

**IN THE COURT OF APPEALS OF IOWA**

No. 9-622 / 07-2102  
Filed November 25, 2009

**The Estate of TAMARA M. WILSON**  
**by STUART W. WILSON, Administrator,**  
**and STUART W. WILSON, Individually,**  
Plaintiffs-Appellants,

**vs.**

**THE IOWA CLINIC, P.C., and**  
**DENVILLE ANTHONY MYRIE, M.D.,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, Robert J. Blink,  
Judge.

Plaintiffs appeal from the district court's ruling denying their motion for a  
new trial. **AFFIRMED.**

Roxanne Barton Conlin of Roxanne Conlin & Associates, P.C., Des  
Moines, and Bruce L. Cook of Cook, Brown & Scott, P.L.C., Clive, for appellants.

Robert D. Houghton, Nancy J. Penner, and Jennifer E. Rinden of  
Shuttleworth & Ingersoll, Cedar Rapids, for appellees.

Heard by Sackett, C.J., Vaitheswaran and Danilson, JJ.

**SACKETT, C.J.**

Plaintiffs filed suit alleging the defendants' negligence caused the death of Tamara Wilson. The jury found the plaintiffs proved the defendants were negligent, but determined the plaintiffs failed to prove the negligence was the proximate cause of Tamara's death. The plaintiffs filed a motion for a new trial contending the district court erred in (1) permitting improper rehabilitation of jurors during voir dire, (2) allowing the jury to learn of Tamara's husband's remarriage after her death, and (3) allowing certain expert witnesses to testify as to the cause of Tamara's death. The district court denied the motion for a new trial on each ground and plaintiffs appeal. We affirm.

**I. BACKGROUND.** On June 20, 2003, Tamara Wilson underwent bariatric surgery. Defendant, Dr. Denville Anthony Myrie, performed the gastric bypass operation. Tamara died on December 10, 2003. Her surviving husband, Stuart Wilson, was appointed to serve as administrator of her estate. He filed suit against Dr. Myrie, the Iowa Methodist Medical Center, and The Iowa Clinic, on behalf of Tamara's estate, alleging they were negligent in their postoperative care of Tamara and this negligence caused Tamara's untimely death. He also filed suit individually seeking damages for his loss of Tamara's consortium.

Plaintiffs filed a pretrial motion in limine seeking to exclude certain evidence. They asserted that several of defendants' expert witnesses testified in depositions as to various potential causes for Tamara's death. Plaintiffs' counsel argued that the experts' theories on the cause of Tamara's death should be inadmissible at trial because the testimony was not reliable expert evidence.

Counsel claimed the expert opinions on the cause of Tamara's death were based on speculation and not on a reasonable degree of medical certainty. The court overruled this motion as well as plaintiffs' objections on this ground during trial.

In a supplement motion in limine, the plaintiffs requested the court to exclude any reference to Stuart Wilson's remarriage after Tamara's death. The court also overruled this motion and ruled that Stuart Wilson's remarriage could be introduced during voir dire.

During jury selection, counsel for the plaintiffs sought to have two jurors struck for cause. Plaintiffs' counsel argued the two jurors' answers to questions indicated they were biased against the plaintiffs. One juror had expressed that they agreed with setting a cap on noneconomic damages. Another juror stated that she would have trouble awarding damages for loss of household services. The district court questioned each witness and determined that the jurors recognized their own bias but had the ability to set their leanings aside and follow the court's instructions. Plaintiffs then used peremptory strikes to remove these two jurors.

Trial was held July 16, 2007, through August 3, 2007. The jury returned a verdict finding plaintiffs had proved the defendants were negligent but that the plaintiffs had not proved the negligence was a proximate cause of Tamara's death. The plaintiffs filed a motion for a new trial contending the trial court erred in allowing and engaging in improper rehabilitation of jurors. They also argued the court should not have admitted expert testimony based on speculation or

evidence of Stuart Wilson's remarriage. The motion was overruled and the plaintiffs appeal.

**II. STANDARD AND SCOPE OF REVIEW.** Our review of a denial of a motion for new trial depends on the grounds asserted in the motion and ruled upon by the court. *WSH Prop., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). If the motion and ruling are based on a legal question, our review is for errors at law. *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007). If the motion is based on a discretionary ground, we review it for an abuse of discretion. *Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999). In ruling on motions for a new trial, "the district court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. P. 6.14(6)(c).

**III. JURORS.** The plaintiffs first contend a new trial should have been granted because the district court allowed and engaged in improper rehabilitation of jurors that should have been excused for cause. They assert because the court failed to remove the two jurors for cause, the plaintiffs used two peremptory challenges to strike these jurors and would have preferred to use those peremptory strikes on two other jurors. They contend the plaintiffs' fundamental rights to an impartial jury, due process, and equal protection were compromised because they were denied two peremptory strikes due to the court's failure to remove the two jurors for cause.

The plaintiffs did not raise the due process and equal protection issues before the district court and it was not addressed in the court's ruling so we deem

those constitutional arguments waived. *Prell v. Wood*, 386 N.W.2d 89, 92 (Iowa 1986) (“On appeal, we cannot review an issue which was not presented to the trial court, which includes constitutional claims.”). The plaintiffs did preserve error on their claim that their right to an impartial jury was infringed and that the two jurors should have been removed for cause pursuant to Iowa Rule of Civil Procedure 1.915(6)(j).

It is well settled that the Sixth and Fourteenth Amendments of the federal constitution guarantee the right to an impartial jury. *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S. Ct. 2273, 2277, 101 L. Ed. 2d 80, 88 (1988). Our current standard for evaluating challenges to a jury’s impartiality is outlined in *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1993). In *Neuendorf*, the court adopted the view that

in order to obtain relief under a legal theory that a juror is not impartial it must be shown that that juror actually served in the case. When that juror did not serve in the case, it must be shown that the jury that did serve was not impartial.

509 N.W.2d at 747. The court will not presume there was prejudice because the party was forced to use a peremptory challenge to remove a potentially biased juror. *Id.* Even if a court fails to remove a biased juror for cause and a party must waste a peremptory challenge to strike the juror, to succeed on its claim, the party must prove that the jury that did serve was not impartial. *Id.* This proof cannot be based on speculation but must appear from matters shown in the record. *Id.*

Plaintiffs urge that the *Neuendorf* decision should be overturned. Alternatively, they contend they have met the standard required by *Neuendorf* because the record shows the jury that did serve was not impartial. We are

obligated to follow supreme court precedent and therefore must apply the *Neuendorf* standard. See *State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957) (“If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.”); *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) (“We are not at liberty to overturn Iowa Supreme Court precedent.”). We therefore review the record to determine whether there is a showing that the jury that served was impartial.<sup>1</sup>

After the district court overruled the plaintiffs’ challenges for cause and the final jury was selected, plaintiffs’ counsel, outside the presence of the jury, asserted that if the court had struck the two jurors for cause, counsel would not have needed to use two peremptory challenges on those jurors and would have instead used the peremptory strikes to remove two jurors who were seated on the final jury. Counsel claimed the two jurors that were on the jury would have been removed with the peremptory strikes because they were likely to disfavor the plaintiffs’ case. During voir dire one juror had expressed the view that obese persons lack will power. In addition, the two jurors explained that they had busy schedules and other obligations to tend to during the trial. Both jurors also had worked in the medical field, a characteristic the plaintiffs’ attorney found unfavorable to their case. The attorney argued that these jurors were likely to be

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<sup>1</sup> Plaintiffs also contend that the judge engaged in improper rehabilitation of the two jurors plaintiffs sought to remove for cause. We need not and do not address this argument. Even if the judge did improperly question the jurors, the plaintiffs removed the jurors through peremptory challenges and they did not ultimately serve on the jury. Under *Neuendorf*, our focus must be on whether the plaintiffs were prejudiced by an impartial jury that actually rendered the verdict in plaintiffs’ case. See *Neuendorf*, 509 N.W.2d at 747.

distracted during the trial due to their schedule and since the plaintiffs' presentation of evidence was likely to take the most time, these jurors may lean against the plaintiffs for this reason as well.

This type of situation was discussed in *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). The Supreme Court concluded that when a court erroneously fails to remove a juror for cause and counsel chooses to use a peremptory challenge to cure the error, a defendant's right to an impartial jury is not impaired or violated. *Martinez-Salazar*, 528 U.S. at 307, 120 S. Ct. at 777, 145 L. Ed. 2d at 798. It noted that "[a] hard choice is not the same as no choice." *Id.* at 315, 120 S. Ct. at 781, 145 L. Ed. 2d at 803. The court explained that when the court did not remove the juror for cause, the party could either (1) keep the challenged juror, and raise the issue of the court's failure to remove the juror for cause on appeal; or (2) elect to use a peremptory challenge to remove the juror. *Id.* Also, although plaintiffs' counsel pointed out traits of the seated jurors that might be unfavorable to plaintiffs' case, the plaintiffs do not allege that these characteristics or viewpoints rendered the jurors not impartial. Plaintiff's failure to challenge any of the actually seated jurors for cause supports an inference that the jurors were impartial and plaintiff suffered no prejudice. See *id.* at 316, 120 S. Ct. at 782, 145 L. Ed. 2d at 803-04 (noting that the district court's ruling did not result in the seating of any juror who should have been dismissed for cause); *State v. Tillman*, 514 N.W.2d 105, 108 (Iowa 1994) ("A lack of apparent prejudice is suggested by the fact that Tillman did not even challenge the members of the panel that were actually seated as jurors.").

Although the plaintiffs would have used peremptory challenges on two jurors that were seated, the plaintiffs do not argue that the two jurors were biased to a degree as to appear to have “formed or expressed an unqualified opinion on the merits of the controversy, or show[ed] a state of mind which will prevent the juror from rendering a just verdict.” Iowa R. Civ. P. 1.915(6)(j). We conclude the plaintiffs failed to establish that the jury seated was not impartial.

**IV. STUART WILSON’S REMARRIAGE.** The plaintiffs next contend that the court erred in allowing the jury to learn of Stuart Wilson’s remarriage. We review this evidentiary issue for an abuse of discretion. *Mohammed v. Otoadese*, 738 N.W.2d 628, 631 (Iowa 2007). The parties agree that *Groesbeck v. Napier*, 275 N.W.2d 388 (Iowa 1979), governs this issue. In *Groesbeck*, our supreme court determined that “evidence of remarriage of a surviving spouse is inadmissible on the issue of mitigation of the surviving spouse’s damages for loss of services and support from a deceased spouse.” 275 N.W.2d at 391. Because this evidence is inadmissible, the court found voir dire examination of prospective jurors about the surviving spouse’s remarriage should be limited. *Id.* at 392. It held that mention of the remarriage may be made during voir dire but “[t]he jurors should be instructed to disregard the remarriage when considering the matter of damages.” *Id.* at 393. This is precisely what transpired in this case. The district court allowed mention of the remarriage during voir dire only so the attorneys could discover whether any potential jurors knew Stuart’s current wife. It then instructed the jury to ignore the fact of Stuart’s remarriage for the remainder of the trial. The plaintiffs ask us to overrule *Groesbeck*. As stated above, we are

required to follow supreme court precedent and decline to overrule *Groesbeck*. See *Starks v. Fairbanks*, 436 N.W.2d 657, 659 (Iowa Ct. App. 1988) (stating that “[w]e are controlled by the holding of *Groesbeck*” and declining to overrule it).

The plaintiffs also cannot prove they were prejudiced by the evidence of Stuart’s remarriage. *Groesbeck* makes clear that remarriage is not to be considered in calculating a surviving spouse’s *damages*. See 275 N.W.2d at 393. The jury in this case never reached the question of damages since it found for the defendants on the issue of liability.

**V. EXPERT WITNESS TESTIMONY.** The plaintiffs’ final contention concerns the testimony of three expert witnesses for the defendants. They argue that the witnesses should not have been able to testify as to “possible” causes of Tamara’s death. Plaintiffs assert this testimony was inadmissible because the experts’ theories on Tamara’s death were speculative and could not be testified to with a reasonable degree of medical certainty.

Tamara’s autopsy report stated that the autopsy failed to reveal an anatomic cause for her death. The pathologist’s report stated, “I suspect the sudden death of this individual may be attributable to a fatal cardiac arrhythmia although an anatomic cause for the latter is not evident at autopsy.” The plaintiffs’ theory was that due to the defendants’ negligent treatment, Tamara suffered from hypokalemia (low potassium) which caused her to have a sudden cardiac arrhythmia and die. They called medical experts to explain that in their opinion, this was a likely cause of Tamara’s death. The defendants called three expert witnesses to refute this theory, Dr. Schauer, Dr. Ver Steeg, and Dr.

Dellsperger. Each of these witnesses testified about other potential theories on the cause of death in bariatric patients. They opined that other potential causes included the theory that when obese persons lose weight, fatty acids from the liver are released, which may promote sudden dysrhythmia. They also described how higher incidents of death among obese persons can occur due to a weak heart muscle, infiltration of the electrical system of the heart, and diabetes.

Each defense expert ultimately testified that the cause of Tamara's death was unknown. Dr. Schauer testified that the bottom line was that it was impossible to say exactly what caused Tamara's death. Dr. Ver Steeg testified that Tamara's death was a rare, sudden death for unexplained causes, and that although it is known there is a higher incidence of death among bariatric patients, the cause of this higher incidence of death is not yet known among medical professionals. He testified, "I don't think we're ever going to know for sure why she died. So I think to a reasonable degree of medical certainty, we aren't going to be able to point to any specific thing that caused her death." Dr. Dellsperger testified that unexplained death in bariatric surgery patients is "more theory and conjecture at this time." He concluded that any explanation for Tamara's death at this time would be only a theory, that common causes were excluded by the autopsy, and that "many times we do not know why people die suddenly."

Plaintiff argues that none of the theories presented by the defendants' medical experts could be testified to with a reasonable probability but were only theories based on speculation. The defendants argue the plaintiffs did not preserve error on this issue. They argue the plaintiffs did not make a timely

objection on this issue during the testimony of Dr. Schauer or Dr. Ver Steeg. They concede a timely objection was made during Dr. Dellsperger's testimony but argue that at that point, the theories had already been introduced into the record through the other experts. The district court found the testimony was properly admitted as relevant under Iowa's liberal rule on the admission of expert testimony, and plaintiffs were not prejudiced since much of the evidence was introduced themselves.

We first address whether the plaintiffs preserved error on this claim. A motion in limine does not generally preserve error on a claim. *Berg v. Des Moines Gen. Hosp. Co.*, 456 N.W.2d 173, 177-78 (Iowa 1990). An objection must be made when the grounds for the objection become apparent and if made after the disputed testimony, "the proper procedure is to move to strike and have the jury admonished to disregard the objectionable statement." *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805-06 (Iowa 1994). Failing to object to evidence when it is offered and to specify the proper ground for objection operates as a waiver on appeal of the admission of the evidence. *Id.* The plaintiffs made no objection during Dr. Schauer's testimony, but did object to the testimony of Dr. Ver Steeg and Dr. Dellsperger. From our review of the objections made on the record, it is apparent that the plaintiffs asserted that these experts' opinions were speculative and the objections were overruled. We therefore deem the error preserved as to the admission of the opinions of Dr. Ver Steeg and Dr. Dellsperger.

The trial court has broad discretion in making rulings on expert testimony and we will not disturb its rulings absent an abuse of discretion. *Id.* at 805; *U.S. Borax & Chem. Corp. v. Archer-Daniels-Midland Co.*, 506 N.W.2d 456, 461 (Iowa Ct. App. 1993). Iowa is committed to a liberal rule allowing opinion testimony if it will aid the jury and is based on special training, experience, or knowledge on the issue. *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 774 (Iowa 2006). If such specialized knowledge “will assist the trier of fact to understand the evidence or to determine a fact in issue,” an expert witness may provide an opinion on the topic. Iowa R. Evid. 5.702.

Before medical expert testimony will be considered competent, “there must be sufficient data upon which the expert judgment can be made” and the expert’s conclusion must be based on “more than mere conjecture or speculation.” *Yates*, 721 N.W.2d at 774. Yet, the expert’s opinion does not have to be expressed with absolute certainty either. *Williams v. Hedican*, 561 N.W.2d 817, 823 (Iowa 1997); *State v. Buller*, 517 N.W.2d 711, 713 (Iowa 1994). “An expert’s lack of absolute certainty goes to the weight of this testimony, not to its admissibility.” *Williams*, 561 N.W.2d at 823 (quoting *Buller*, 517 N.W.2d at 713); *see also Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 888 (Iowa 1994) (acknowledging the “concern that expert testimony regarding the causes of personal injury can fall wholly in the realm of conjecture, speculation, and surmise” but stating that the trial court’s discretion in making a ruling and the jury’s weighing of such testimony are the most effective methods of determining the admissibility and value of such testimony). Vigorous cross-examination of

expert opinions, and the basis for the opinion, aids the jury in determining the most plausible scenario of a case. *Hutchison*, 514 N.W.2d at 888.

We agree that the expert opinions describing potential causes of Tamara's death were based on theory and speculation. However, it is also apparent from the testimony that the opinions were based on scientific and medical resources. The doctors testified that the cause of Tamara's death, and the deaths of other bariatric surgery patients, is largely unknown across the medical field at this time. The increased rate of death among this group is based on theory at this time. Also, both parties agreed that the cause of Tamara's cardiac arrhythmia was not immediately known, and could only be surmised through the process of elimination. We find the district court did not abuse its discretion in admitting the testimony because the opinions were based on each expert's medical knowledge and expertise.

We further agree with the district court that even if this testimony was inadmissible, the plaintiffs could not establish they were prejudiced because they introduced much of the evidence themselves. The trial court's decision on the admission of evidence will only be reversed if its abuse of discretion prejudiced the complaining party. *Mensink v. Am. Grain*, 564 N.W.2d 376, 380 (Iowa 1997). Under the doctrine of curative admissibility, "when one party introduces inadmissible evidence, with or without objection, the trial court may allow the adverse party to offer otherwise inadmissible evidence on the same subject if it is responsive to the evidence in question." *Lala v. Peoples Bank & Trust Co.*, 420 N.W.2d 804, 807-08 (Iowa 1988). Plaintiffs presented their theory in the same

manner as the defendants. They presented expert witnesses and through questioning ruled out various potential causes of Tamara's cardiac arrhythmia. The defendants were entitled to present their expert witness opinions in the same manner. The question the jury had to answer was whether they believed Tamara died because of hypokalemia, as the plaintiffs asserted, or for some other potential reason, as the defendants argued.

**VI. CONCLUSION.** We affirm the district court's ruling denying the plaintiffs' motion for a new trial. The plaintiffs' right to an impartial jury was not infringed by the court's failure to remove two potential jurors for cause. The court did not err in allowing the potential jurors to be informed of Stuart Wilson's remarriage during voir dire. We also find the court did not abuse its discretion in allowing the defendants' experts to testify as to various possible causes of Tamara's death.

**AFFIRMED.**