IN THE COURT OF APPEALS OF IOWA

No. 7-504 / 07-0080
Filed October 24, 2007

DWAYNE HUPKE and DOROTHY HUPKE,
Plaintiffs-Appellants,

vs.

FAMILY HEALTH CARE OF SIOUXLAND, P.L.C.,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge.

Plaintiffs appeal from the district court's ruling denying their motion for new trial following a verdict and judgment entry in favor of defendant. **AFFIRMED.**

Edward J. Keane of Gildemeister & Keane, L.L.P., Sioux City, for appellants.

Charles T. Patterson and John C. Gray of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P., Sioux City, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Dwayne and Dorothy Hupke appeal from the district court's ruling denying their motion for new trial following a verdict and judgment entry in favor of Family Health Care of Siouxland, P.L.C. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

On September 15, 2004, Dwayne Hupke underwent a colonoscopy and esophogastroduodenoscopy at Family Health Care. Dr. John Kissel, the Hupkes' family physician, began performing the outpatient diagnostic procedures at 11:05 a.m. and finished at 11:30 a.m. Barb Heikes, a registered nurse with over thirty years experience, assisted Dr. Kissel. Dwayne received the medications Versed and Demerol throughout the twenty-five minute procedure, which caused him to be "arousable but asleep."

Heikes monitored Dwayne after Dr. Kissel completed the procedures. She engaged in conversation with him "to get him awake more" and gave him water and toast around noon to aid in rousing him. After he finished the water and toast, she "had him set on the edge of the bed to make sure he was stable and then . . . assisted him to the bathroom."

Heikes helped him sit down on the toilet and "put the chair with his clothes on it right up next to the toilet, so they were right in front of him." She told him she would "be right outside the door, if he needed anything to please let [her] know." She further instructed him "to sit and call me when he was ready to put his clothing on." Heikes left the bathroom door "cracked open" and waited for Dwayne a few feet outside of the bathroom. Approximately two to three minutes later, she went into the bathroom after hearing a noise and discovered Dwayne

"standing, just leaning over the sink, and he had one hand up over his eye." He told her "he had slipped and hit his eye on the sink." Dr. Kissel's notes following the incident indicated "apparently he got one leg in his underwear and then lost his footing and fell." Dwayne thereafter lost sight in his eye.

The Hupkes filed an amended petition against Family Health Care on May 19, 2005. They alleged Family Health Care's employee, Heikes, negligently left Dwayne alone in the bathroom while unattended resulting in a permanent and severe eye injury. Dwayne sought recovery for his personal injury and damages, while Dorothy sought recovery on a loss of consortium claim.

The Hupkes filed a motion in limine on September 22, 2006, requesting in relevant part that the district court preclude Family Health Care from introducing the following evidence: (1) whether the Hupkes had any complaint with any of the care or treatment rendered by Dr. Kissel before September 15, 2004; (2) whether the Hupkes had their records transferred from Dr. Kissel's office after the incident; (3) whether Dwayne had any complaints regarding a previous colonoscopy done at Dr. Kissel's office in October of 2001; (4) an informed consent form signed by Dwayne concerning the procedures performed on September 15; and (5) a survey of nurses taken by Family Health Care's expert witness, Dr. Ronald Kolegraff. Following a hearing, the district court entered an order sustaining the motion as to certain evidence and overruling the motion as to the above-listed evidence.

The case proceeded to trial on September 26, 2006. The jury returned a verdict in favor of Family Health Care. The Hupkes filed a motion for new trial asserting the verdict was not supported by sufficient evidence. They further

asserted "[e]vidence of implied consent should not have been admitted," and "Defendants should not have been permitted to introduce evidence that Plaintiffs had no complaint against Dr. Kissel, but had their records transferred from Dr. Kissel's Office." The district court entered a ruling on December 6, 2006, denying the motion for new trial.

The Hupkes appeal. They claim the district court erred when it allowed "irrelevant, prejudicial, misleading, and confusing" evidence regarding (1) the informed consent form signed by Dwayne; (2) Dr. Kolegraff's survey of nurses; (3) whether the Hupkes had any complaints related to Dr. Kissel's care or treatment before September 15, 2004; (4) whether the Hupkes complained about a prior colonoscopy procedure conducted at Dr. Kissel's office in October 2001; and (5) whether the Hupkes transferred their records from Dr. Kissel's office and terminated their doctor-patient relationship after September 15. They further claim the district court erred in failing to grant a new trial because the jury's verdict was not supported by sufficient evidence.

II. SCOPE AND STANDARDS OF REVIEW.

Our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). When the motion and ruling are based on discretionary grounds, our review is for abuse of discretion. *Id.* However, when the motion and ruling are based on a claim the trial court erred on issues of law, our review is for correction of errors at law. *Id.*

If a verdict "is not sustained by sufficient evidence" and the movant's substantial rights have been materially affected, it may be set aside and a new

trial granted. Iowa R. Civ. P. 1.1004(6); *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007). "Because the sufficiency of the evidence presents a legal question, we review the trial court's ruling on this ground for the correction of errors at law."[1] *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). On the other hand, "[w]e generally review the admission of evidence at trial for an abuse of discretion." *Clinton Physical Therapy Servs.*, 714 N.W.2d at 609-10. Therefore, our review of the trial court's ruling as to the challenged evidence in this case is for abuse of discretion. *Hansen v. Central Iowa Hosp. Corp.*, 686 N.W.2d 476, 480 (Iowa 2004).

III. MERITS.

A. Error Preservation.

Before we consider the merits of the claims on appeal, we must first address Family Health Care's contention that the Hupkes did not preserve error on the admissibility of the contested evidence because they did not object to the evidence at trial.

"The primary purpose of a motion in limine is to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on its admissibility." *Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa Ct. App. 1997); *see also Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974) (stating a motion in limine "serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of

[1] The Hupkes assert a ruling on a motion for new trial based on whether the jury's verdict is supported by sufficient evidence is reviewed for abuse of discretion. Family Health Care does not disagree with this claimed standard of review. We believe *Estate of Hagedorn*, 690 N.W.2d at 87, states the correct standard of review applicable to the facts presented by this case. However, our result would be the same even if we reviewed the issue for abuse of discretion.

trial."). A court's ruling on a motion in limine is not a final ruling on evidence. *Twyford*, 220 N.W.2d at 923. Instead, "[i]t adds a procedural step to the offer of evidence." *Id*. Ordinarily, error claimed in a court's ruling on a motion in limine is therefore waived unless a timely objection is made when the evidence is offered at trial. *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006). However, when the motion in limine is

> resolved in such a way it is beyond question whether or not the challenged evidence will be admitted during trial, there is no reason to voice objection at such time during trial. In such a situation, the decision on the motion has the effect of a ruling.

Id. (citation omitted); *see also Kalell v. Petersen*, 498 N.W.2d 413, 415 (Iowa Ct. App. 1993) (stating a defendant does not need to renew objections at trial if the prior ruling is an "unequivocal holding" on the issues raised) (citation omitted).

"The key to our analysis is to determine what the trial court ruling purported to do." *Alberts*, 722 N.W.2d at 406. A ruling that simply grants or denies "protection from prejudicial references to challenged evidence cannot preserve the inadmissibility issue for appellate review." *Id.* (citation omitted). "But if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial." *State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979).

No such unequivocal holding reaching the ultimate issues presented by the motion in limine appears in the record. Instead, the court's ruling merely stated the Hupkes' motion was "overruled" as to the challenged evidence. Such a ruling does not "resolve[ ] the matter in such a way that it was beyond question that the challenged evidence would" be admitted during trial. *Alberts*, 722 N.W.2d at 406. Thus, in order to preserve error on the admissibility of the

contested evidence, the Hupkes needed to object to the evidence when it was presented at trial.[2] *See State v. Mendiola*, 360 N.W.2d 780, 782 (Iowa 1985) (McCormick, J., concurring specially) ("When a motion in limine is overruled, error is not preserved unless objection is made when the evidence is offered."). They did not object to any of the evidence they assert the district court erroneously allowed at trial. Therefore, error was not preserved on their claims that the court erred in admitting the challenged evidence.

B. Sufficiency of the Evidence.

The Hupkes' remaining assignment of error is that the district court erred in overruling the portion of their motion for new trial that claimed the jury's verdict was not supported by sufficient evidence.

We view the evidence in the light most favorable to the jury's verdict when reviewing a motion for new trial. *Estate of Pearson ex rel. Latta v. Interstate Power and Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005); *see also Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 543 (Iowa 1997) (viewing the evidence "in the light most favorable to the jury's verdict" in assessing the sufficiency of the evidence). Our only inquiry is to determine whether there is sufficient evidence

[2] The Hupkes do not refer us to places in the record where the district court allowed evidence regarding whether they had any complaints related to Dr. Kissel's care or treatment before September 15, 2004, and whether they complained about a prior colonoscopy procedure conducted at Dr. Kissel's office in October 2001. Although we find the record contains such evidence, the Hupkes' failure to cite to the record is sufficient in itself to hold error waived as to these claims. Iowa R. App. P. 6.14(1)(*f*); *Channing v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001). Furthermore, although Dr. Kolegraff's deposition contains evidence of an informal survey of nurses in five different hospitals, nothing indicates that the deposition or any other evidence of the survey was presented at trial. The record simply does not demonstrate existence of the claimed error. Finally, we note the Hupkes, not Family Health Care, offered the exhibit at trial that contains the informed consent form they now complain about. Having offered the exhibit, they may not now complain of its admission into evidence. *Olsen v. Harlan Nat'l Bank*, 162 N.W.2d 755, 761 (Iowa 1968).

to justify submitting the case to the jury. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996).

The Hupkes argue the jury's verdict in favor of Family Health Care "is not reconcilable with the facts" because the "evidence shows that Heikes did not follow FHC's policy of being in the room to assist patients with dressing after a colonoscopy." The Hupkes further argue "no evidence supports the conclusion that leaving a patient still under the effects of Versed and Demerol along with his clothing in a restroom . . . meets the appropriate standard of care."

The standard of care a hospital or clinic owes to its patients "with respect to nonmedical, administrative, ministerial, or routine care . . . is such reasonable care for patients as their known mental and physical condition may require." *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 102 (Iowa 1971). One of the most important circumstances in determining the reasonableness of the care is the patient's known condition. *Id.* In cases such as these, the jury can use its own knowledge and good sense with respect to the hospital's conduct in question. *Id.*; *see also Cockerton v. Mercy Hosp. Med. Center*, 490 N.W.2d 856, 859 (Iowa Ct. App. 1992). Thus, the jury in this case was required to assess whether Heikes provided reasonable care to Dwayne by assisting him to the bathroom, leaving his clothes next to him, and instructing him to "call [her] when he was ready to put his clothing on" in light of his known condition following the procedures.

The evidence presented at trial established that a possible side effect of the medications Dwayne received during his procedures is "forgetfulness." Dwayne testified he did not remember being assisted to the bathroom or trying to

dress himself. The Hupkes contended at trial it was therefore negligent for Heikes to instruct Dwayne to wait for her before getting dressed but then leave his clothing on a chair next to him knowing he was "still feeling the effects of the anesthesia." Dr. Frank Pettid, an expert witness for the Hupkes, testified Heikes should have not put Dwayne's clothes next to him "because under the circumstances of his being . . . still under the influence of medications, placing the clothes next to him would give him the false impression that . . . he can do this on his own."

However, Heikes testified in her experience most patients "remember[ed] what was happening" within an hour after receiving Versed. She closely monitored Dwayne throughout the procedures and assessed his recovery for approximately thirty minutes following his procedures. She did not help him to the bathroom until she was satisfied he was "stable" as indicated in part by his ability to engage in "normal conversation" and respond appropriately to her questions. Heikes testified it was "routine to have all patients have you in there when they stood up to get dressed." Therefore, after situating Dwayne in the bathroom, Heikes testified she "told him to sit and call me when he was ready to put his clothing on."

Courtney Jackson testified that she helped establish the "nursing protocol" at Family Health Care when she was employed there as a registered nurse. She stated Heikes's verbal instructions to Dwayne and her care for him following his procedures were appropriate and within protocol. Myrna Mamaril, a clinical nurse specialist certified in "post-anesthesia" recovery, likewise testified it is not inappropriate in her experience to verbally instruct a patient who had been

administered Versed because the forgetfulness associated with the medication does not interfere with a patient's ability to comprehend and follow verbal instructions. Dr. Kolegraff, a general surgeon who had performed approximately "5 to 10,000" colonoscopies, also testified Heikes's care for Dwayne following the procedure was consistent with the care nurses provided after procedures he performed.

Upon review of the record, we find sufficient evidence in the record to support the jury's verdict in favor of Family Health Care. We therefore conclude the district court did not err in denying the motion for new trial. The judgment of the district court is affirmed.

IV. CONCLUSION.

The Hupkes failed to preserve error on their claims that the court erred in admitting the challenged evidence because they did not object to any of the evidence at trial. There is sufficient evidence in the record to support the jury's verdict in favor of Family Health Care. We therefore conclude the district court did not err in denying the motion for new trial that claimed the verdict was not supported by sufficient evidence. The judgment of the district court is affirmed.

AFFIRMED.