided we're going to do it, then she explained, you know, what we're going to do . . . the right one first and then we'll do the left one." Defense counsel drew Folkers's attention back to the June 3 notes, where Dr. Kounkel wrote "Discussed RBs, questions answered." Counsel next asked: "If Doctor Kounkel were to testify that that translates to discussed surgery and she wrote this down on your June 3rd of 2008 visit, would you disagree that occurred?" Folkers answered, "No, because that's when I was going to have the surgery."

Defense counsel continued:

> Q. And if you look at the next few writings there, it looks like an R and a B, with a question -- or apostrophe S. Do you see that, right next to "discussed"?
>
> . . .
>
> A. It says R --
>
> Q. RBs. A. What's RBs?
>
> Q. If Doctor Kounkel were to testify that R and B stands for risk and benefit, would you deny at that time you discussed the risks and benefits of the surgery? A. Yes. This is where we disagree too. I —
>
> . . .
>
> Q. If you look at the next part right after the R and Bs, do you see where it says "questions answered"? Are you denying today that your questions about the surgery were answered at that time? A. Of the surgery, yes.

Defense counsel then proceeded to read an excerpt from Folkers's deposition testimony, over her lawyer's several objections:

> Q. I asked the question: . . . "But if we take the time machine back to that time, July 9th, and your subsequent visit, do you feel that Doctor Kounkel was attentive to you during the procedure and afterwards?" Your answer --
>
> [PLAINTIFF'S COUNSEL]: I'm going to object to him reading this as impeachment testimony discussions of the July 9th surgery when his previous question was about the June 3rd, 2008, discussion.
>
> THE COURT: Are you getting to the other one?
>
> [DEFENSE COUNSEL]: Well, I think the answer that comes in about the right eye is embraced in --
>
> THE COURT: I will allow you some leeway on that.
>
> Q. Thank you. "Attentive to you during the procedure and afterwards?
>
> "On the right eye?"
>
> "Yes."
>
> You answered, "I think so."
>
> "Did you have any questions for her at that time that weren't answered by Doctor Kounkel?"
>
> [PLAINTIFF'S COUNSEL]: I would have the same objection, Your Honor.
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> THE COURT: Overruled.
>
> Q. "No, I don't think so."
>
> . . . .
>
> Q. (Defense counsel) Did Doctor Kounkel ever talk to you about the risk and benefit of the surgery -- A. No.
>
> Q. -- at any time -- A. No.
>
> Q. -- before the right eye surgery or during the time of the right eye surgery? A. No.
>
> Q. Did she ever take the time to answer your questions about the surgery? A. I didn't have any questions at that time after she did the right eye. It was foggy, my right eye, but they lasered that off, Doctor Sarno did.
>
> Q. But you don't remember her ever talking about any of the complications, correct? A. No. I just signed that paper.

Assuming without deciding the deposition excerpt constituted improper impeachment, we reject Folkers's claim its admission prejudiced her case. As Folkers argues on appeal, her negligence case was premised on whether cataract surgery was necessary. Folkers maintains the doctor should have first ruled out the possibility of improved sight from an update of her prescriptive

lenses. Because Dr. Kounkel justified the surgery based on Folkers's difficulty reading small print, Folkers says the content of their June 3 meeting is central to the necessity issue.

But whether Dr. Kounkel explained the risks and benefits of surgery is collateral to the claim the doctor should have investigated and adjusted Folkers's corrective lens prescription before recommending the procedure. The court instructed the jurors that they were to determine negligence based on the testimony of medical experts, not that of the patient:

> You are to determine the standard of care, i.e. the degree of skill, care, and learning required of physicians from the opinions of the physicians who have testified as to the standard. You are also to determine the failure to meet the standard of care for physicians, if any, from the opinions of the physicians who have testified as to such a failure or lack thereof.

Since neither party objected to the instruction, it is the law of the case. *Easton v. Howard*, 751 N.W.2d 1, 5 (Iowa 2008). Moreover, the instruction is consistent with the law regarding expert testimony on the standard of care. *Hill v. McCartney*, 590 N.W.2d 52, 56 (Iowa Ct. App. 1998) ("Generally, when the ordinary care of a physician is an issue, only experts can testify and establish the standard of care and the skill required."); *see also Bazel v. Mabee*, 576 N.W.2d 385, 387 (Iowa Ct. App. 1998) ("Most medical malpractice lawsuits are so highly technical they may not be submitted to a fact finder without medical expert testimony supporting the claim.").

We presume the jury followed its instructions unless the contrary is shown. *Lehigh Clay Products, Ltd. v. Iowa Dep't of Transp.*, 512 N.W.2d 541, 546 (Iowa 1994). Because the jury did not rely on Folkers's lay testimony to decide if the

doctor performed cataract surgery unnecessarily and therefore breached the standard of care, admitting an excerpt of the patient's deposition transcript did not result in prejudice. The jury's assessment of Folkers's credibility had no direct connection to its decision on negligence. Therefore admission of the deposition testimony does not warrant reversal. *See Mohammed*, 738 N.W.2d at 633.

B. Did the District Court Erroneously Instruct the Jury?

Folkers argues because the above-quoted deposition statements were erroneously admitted, the district court should not have instructed the jury concerning out-of-court admissions as follows:

> You have heard evidence claiming the Plaintiff made statements before this trial while under oath. These statements are called admissions.
>
> If you find an admission was made, you may consider it as if made during this trial. Decide whether to consider the admission for any purpose and what weight to give it.

Folkers asserts this instruction further emphasized the district court's evidentiary mistake and prejudiced her.

Continuing to assume without deciding that the deposition statements were inadmissible, Folkers's testimony regarding what she knew at the time of surgery has no bearing on whether the surgery was necessary, which the court instructed the jury to resolve by considering expert testimony alone. The instruction on plaintiff's admissions was harmless error for the same reason admitting the deposition excerpt did not cause prejudice. *See Easton*, 751 N.W.2d at 5; *Hill*, 590 N.W.2d at 56; *Lehigh*, 512 N.W.2d at 546. With no

showing of prejudice, the instruction does not warrant reversal. *See Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 110 (Iowa 2011).

AFFIRMED.