

IN THE COURT OF APPEALS OF IOWA

No. 9-265 / 08-0593
Filed June 17, 2009

**JOHN J. BURKE, SHERYL A. BURKE,
JOHN J. BURKE, as Parent and Next
Friend of AVA BURKE and OLIVIA BURKE,**
Plaintiffs-Appellants,

vs.

**ROBERT J. BRIMMER and PHYSICIANS'
CLINIC OF IOWA, P.C.,**
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady,
Judge.

Medical malpractice plaintiffs seek a new trial due to attorney misconduct
in closing arguments. **AFFIRMED.**

H. Daniel Holm Jr. and David A. Stamp of Ball, Kirk, & Holm, P.C.,
Waterloo, for appellants.

Jack Hilmes and Eric G. Hoch of Finley, Alt, Smith, Scharnberg, Craig,
Hilmes & Gaffney, P.C., Des Moines, for appellees.

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

EISENHAUER, J.

The sole issue before us is whether the trial court erred in not granting the Burkes' motion for a new trial in their unsuccessful medical malpractice action against Robert J. Brimmer, M.D. and Physicians Clinic of Iowa, P.C. (Brimmer). The Burkes argue a new trial is warranted due to prejudicial misconduct during closing argument when defense counsel showed the jury a color photograph. This photograph was an intra-operative, intra-abdominal picture taken by Dr. Brimmer immediately after completion of the surgery at issue.

The trial court had previously ruled the color photograph inadmissible because Brimmer had not voluntarily disclosed it to the Burkes during discovery. Although not admitted into evidence, Dr. Brimmer and defense witnesses were allowed to testify as to what they observed in the color photograph and were allowed to use colored markers to create greater detail on the black and white copy of the contested photograph. The black and white copy was disclosed during discovery and was admitted into evidence. Because the Burkes' expert testified prior to Brimmer's disclosure of the color photograph, the Burke's expert was not able to view it and testify about it.

I. Scope of Review.

Our review is for correction of errors of law. Iowa R. App. P. 6.4. "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 Plan, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). If the motion and ruling are based on a discretionary ground, such as attorney misconduct, we

review for an abuse of discretion. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). An abuse of discretion occurs when the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976).

II. Attorney Misconduct.

As a preliminary matter we must determine whether the Burkes successfully preserved error. To properly preserve for review alleged error of counsel during jury argument, opposing counsel must make a timely objection and bring the alleged misconduct to the attention of the presiding judge. *State v. Phillips*, 226 N.W.2d 16, 18 (Iowa 1975). The Burkes' counsel interrupted opposing counsel's closing argument and objected to counsel's using the color photograph in argument and showing it to the jury. Therefore, error was properly preserved.

The Burkes argue attorney misconduct prejudiced their case and altered the outcome of the trial because both their treating surgeon and retained expert "never had an opportunity to view and comment" upon the excluded color photograph containing enhanced details. Further, the timing of defense counsel's display of the color photograph to the jury resulted in "one of the last actions the jury saw was [Burke's] counsel attempting to prevent them from seeing a piece of evidence they had not seen prior to that time."

Initially, we must determine if misconduct occurred. Counsel has no right to create evidence by his or her arguments. *Rosenberger Enter., Inc. v. Ins.*

Serv. Corp., 541 N.W.2d 904, 907 (Iowa Ct. App. 1995). We conclude counsel misconduct did occur and adopt the findings of the district court:

The court finds that counsel for [Brimmer], Jack Hilmes, deliberately sought to frustrate the court's ruling by showing an exhibit that, after extensive discussion and argument, had been excluded from the jury's consideration as an exhibit. This kind of behavior is intolerable.

However, a finding of misconduct does not end our inquiry. A new trial based on attorney misconduct is warranted only when "it appears that prejudice resulted or a different result would have been probable but for any misconduct." *Id.* Additionally, trial courts have "considerable discretion" in determining whether any alleged misconduct was prejudicial or affected the outcome. See *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992). Such discretion is warranted because the trial court "has before it the whole scene, the action and incidents of the trial as they occur, and is in a much better position to judge whether the [aggrieved party] has been prejudiced by misconduct of opposing counsel." *Id.* Therefore, reviewing courts will not interfere with the trial court's determination "unless it is reasonably clear discretion has been abused." *Id.*

Here the district court denied the motion for new trial and ruled "the misconduct did not affect the outcome of the trial because there was more than adequate support for the jury's failure to find liability." After reviewing the record and utilizing the "considerable discretion" standard of review, we do not find a clear abuse of discretion in the trial court's denial of a new trial to the Burkes.

AFFIRMED.