IN THE COURT OF APPEALS OF IOWA

No. 9-089 / 08-0285
Filed May 29, 2009

NATHANIEL GARDNER, by his Conservator, IOWA STATE BANK, and his Parent and Next Friend, DEBRA GARDNER; and DEBRA GARDNER, Individually,
Plaintiffs-Appellees,

vs.

BROADLAWNS MEDICAL CENTER, LARRY LINDELL, M.D., and ROBERT RAILEY, M.D.,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Defendants appeal an adverse jury verdict in a medical negligence case. **AFFIRMED**.

David L. Brown, Chester C. Woodburn III, and Alexander E. Wonio of Hansen, McClintock & Riley, Des Moines, and Robert D. Houghton and Nancy J. Penner of Shuttleworth & Ingersoll P.L.C., Cedar Rapids, for defendants-appellants.

Frederick James of The James Law Firm, Des Moines, and Kenneth M. Suggs of Janet, Jenner & Suggs, L.L.C., Baltimore, Maryland, and Kristin H. Johnson, Clive, for plaintiffs-appellees.

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

EISENHAUER, J.

Mother Debra Gardner and son Nathaniel Gardner filed suit against Broadlawns Medical Center, Dr. Lindell, and Dr. Railey (Broadlawns) alleging medical negligence during Nathaniel's delivery. Additional allegations of medical negligence against Blank Children's Hospital were settled before trial. Nathaniel incurred brain damage resulting in cerebral palsy and other injuries. After a lengthy trial in November/December 2007, the jury found in favor of the plaintiffs and allocated damages between Broadlawns and Blank. Defendants appeal the adverse verdict claiming the court erred: (1) in sustaining the plaintiffs' pretrial motion in limine, and (2) in failing to order a mistrial on the first day of trial. Finding no abuse of discretion by the trial court, we affirm.

I. Motion in Limine.

Before trial the plaintiffs moved in limine to preclude the defendants from making any reference to Debra's prior methamphetamine use. Originally, the trial court denied the motion. However, in a supplemental order following the pretrial conference, the motion was granted and the evidence was excluded. The court ruled any probative value would be substantially outweighed by considerations of unfair prejudice under Iowa Rule of Evidence 5.403.

The issue was again addressed when the court rejected the defendants' motion for new trial. The court reaffirmed its exclusion of the evidence while finding: "It is undisputed that [Debra] had previously used methamphetamine, but had stopped using the drug sometime prior to Nathaniel's conception."

On appeal, the defendants claim the court erred in excluding the evidence. We review the district court's ruling on the admissibility of evidence for an abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). The party claiming an abuse of discretion must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id*.

Relevant evidence is evidence having any tendency to make a fact of consequence "more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. However, "even relevant evidence should not be admitted when 'its probative value is substantially outweighed by the danger of unfair prejudice . . . .'" *Graber,* 616 N.W.2d at 637-38 (citing Iowa R. Evid. 5.403). Thus, Iowa courts undertake a two-step analysis. *Id*. at 638. First, the court determines if the contested evidence is relevant. *Id*. Second, if the evidence is relevant, the trial court exercises its discretion to "determine whether its probative value was outweighed by its prejudicial effect." *State v. Brewer*, 247 N.W.2d 205, 214 (Iowa 1976).

"The probative value of evidence is different than the 'relevancy' of evidence." *State v. Cromer*, ___N.W.2d ___, ___ (Iowa 2009). "Relevancy relates to the tendency of evidence 'to make a consequential fact more or less probable.'" *Id*. (quoting *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988)). In contrast, the "probative value" of evidence gauges the strength and force of the relevancy tendency. *State v. Rodriquez*, 636 N.W.2d 234, 240 (Iowa 2001).

"Unfair prejudice arises when the evidence prompts the jury to make a decision on an improper basis, often an emotional one." *Waits v. United Fire & Cas. Co*., 572 N.W.2d 565, 569 (Iowa 1997). Examples of prejudicial evidence include evidence that arouses the jury's sense of horror, or provokes the jury's instinct to punish, or triggers other intense reactions. *Rodriquez*, 636 N.W.2d at 240. In its discretionary weighing of probative value/unfair prejudice, the court considers "the degree to which the jury will probably be roused by the evidence to overmastering hostility." *Id*.

Broadlawns first argues the evidence was relevant to causation and credibility and further claims the court erred in weighing the evidence in its determination of probative value. However, the Iowa Supreme Court recently utilized a similar analysis while gauging "the strength and force of the relevancy tendency." *See Cromer*, ___N.W.2d at ___. The *Cromer* court concluded evidence had "limited probative value" and further stated "the probative value of the statements . . . was ultimately diminished" by the circumstances by which they were obtained. Under a rule 5.403 analysis, the circumstances "tended to make the statements less probative of the ultimate issue." *Cromer*, ___N.W.2d at ___. The *Cromer* court, therefore, analyzed the degree of probability and assigned the evidence less weight in the balancing process.

The district court here concluded the evidence was relevant and somewhat probative as it analyzed the evidence's "strength and force," stating:

> If the defendants had been given carte blanche in presenting the factual background regarding [Debra's] prior drug use, its only benefit would have been to arguably support a theory of causation that was unreliable at best and conjectural at worst. The court was

> perhaps being generous when it concluded that this evidence was even of slight probative value.

We find no abuse of discretion in the court's analysis.

Broadlawns next argues the danger of unfair prejudice to Debra did not outweigh the probative value of the evidence and the defendants' "substantial right to a fair trial was affected by the exclusion of the drug use evidence."

The district court's final motion in limine ruling recognized, "[t]he concern is that the jury will look beyond the medical connection, and merely view [Debra] as a bad person or a drug addict, not worthy of compensation." Further, "the court after considerable reflection has reconsidered this issue, and now concludes that its value is substantially outweighed by the inherently prejudicial nature of evidence of prior drug use, especially where the drug in question is methamphetamine." The court's ruling was considered anew and remained unchanged in the court's denial of the defendants' motion for a new trial:

> The court remains convinced, however, that whatever the probative value of this evidence, it was substantially outweighed by considerations of unfair prejudice. . . . Evidence of prior drug use has been repeatedly identified as unfairly prejudicial, even when potentially probative on a contested issue.

The defendants here shoulder a heavy burden. We reverse on issues of prejudice "only when we find a clear abuse" of the court's discretion. *Shawhan v. Polk County*, 420 N.W.2d 808, 809 (Iowa 1988). Clear abuse is required because the balancing process required by rule 5.403 "is no trivial task. Wise judges may come to differing conclusions in similar situations." *Rodriquez*, 636 N.W.2d at 240. "Accordingly, much leeway is given trial judges who must fairly weigh probative value against probable dangers." *Id*.

Here, the court specifically stated its ruling was made "after considerable reflection." Further, "there are few subjects more potentially inflammatory than narcotics and thus such evidence should usually be excluded in a non-narcotics trial . . . ." *Shawhan*, 420 N.W.2d at 810 (quoting *United States v. Ong*, 541 F.2d 331, 339-40 (2d Cir. 1976)). Confronted with the evidence of Debra's prior drug use, there is a serious danger the jury would decide the case based on emotions, an improper basis, and conclude Debra was a "bad person" or "drug addict" and thus less entitled to recover damages. *See Estate of Long v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 91 (Iowa 2002) (upholding exclusion of evidence of drug use). Therefore, the trial court could reasonably conclude any probative value was substantially outweighed by not only the danger, but the likelihood, of unfair prejudice. *See Shawhan,* 420 N.W.2d at 810. After considering the leeway we afford trial judges in the balancing process and the "clear abuse" standard of review, we do not find an abuse of discretion in the trial court's exclusion of the evidence.

II. Denial of Mistrial.

Defendants also argue "numerous and cumulative errors require a new trial." Specifically, they claim the court should have granted a new trial due to error in denying their three motions for mistrial concerning: (1) an incorrect statement of the law made by plaintiffs' counsel during opening statements, (2) irrelevant expert evidence on negligence, and (3) inadmissible hearsay by an expert's reading from a medical treatise.

"The scope of review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion." *Clinton Physical Therapy Serv., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). If the motion is based on a discretionary ground, we review for abuse of discretion. *Id*. "A ruling on a motion for new trial following a jury verdict is a matter for the trial court's discretion." *Condon Auto Sales & Serv., Inc., v. Crick*, 604 N.W.2d 587, 595 (Iowa 1999). Additionally, "[t]rial courts are vested with broad discretion in determining whether to grant a mistrial," which is considered "an extreme remedy." *Yeager v. Durflinger*, 280 N.W.2d 1, 7 (Iowa 1979). "Such discretion is recognition of the trial court's better position to appraise the situation in the context of the full trial." *Id*. Therefore, we review for an abuse of discretion.

Broadlawns argues a mistrial was warranted when, during plaintiffs' opening statement, counsel stated Iowa law held Broadlawns responsible for all damages, even if Blank was found to have contributed to those damages. In denying a new trial on this issue, the court ruled:

> This portion of counsel's remarks, while erroneous, did not rise to the level of misconduct justifying a mistrial. . . . Counsel (after the motion was urged in chambers and denied) immediately reminded the jury that they were not to regard his comments as authoritative on the law. The jury was repeatedly told by the court that the sole source of the law they were to apply would be the court, and was instructed on this proposition as well. Any impact from counsel's erroneous description of Iowa law in his opening remarks was appropriately cured in these admonitions to the jury from the court.

We cannot assume that the jury failed to follow the court's instructions and, after our review of the record, find no abuse of discretion.

Broadlawns' second claimed error concerns plaintiffs' questioning on whether Broadlawns' prenatal care was substandard. The court sustained Broadlawns' objection, immediately told the jury Debra's prenatal care is not an issue, and stated: "The question should not have been asked and the answer will be stricken from the record. Do not consider it in your deliberations." The court ruled, "[t]he question, albeit improper, did not warrant a mistrial then or a new trial now," and explained:

> First, it represents a single question contained within a trial that spanned two and one-half weeks. The court is reluctant to conclude the prejudicial nature of the question and response would have been so potent in the jury's mind as to outweigh the substantial balance of the evidentiary record. . . .
>
> This is especially true where, as here, the court admonished the jury to disregard the question and resulting answer. . . .

Although we agree the evidence was improper, "[n]ot every erroneous admission of evidence requires a reversal." *Graber*, 616 N.W.2d at 638. While prejudice is presumed, reversal is only warranted when "a substantial right of the party is affected." *Id*. (quoting Iowa R. Evid. 103 (*a*)). "Consequently, this court should reverse only when justice would not be served by allowing the trial court judgment to stand." *Shawhan*, 420 N.W.2d at 810. With these principles in mind, we find no abuse of the trial court's broad discretion. The court's admonition to the jury was sufficient to cure any prejudice that may have resulted.

Broadlawns' third claimed error is the trial court's failure to grant a mistrial after the introduction of inadmissible hearsay when one witness was incorrectly allowed to read a portion of a single page from a medical treatise. The court

admitted it utilized "an incorrect standard for admission that [it] reconsidered shortly thereafter." On its own initiative, on the next day of trial the court told the jury of the error and, in a very lengthy and detailed instruction, admonished the jury to not consider the treatise evidence. In denying Broadlawns' motion for new trial, the court noted Broadlawns provided no specificity "as to the precise nature of the claimed prejudice," and ruled:

> The mere fact that the court may have utilized an inappropriate standard for admission of a small portion of a learned treatise on one occasion during such a prolonged trial is not in and of itself grounds for granting a motion for mistrial.

The trial court properly admonished the jury to disregard the evidence, we have no reason to conclude the jury ignored the court's instruction, and our review of the record shows no abuse of discretion.

Finally, Broadlawns argues when the above-discussed errors are considered together, a new trial is warranted. Three errors during the course of a lengthy trial, all of which were corrected, even when considered together, do not lead us to the argued conclusion.

AFFIRMED.