

IN THE COURT OF APPEALS OF IOWA

No. 9-371 / 08-0651
Filed June 17, 2009

**HEATHER ALVAREZ, Individually and
As Administrator for the ESTATE OF JOSE
WILLIAM ALVAREZ, JR.,**
Plaintiffs-Appellants,

vs.

GARY LEE JENNETT, M.D.,
Defendant-Appellee.

Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson,
Judge.

The plaintiff appeals from the denial of her motion for mistrial.

AFFIRMED.

Alfredo Parrish of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry &
Fisher, L.L.P., Des Moines, for appellants.

Nancy J. Penner, Robert D. Houghton, and Jennifer E. Rinden of
Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee.

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

EISENHAUER, J.

Heather Alvarez brought suit against Dr. Gary Lee Jennett following the death of her infant son, Jose William Alvarez. She claimed Dr. Jennett committed medical malpractice. During trial, Alvarez moved for mistrial based on (1) allegedly inaccurate interrogatory responses that Dr. Jennett knew to be false and (2) questions asked of Jennett regarding her trial attorney's personal knowledge and the manner in which he conducted pre-trial discovery. The district court denied the motion and the jury returned a verdict in favor of Dr. Jennett. Alvarez appeals claiming error in the denial of the motions for mistrial.

The district court has considerable discretion in determining whether to grant a mistrial. *United States Borax & Chemical Corp. v. Archer-Daniels-Midland Co.*, 506 N.W.2d 456, 461 (Iowa Ct. App. 1993). Such discretion is a recognition that the district court is in a better position to appraise the situation in the context of the full trial. *Id.* An abuse of discretion occurs when the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). 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. *Id.*

We first address Alvarez's contention mistrial should have been granted as a discovery sanction. In his answers to interrogatories, Dr. Jennett did not disclose a conversation he had with a nurse. The nurse stated she had erroneously marked Jose William Alvarez's condition at discharge as "serious."

The nurse informed Dr. Jennett of the error or “typo” the following day. Alvarez argues Dr. Jennett did not provide this information in response to Interrogatory No. 2, which asked about statements Dr. Jennett had obtained regarding any of the events referred to in the petition, and in response to Interrogatory No. 14, which asked about conversations with any hospital staff present during any stage of Jose William Alvarez’s care.

Dr. Jennett testified at trial regarding his conversation with the nurse. Alvarez claims this is the first time Dr. Jennett alleged the discharge documents mistakenly listed Jose William Alvarez’s condition as “serious” rather than “satisfactory.” Although Dr. Jennett did not provide the information in his initial discovery answers in July 2006, he supplemented his discovery response on February 14, 2008, directing Alvarez to a supplemental discovery response made two days earlier by a co-defendant, which disclosed the nurse “will testify she made a documentation error when she recorded that the baby was ‘serious’ at the time of discharge when she meant to hit the ‘satisfactory’ computer key.” By citing carefully selected portions of Jennett’s testimony, Alvarez contends Jennett admitted his initial discovery response was false and he made no effort to correct the falsity. However a complete reading of the record and review of all the discovery responses discloses Alvarez was made aware of the claim of mistake well ahead of trial.

In addition Alvarez cites no Iowa authority for the proposition a false interrogatory answer is grounds for a new trial. It is common for answers to discovery questions to be used to impeach witnesses' testimony. Alvarez's counsel did just that and the fact finder had the opportunity to assess Jennett's credibility. The district court did not abuse its discretion in denying the motion for mistrial on this basis.

Alvarez also contends the court should have granted a mistrial because defense counsel improperly asked questions regarding her trial attorney's knowledge and discovery strategy. Specifically, defense counsel questioned Dr. Jennett regarding whether plaintiff's counsel had ever contacted him to depose him or the nurse. Alvarez complains "[t]he implication left with the jury is that Plaintiff and her counsel were in some manner or respect derelict in their duties, failing to engage in required fact finding measures prior to trial." She alleges the admission of the evidence was "improper, irrelevant, and unfairly prejudicial."

The trial court overruled the motion for mistrial stating:

But I suspect the jury may have an impression based on questioning by Mr. Parrish that something was not right there in terms of discovery responses. For that reason, I thought it fair with respect to the second ground of your motion to permit Mr. Houghton to get into the questioning that you objected to.

We conclude Alvarez has failed to show how she was prejudiced by any improper questions posed by defense counsel regarding whether her trial counsel deposed or attempted to depose Dr. Jennett or the nurse. See *Carter v. Wiese Corp.*, 360 N.W.2d 122, 130 (Iowa Ct. App. 1984) (holding that in order to warrant a mistrial, an improper reference to insurance must be prejudicial to the

moving party). These questions do not go to the issue of liability and do not inflame the jury's passion. As such, we cannot find the district court abused its discretion in denying of the motion for mistrial.

AFFIRMED.