IN THE COURT OF APPEALS OF IOWA

No. 9-378 / 08-0902
Filed July 22, 2009

KERRY HORN,
Plaintiff-Appellee,

vs.

BRADLEY A. CHICOINE, D.C.,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

The defendant appeals from the district court's denial of his motion for directed verdict, or in the alternative a new trial, alleging six separate errors. **AFFIRMED.**

Joseph Fitzgibbons, Estherville, for appellant.

Paul Lundberg, Sioux City, for appellee.

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

MANSFIELD, J.

In this chiropractic malpractice case, the defendant, Dr. Bradley Chicoine, appeals a judgment in the amount of $150,000 that was entered on a jury verdict in favor of the plaintiff, Kerry Horn. After considering Dr. Chicoine's six separate claims of error, we affirm.

I. Background Facts and Procedural History.

The jury could have found the following facts based upon the evidence presented:

This case arises from the chiropractic treatment of Horn by Bradley Chicoine, D.C., for lower back and neck pain. Horn is a forty-three-year-old welder and steel fabricator with fifteen years of experience. Horn began seeing Dr. Chicoine in January 2004. He complained of neck and low back symptoms and received eight chiropractic treatments from Dr. Chicoine. The treatments ended in late February 2004, with Horn no longer complaining of any symptoms.

On August 17, 2005, Horn again sought treatment from Dr. Chicoine for neck and low back pain. Horn received fourteen chiropractic treatments, the last being administered on November 4, 2005. It appears Horn's back pain was relieved during this time, but his neck pain began to increase in early September. On September 15, 2005, Horn went to Dr. Chicoine's office with increased neck pain, pain in his shoulders, and numbness radiating into his hands. In an attempt to relieve this pain, Dr. Chicoine resorted to manual adjustments of Horn's cervical spine (neck area). These manual adjustments continued through the November 4 visit, yet Horn's neck and shoulder pain remained.

On November 4, 2005, after the manual adjustment did not relieve the pain, Dr. Chicoine tried a new technique on Horn's neck, a MedX machine. The MedX machine is used to test and strengthen a patient's cervical spine, employing six separate positions. Dr. Chicoine's office manager was in charge of administering the MedX treatment to patients. After the first two positions were completed, Horn experienced severe pain on attempting the third position. The MedX treatment was aborted, and Horn was given ultrasound and light massage to help alleviate the pain he was experiencing. After this session, Horn never returned to Dr. Chicoine.

About a week later, Horn went to the emergency room at St. Luke's Hospital. Although the hospital records mention only a finger laceration, Horn testified that he also complained of neck pain and that was indeed the primary reason for his visit. The next day, November 14, 2005, Horn called the office of Dr. Froggatt, an orthopedist, for an appointment regarding his neck and shoulder pain. The first appointment available was November 22, 2005. After an initial examination, Dr. Froggatt ordered an MRI to be performed on Horn's cervical spine that same day. The MRI revealed disk herniations at two levels of Horn's cervical spine. Dr. Froggatt referred Horn to an orthopedic spine specialist, Dr. Samuelson, who performed spinal fusion surgery on January 3, 2006. Horn remains on a ten-pound lifting restriction and, according to Dr. Froggatt, has sustained a nine percent permanent functional impairment to the body as a whole.

On June 30, 2006, Horn brought this medical malpractice case against the chiropractor, alleging Dr. Chicoine's negligence in treating his cervical spine

resulted in permanent injury to him. Trial commenced on November 26, 2008. Dr. Froggatt testified in a pretrial deposition that he believed it was unlikely that Horn's back injuries were caused by, or that his back surgery was necessitated by, Dr. Chicoine's chiropractic care. However, on Horn's motion, the district court excluded these opinions at trial because Dr. Froggatt also testified he did not know what chiropractic care Dr. Chicoine had provided. At the same time, over objection, the district court allowed Horn's only expert, a chiropractor named Dr. Ferezy, to testify that Dr. Chicoine's manipulations and use of the MedX machine aggravated Horn's spinal condition and were a "contributing factor" to his requiring back surgery.

In addition, a problem with the DVD of Dr. Ferezy's deposition occurred at trial. (Dr. Ferezy did not testify in person.) After the direct examination of Dr. Ferezy by plaintiff's counsel had been played for the jury, the DVD began skipping. Following a non-reported bench conference, Dr. Chicoine's counsel read the transcript of his cross-examination of Dr. Ferezy to the jury. Subsequently, Dr. Chicoine moved for a mistrial at the close of Horn's case, asserting that he had suffered unfair prejudice, but this motion was overruled.

Dr. Chicoine also attempted to introduce evidence at trial of Horn's prior drug use, as well as his prior misdemeanor convictions for OWI, various driving offenses, possession of drug paraphernalia, and solicitation of prostitution. The district court excluded this evidence, despite Dr. Chicoine's argument that Horn's acknowledged drug use was inconsistent with his denials of prior drug use in his medical records that had been admitted at trial.

After deliberations, the jury returned a verdict for Horn in the amount of $150,000, with separate figures for six categories of damages therein. No request to poll the jury was made by either party. Subsequently, Dr. Chicoine filed a timely motion for judgment notwithstanding the verdict, or in the alternative, for new trial. On the day of the hearing, Dr. Chicoine supplemented his motion with a juror affidavit. The court struck the affidavit and ultimately denied Dr. Chicoine's motion.

Dr. Chicoine now appeals. He asserts that the district court erred: (1) in excluding Dr. Froggatt's opinions that Horn's injuries were unlikely to have been caused by Dr. Chicoine's course of treatment; (2) in admitting Dr. Ferezy's testimony connecting Dr. Chicoine's course of treatment to Horn's injuries and subsequent surgery; (3) in excluding evidence of Horn's use of methamphetamine at the time he was undergoing treatment with Dr. Chicoine; (4) in upholding the jury's award of $16,057.97 in damages for future pain and suffering; (5) in denying a mistrial when the DVD of Dr. Ferezy's deposition was used to present his direct testimony but only a transcript was used to present his testimony under cross-examination; and (6) in allowing the jury's "arbitrary" verdict—that was allegedly in the nature of a "quotient" verdict—to stand.

II. Standard of Review.

Most of the claims of error covered by this appeal are reviewed for abuse of discretion. "The admission of expert testimony rests in the discretion of the district court, and we will not reverse its decision absent manifest abuse of that discretion." *Gail v. Clark*, 410 N.W.2d 662, 673 (Iowa 1987) (citing *DeBurkarte v. Louvar*, 393 N.W.2d 131, 138 (Iowa 1986)). When reviewing questions on the

admissibility of evidence, "issues of relevancy and prejudice are matters normally left to the discretion of the trial court; we reverse the trial court only when we find a clear abuse of that discretion." *Shawhan v. Polk County*, 420 N.W.2d 808, 809 (Iowa 1988). Additionally, review of denial of a mistrial is for abuse of discretion since the trial court is in a "better position to appraise the situation in the context of the full trial." *Yeager v. Durflinger*, 280 N.W.2d 1, 7 (Iowa 1979) (citations omitted).

Although Dr. Chicoine asserts that the admission of Dr. Ferezy's testimony should be reviewed for errors at law, we disagree. Though the scope of chiropractic practice is governed by statute in Iowa, the specific issue here was the admission of expert testimony. Because this court is essentially being called on to second-guess the admission of that testimony, the standard of review is for abuse of discretion. *See Shawhan*, 420 N.W.2d at 809.

Finally, with respect to the trial court's failure to direct a verdict for Dr. Chicoine on Horn's claim for future pain and suffering, notwithstanding the parties' consensus otherwise, we think a different standard of review applies. The question here is whether "substantial evidence" supports the plaintiff's claim, that is, whether reasonable minds could accept that evidence as adequate. *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 313 (Iowa 1998) (citations omitted).

III. Analysis.

A. Exclusion of Dr. Froggatt's Opinion Testimony.

Dr. Chicoine initially contends the trial court erred in excluding the opinion testimony of Dr. Froggatt, a treating orthopedic specialist, as to the cause of Horn's injuries. In correspondence with Horn and his counsel, and in his

recorded deposition testimony, Dr. Froggatt stated that even though chiropractic treatment was a "possible cause of Horn's injury, it was most likely not the probable cause." Horn successfully opposed the admission of this testimony, based on Dr. Froggatt's acknowledgment that he did not know what chiropractic treatment Horn had actually received.[1]

We believe the district court did not abuse its discretion in this ruling. Given Dr. Froggatt's lack of familiarity with the underlying facts, it was not error for the court to exclude his expert testimony. Although Iowa does maintain a liberal expert opinion admission policy, "liberality does not mean an expert opinion may be admitted if it is based on nothing more substantial than conjecture or guess." *Tiemeyer v. McIntosh*, 176 N.W.2d 819, 824 (Iowa 1970) (citations omitted). Dr. Froggatt admitted he did not know the standards for chiropractic care and he was not aware of the treatment Horn received from Dr. Chicoine. His opinion of causation was based on his understanding of "the usual chiropractic care," rather than the specific chiropractic care provided by Dr. Chicoine. It was based simply on what he believed Horn's chiropractic care might have entailed, and was "nothing more substantial than conjecture or guess." *Id.*; *see also Ort v. Klinger*, 496 N.W.2d 265, 267 (Iowa Ct. App. 1992)

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[1] As Dr. Froggatt testified in his deposition, "I have no idea of the treatment that Mr. Horn received." He did go on to state that his opinions were based on "the usual chiropractic care," which involves a MedX machine. However, Dr. Froggatt acknowledged that he did not know what treatment Horn had or had not received in addition to the MedX machine. As he put it:

> Q. You don't know whether Mr. Horn also had chiropractic manipulations to his cervical spine. A. That's correct.
>
> Q. And knowing—or that information would be something that you would have to look at in terms of whether that would change your opinion? A. Yes, sir.

(affirming district court's exclusion of expert testimony when doctor did not know type of treatment patient had received).

Furthermore, a trial court's decision regarding expert testimony will not be overturned "absent an abuse of that discretion and prejudice to the complaining party." *Olson*, 579 N.W.2d at 309 (citations omitted). Dr. Chicoine retained four experts to testify on his behalf—three chiropractors and one neurosurgeon. All four of these individuals reviewed Dr. Chicoine's course of care, and all were permitted to testify that his treatment did not cause Horn's injuries. We do not believe the trial judge abused his discretion in excluding the testimony of a fifth expert who admittedly did not have the same base of knowledge.[2]

Dr. Chicoine also argues that Horn waived any objection to the admissibility of Dr. Froggatt's opinions by posing questions to him about his opinions at deposition. We disagree. In the deposition, Horn's counsel first asked for Dr. Froggatt's opinions (which he had already stated in his letters), and then elicited facts which showed that those opinions lacked the necessary foundation. We do not believe this fairly typical manner of taking a deposition amounts to an Iowa Rule of Civil Procedure 1.717(5) waiver of objections to the admissibility of the original opinions.

[2] Dr. Chicoine points out that Dr. Froggatt, unlike the other experts who testified on his behalf, was a treating physician rather than a retained expert. All other things being equal, this might be expected to enhance his credibility before the jury. On the other hand, the district court, who unlike us saw and heard these witnesses, stated that Dr. Ferezy (Horn's retained expert) "was much better than Dr. Froggatt insofar as his presentation and delivery and somebody that you would want to listen to." In the end, we reiterate our belief that the district court's exclusion of Dr. Froggatt's opinion testimony was within the bounds of its discretion.

B. Admission of Dr. Ferezy's Opinion Testimony.

To establish negligence in a medical malpractice case, the plaintiff must show (1) the standard of care for that profession, (2) the deviation from that standard, and (3) the causal relationship between the deviation and the injury. *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992) (citing *Daboll v. Hoden*, 222 N.W.2d 727, 734 (Iowa 1974)). Additionally, only an expert can "testify and establish the standard of care" required by physicians in that particular school of medicine. *Id*. (citing *Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992); *Perin v. Hayne*, 210 N.W.2d 609, 618 (Iowa 1973)).

Dr. Chicoine urges that the trial court erred when it allowed the plaintiff's liability expert, Dr. Ferezy, to testify on the third point above. In particular, Dr. Chicoine asserts that Dr. Ferezy, while qualified as an expert witness in the field of chiropractic care, was not qualified to testify as to whether Horn needed surgery as a result of Dr. Chicoine's course of treatment—only an orthopedic surgeon could do that.

Dr. Chicoine relies heavily on two cases to support his position. In *Logan v. Dayton Hudson Corp.*, a slip-and-fall case, the lower court allowed a chiropractor to testify as an expert that the plaintiff "might need surgical intervention at a future date." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). Upon motion of the defendant, the lower court later reversed its ruling and granted a new trial. *Id*. In affirming that decision, the U.S. Court of Appeals for the Sixth Circuit noted that the qualifications for the chiropractor did not include surgery or the ability to diagnose if surgery was required. *Id*. In addition, the court pointed out that none of the surgeons in the case testified the

plaintiff would need surgery. *Id*. at 791. The appellate court did not find an abuse of discretion in the grant of a new trial by the district court. *Id*.

Dr. Chicoine's other authority, *Joseph v. Kerkvliet*, is an automobile accident case. *Joseph v. Kerkvliet*, 642 N.W.2d 533, 535-36 (S.D. 2002), *superseded on other grounds by rule as recognized in In re Estate of Duebendorfer*, 721 N.W.2d 438, 444 (S.D. 2006). Three years after the accident, the plaintiff suffered two other traumatic incidents. *Id*. at 534. Thereafter, the plaintiff consulted a chiropractor who suggested that a spinal fusion operation might be necessary. *Id*. The plaintiff underwent back surgery prior to trial. *Id*. The trial court, however, granted a motion in limine to exclude evidence of that surgery. *Id*. On appeal, the South Dakota Supreme Court upheld the trial court's ruling that the testimony of the plaintiff's chiropractor was insufficient to establish that the 1995 automobile accident necessitated the 1999 spinal fusion surgery. *Id*. at 536.

We believe those cases are distinguishable. Neither was a chiropractic malpractice case. In this case, both sides presented testimony on whether Dr. Chicoine's actions caused or aggravated Horn's herniated disk condition. The plaintiff offered one chiropractor (Dr. Ferezy) who testified that it did; the defendant offered three chiropractors who testified that it did not. The qualifications of a chiropractor to testify on that issue are not really disputed here. Instead, Dr. Chicoine's real argument is that a chiropractor should not have been allowed to testify as to Horn's need for surgery. However, the problem with this strand of Dr. Chicoine's argument is that, given Horn's disk condition, the need for surgery was not really contested. Indeed, the neurosurgeon who was called

as a witness by Dr. Chicoine conceded the need for surgery; he just did not agree that the disk condition was caused by Dr. Chicoine's course of care.

In short, we do not believe the district court abused its discretion in admitting Dr. Ferezy's testimony that Dr. Chicoine's course of treatment was a contributing factor in Horn's having to undergo spinal surgery, given (1) the parties' apparent agreement that chiropractors were qualified to testify as to whether Horn's disk condition resulted from negligent chiropractic care and (2) the lack of any meaningful dispute in this case that Horn's disk condition by 2006 was serious enough to require surgery.

We note also that we are reviewing for an abuse of discretion. We have determined that the district court did not abuse its discretion in admitting Dr. Ferezy's testimony regarding causation. This does not mean that a contrary decision, to exclude the chiropractor's testimony as occurred in *Logan* or *Joseph*, would have necessarily been an abuse of discretion. We leave that determination for another case and another day.

C. Exclusion of Drug Use.

Dr. Chicoine also contends the trial court erred in prohibiting the introduction of Horn's alleged methamphetamine use. As Dr. Chicoine explains, he sought to introduce that evidence to undercut Horn's credibility and reliability, since at the time Horn was using methamphetamine he was also denying to his healthcare providers that he used recreational drugs.

On October 4, 2005, Horn pled guilty to a possession of drug paraphernalia charge. According to the officer's affidavit, Horn admitted the glass pipe in his possession was used for smoking methamphetamine, and

admitted to smoking methamphetamine the previous day. However, Horn repeatedly denied to his healthcare providers in November and December 2005 that he had been using methamphetamine or any other recreational drugs.

We believe that the district court's exclusion of this evidence was not an abuse of discretion for several reasons. First, as the district court pointed out, possession of paraphernalia could mean a variety of things. What really mattered to Dr. Chicoine was Horn's admission, as contained in the officer's affidavit, that he had smoked methamphetamine. However, that affidavit was hearsay, *see* Iowa R. Evid. 5.803(8)(B)(*i*), and Dr. Chicoine's offer of proof did not include pertinent testimony from either Horn or the officer.

Second, the supreme court has recognized that evidence of drug use is often highly prejudicial. *Shawhan*, 420 N.W.2d at 810.

Third, all lies are not equal. This kind of lie strikes us as somewhat unexceptional. We suspect that many people who give generally accurate and reliable medical histories might nonetheless fail to answer questions about drug use truthfully where that use is seemingly unrelated to the medical conditions for which they are seeking treatment.

In short, we hold that the district court did not abuse its discretion in excluding evidence of Horn's methamphetamine use. Evidence should be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. We believe the trial court engaged in a proper application of rule 5.403.

D. Future Pain and Suffering Damages.

Additionally, Dr. Chicoine asserts that it was error to allow the jury to award future pain and suffering damages because no medical doctor testified that Horn would have any future pain or suffering, and the court should have granted the motion for a directed verdict on this claim. In Iowa, pain suffered right up to the time of trial, combined with evidence plaintiff has not fully recovered, is sufficient for "future pain and suffering [to] be submitted to the jury without medical testimony." *Mariber v. A.M. Servicing Corp.*, 161 N.W.2d 180, 183 (Iowa 1968) (citations omitted). Moreover, "[i]f substantial evidence supports . . . the elements of the plaintiff's claims, the district court should deny the motion." *Olson*, 579 N.W.2d at 313 (citing *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990)).

Horn testified at trial that he still has numbness and no longer does yard work or snow shoveling because it makes his arm twitch and causes soreness in his neck. Dr. Froggatt testified that Horn had incurred a nine percent permanent impairment to his whole body and had not yet fully recovered from his injury. Additionally, Horn was still under the care of Dr. Samuelson, the orthopedic spine specialist, and was still limited to lifting ten pounds or less at the time of trial. We believe the foregoing evidence supports the trial court's decision to submit damages for future pain and suffering to the jury, who could have reasonably found Horn would suffer pain in the future because of his injuries. *See, e.g.*, *Determan v. Johnson*, 613 N.W.2d 259, 261 (Iowa 2000) (affirming grant of directed verdict for insufficient evidence).

E. Reading Transcript vs. Playing DVD.

Dr. Chicoine asserts that his inability to show the DVD of his counsel's cross-examination of Dr. Ferezy resulted in unfair prejudice, and a new trial should have been granted. "The district court has considerable discretion in the matter of whether to afford an aggrieved litigant a new trial. Only when there is a clear abuse of that discretion will we interfere with the court's ruling upon the motion." *Reener v. Hill & Williams Bros., Inc.*, 502 N.W.2d 26, 27 (Iowa Ct. App. 1993) (citations omitted).

Dr. Chicoine cites *Gavlock v. Coleman*, 493 N.W.2d 94, 99 (Iowa Ct. App. 1992), in support of his argument that video testimony carries more weight than a written transcript with the jury. Much time has elapsed since 1992. Video has become ubiquitous, and courtroom video presentations may no longer have the same ability to attract attention they once did. Regardless, the issue in *Gavlock* was whether the Iowa Rules of Civil Procedure even allowed for videotaped depositions to be taken, and the court determined the use of video was not prohibited by the rules. *Id*. However, at no point in its ruling did the court state a combination of playing the video (for some testimony) and reading the transcript (for other testimony) would be grounds for a mistrial. *Id*. Dr. Chicoine cites no authority that directly supports his position. In *Lipke v. Celotex Corp.*, 505 N.E.2d 1213, 1221 (Ill. Ct. App. 1987), the court held that a trial court did not abuse its discretion in refusing to grant a continuance, but rather directing the defendant to read the testimony of its expert, when the sound portion of the video equipment broke down.

In this case, after the malfunction occurred, and there was an unreported conference between the court and counsel, Dr. Chicoine's counsel read the remainder of Dr. Ferezy's testimony to the jury. The district court later explained that it had offered Dr. Chicoine a chance to play the deposition later, or have two different people read the questions and answers. For fear of letting the "jury sit" or losing the "context of the witness testimony," Dr. Chicoine's counsel elected to read the deposition, rather than undertake any of the court's other offered remedies. We find the trial court did not abuse its discretion when it denied the motion for a mistrial.

F. Issue of Irregularity in Jury Proceedings.

Lastly, Dr. Chicoine maintains there was an irregularity in the way the jury arrived at its verdict. On the date of the hearing on Dr. Chicoine's motion for new trial, he filed a supplement to his motion, attaching a juror affidavit purportedly explaining how the verdict was arrived at. Not surprisingly, this juror relates that there was disagreement in the jury room, that the jury ultimately arrived at a $150,000 total verdict, and that the $150,000 was then allocated rather arbitrarily to the various categories of damages. The district court ruled the affidavit was inadmissible. We agree. *See* Iowa R. Evid. 5.606(*b*); *Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988). Even if the affidavit of the juror were considered, it would not establish an impermissible quotient verdict. The affidavit does not indicate that the jurors agreed to submit their own damage figures and to be bound by the average of their respective figures. *Ryan*, 422 N.W.2d at 493 (explaining quotient verdict).

We do not agree with Dr. Chicoine that a combination of trial court errors necessitates a new trial here.

IV. Conclusion.

For the foregoing reasons, we affirm the judgment below.

AFFIRMED.