IN THE COURT OF APPEALS OF IOWA

No. 9-643 / 08-1959
Filed December 30, 2009

LISA BURKE, Administrator to the Estate of DURELLE BURKE, Deceased, and LISA BURKE, Individually,
Plaintiffs-Appellees,

vs.

GREGORIO LAUZ, M.D., Deceased, and MEDICAL ASSOCIATES OF CLINTON, IOWA, P.L.C.,
Defendants-Appellants.

Appeal from the Iowa District Court for Clinton County, Mark J. Smith, Judge.

Defendants appeal from judgment entered for plaintiffs in this medical malpractice case. **AFFIRMED.**

Richard M. Batcher of Bozeman, Neighbour, Patton & Noe, L.L.P., Moline, Illinois, and George Pillers III, Clinton, for appellants.

Michael J. Motto of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellees.

Charles E. Miller of Lane & Waterman L.L.P., Davenport, for amicus curiae Neeru Aggarwal, M.D.

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

DANILSON, J.

Durelle Burke died as a result of complications from a ventricular peritoneal shunt malfunction that prevented the drainage of excess fluid from his brain. Lisa Burke, Durelle's mother, brought this medical malpractice action individually, and as administrator of Durelle's estate (collectively "Burke"), against Dr. Gregorio Lauz and Medical Associates of Clinton, Iowa, where Dr. Lauz practiced. Following a jury trial, a $2.5 million judgment was entered in Burke's favor. The defendants appeal. Finding no prejudicial error, we affirm.

I. Background Facts and Proceedings.

Burke brought this medical malpractice action in Clinton County against Dr. Lauz and his employer, Medical Associates of Clinton, Iowa. Burke also filed an action against Dr. Arnold Menezes, Dr. Daniel J. Guillaume, and University of Iowa Hospitals and Clinics (UIHC) in Johnson County after having filed a claim pursuant to the Iowa Tort Claims statute. The matters were consolidated in the district court of Johnson County. Claims against the State of Iowa were settled, claims against Drs. Menezes and Guillaume have been dismissed, and the case against defendants Dr. Lauz[1] and Medical Associates was ultimately transferred to Scott County for trial.

Burke moved in limine to exclude defendants' proposed exhibit J, UIHC's home care instructions to patients dated March 1998, contending it was not relevant as to a physician's standard of care. Defendants argued that the exhibit bolstered their expert's opinion that neck pain was not a symptom of shunt malfunction. The court ruled that because the exhibit was not relied upon by

[1] Dr. Lauz died prior to the trial, and his estate was substituted as a party.

physicians, it was not admissible. During trial, however, defendants referred to these home care instructions in questioning witnesses.

The defendants moved in limine to exclude medical literature noticed by plaintiffs and upon which Burke's expert witness, Dr. Finley Brown Jr., intended to rely. Burke noted that because Dr. Lauz, in deposition, did not contest that neck pain was an indicator of shunt malfunction, the treatises had not been earlier identified. But literature research was conducted after defendants' expert witness was deposed and testified that neck pain did not indicate shunt malfunction. The court reserved ruling on the motion.

Jury trial began on July 14, 2008. At defendants' request, a hearing was held outside the presence of the jury to challenge the admission of testimony by Dr. Brown with respect to several medical articles and textbooks concerning the signs of shunt malfunction. The court noted that there "are two issues. One is notice, and the other is whether or not these are treatises relied upon in the field by experts." The court then ruled:

> [T]he purpose of the rule is to avoid surprises. The doctor testified that he has given you his opinion in a prior deposition. If, in fact, these articles were used in the deposition of [defendants'] expert, and also your expert identified Nelson as being a text that he had used, then the issue of surprise isn't present, and therefore, the Court rules that the supplementation is not in violation of the rule. It's just supplementation of his already given opinion, and therefore, the Court will allow the treatises to be used.

A reasonable jury could have found the following facts from the evidence presented at trial: Durelle Burke was born in 1989 with spina bifida. The bones of his spine did not completely encircle his spinal cord. As a complication of spina bifida, Durelle was paralyzed from the waist down and also had

hydrocephalus, that is, a build up of excess spinal fluid in the ventricles of his brain. Shortly after his birth, a ventricular peritoneal (VP) shunt was inserted to drain this excess fluid from the brain. A VP shunt consists of a catheter placed in the ventricles of the brain and plastic tubing flowing from the brain under the skin of the neck and chest, eventually draining fluid into the abdominal cavity.

Dr. Gregorio Lauz, a board-certified pediatrician, was Durelle's primary physician from the age of two months and on. Dr. Lauz had also been the primary physician for Durelle's mother, Lisa Burke.

Durelle was described as a very happy child with a contagious smile. Dr. Lauz described Durelle as a "loveable kid," "very social," and "outgoing." He stated that Durelle and Lisa had a "very good" relationship and that Lisa was "a concerned mother."

In May 2002, Durelle went to the neurosurgery department of UIHC for a regular visit to have his shunt checked. A CT scan showed Durelle's ventricles were slightly enlarged from a visit three years earlier. An x-ray showed there was a separation of the shunt tubing. Despite the radiologist's report of the "discontinuity," Dr. Arnold H. Menezes, neurosurgeon, wrote a letter to Dr. Lauz advising him:

> A head CT obtained today was compared with the prior examination from May of 1999 and was relatively unchanged. The shunt series obtained today shows no kinks or disconnections.
>
> Overall, Durelle appears to be doing quite well at this time. We will plan on seeing him back in Neurosurgery clinic in two years for follow up.

On July 3, 2002, Lisa took Durelle to the emergency room because he was complaining of a headache to the back of his head. He had a temperature

of 102.6, some left shoulder pain, aches, and "droopy" eyes. He was diagnosed with the flu and sent home.

On July 26, 2002, Lisa took Durelle to see Dr. Lauz because Durelle was not feeling well. Dr. Lauz concluded Durelle had a urinary tract infection (UTI), prescribed antibiotics, and sent Durelle home.

On August 6, 2002, Durelle returned for a follow-up visit. Dr. Lauz prescribed a different antibiotic for the unresolved UTI and told Lisa to bring Durelle back in ten to fourteen days.

On August 19, 2002, Durelle returned to Dr. Lauz complaining of neck pain. Dr. Lauz diagnosed "probable torticollis"[2] and prescribed a muscle relaxant[3] and ibuprofen.

On September 4, 2002, Dr. Lauz saw Durelle again for follow-up of the muscle spasms in his neck and persistent UTI. Dr. Lauz did not rule out shunt malfunction as the cause of Durelle's neck spasms. He changed Durelle's prescription to valium.

Over the next several days Durelle continued to complain of neck pain and did not want to have his neck touched. Lisa took him to UIHC on September 13, 2002, for a wheelchair adjustment, hoping it would help ease the neck spasms. Durelle continued to have neck spasms. Lisa testified that she began to doubt Durelle's reports of pain in light of the lack of medical findings of a cause.

On September 23, 2002, Lisa picked Durelle up early from school because his teacher called and reported that Durelle said his "neck really hurt."

[2] Testimony at trial defined torticollis is a tilting of the neck.

[3] Dr. Lauz's notes state that he prescribed Biaxin, but Dr. Neeru Aggarwal testified that it was probably Robaxin, a muscle relaxant.

Lisa took Durelle to Medical Associates, where he was seen by Dr. Neeru Aggarwal because Dr. Lauz was not in the office that day. Dr. Aggarwal's assessment was that Durelle had muscle spasms in the neck and a continued UTI. Dr. Aggarwal prescribed Robaxin as a muscle relaxant again. Lisa testified that she filled the prescription at the Medical Associates building and then returned to Dr. Aggarwal's office because Durelle was having a neck spasm—"to show the doctor how much pain Durelle was in." Dr. Aggarwal told her to take Durelle home to lie down.

Durelle went to school on September 24. On September 25, the teacher wrote a note that Durelle was "lazy" that day and "moaned a lot." That evening at home Durelle suffered a seizure and went into respiratory arrest. Emergency personnel arrived, intubated him, and took him by ambulance to the Clinton hospital. Lisa testified she followed the ambulance to the hospital and at some point that evening Durelle regained consciousness, but could not talk. Durelle was transferred by helicopter to UIHC. He had another seizure while in the helicopter and lost consciousness.

On September 26, surgery was performed. Durelle's shunt was repaired. He never regained consciousness, however, and he was taken off life support on October 21. Lisa left Durelle only two times while Durelle was at UIHC: once to spend the night with her two other children, and once to have dinner with her sister. Durelle died on October 22, 2002, due to "[i]schemic brain injury due to VP-shunt malfunction, meningomyelocele."

Plaintiffs presented the deposition testimony of Dr. Lauz, who testified that he did not believe Durelle had a shunt malfunction in August and September

2002 because it was "absolutely necessary" for a person to present with headache and vomiting before he would diagnose shunt malfunction. Dr. Lauz did not believe Durelle's neck pain/neck spasms justified a referral to a neurosurgeon. However, he did state that shunt malfunction "has to always be in the consideration" and that he "did not clinically rule out a shunt function because his presentation was stiffness of the neck."

Plaintiffs' expert then testified. Dr. Brown is a board certified family physician practicing in Illinois. Dr. Brown testified that he is a generalist with eighty percent of his practice being adult medicine and twenty percent pediatrics. He had been practicing medicine since 1970 and had qualified as an expert in approximately twenty states. Dr. Brown testified that a primary care physician is a patient's generalist with the responsibility to assess a patient's complaints and come to an early diagnosis.

Dr. Brown testified that with respect to patients with VP shunts, such as Durelle, ruling out shunt malfunction was always important. He then referred to various sources of medical literature[4] that indicated possible symptoms of shunt malfunction, some of which included stiff neck and head tilt, which could be described as torticollis, and neck pain. He testified that although Durelle did not present with "classic" complaints of people who have shunt malfunction (severe headache and vomiting), Durelle's doctors[5] in August and September 2002 should have ordered neck shunt x-rays and ruled out shunt malfunction.

[4] One source, *Nelson's Textbook on Pediatrics*, was described by Dr. Aggarwal as "a bible" of pediatrics.

[5] Testimony was given concerning Durelle's office visits to both Dr. Lauz and Dr. Aggarwal.

Dr. Brown testified that Durelle's doctors' failure to rule out shunt malfunction by ordering x-rays or referring Durelle to a neurosurgeon was a breach of the standard of care.

On cross-examination, defendants explored Dr. Brown's medical training and qualifications. They established that Dr. Brown was not a board certified pediatrician. Over his thirty-eight years in practice, he had had ten to twenty shunt-dependent pediatric patients with hydrocephalus and had never had any medical emergencies with regard to shunts. Defendants determined Dr. Brown had not read the medical literature he contended was authoritative until after reviewing defendants' expert's opinion and emphasized that neck pain was not listed as a sign of shunt malfunction in any UIHC records or communications to Dr. Lauz or Lisa Burke, including the discharge instructions for VP shunt-dependent children.

Dr. Irwin Benuck testified as defendants' expert witness. He is a board certified pediatrician practicing in Illinois. He testified that Durelle's doctors acted appropriately in their care. Dr. Benuck testified he had an average of sixteen VP shunt-dependent pediatric patients. He testified, "all the children that have ever presented with us for shunt malfunctions—there have been many—I've never seen just isolated neck pain." He also testified that home health care instructions issued by the UIHC and Children's Memorial Hospital in Chicago do not list neck pain as a clue for a malfunctioning shunt. Dr. Benuck testified that Durelle's loss of consciousness on September 25 was due to an acute event of hydrocephalus. On cross-examination, he testified that Durelle's neck pain, his neck spasm, his loss of appetite, feeling run-down and tired, and his head tilt in the four to five

weeks before September 25, 2002, were coincidence and not symptoms of shunt malfunction.

After plaintiffs rested, defendants moved to strike the testimony of Dr. Brown on grounds he was not qualified as an expert. The motion was overruled, as was defendants' motion for directed verdict.

The jury was instructed in part as follows:

> INSTRUCTION NO. 12
>
> The Plaintiffs must prove all of the following propositions:
>
> Proposition 1. The Defendants were negligent in ONE OR MORE of the following ways:
>
> a. in failing to order radiographic studies of Durelle Burke's head and neck;
>
> b. in failing to refer Durelle Burke to a neurologist or neurosurgeon;
>
> c. in failing to obtain the radiology report from the University of Iowa from May, 2002.
>
> Proposition 2. The negligence was a proximate cause of damage to the Plaintiffs.
>
> Proposition 3. The amount of damage.
>
> If the Plaintiffs have failed to prove any of these propositions, the Plaintiffs are not entitled to damages. If the [P]laintiffs have proved all of these propositions, you will consider the defense of comparative fault as explained in Instruction No. 15.
>
> INSTRUCTION NO. 13
>
> The conduct of a party, including Dr. Lauz, Medical Associates of Clinton, Iowa, P.L.C., as the employer of Dr. Aggarwal or the State of Iowa as a released party, is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.
>
> "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.
>
> . . . .
>
> INSTRUCTION NO. 15
>
> Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding

> circumstances as shown by the evidence, together with the conduct of the Defendants and the State of Iowa, who has been released, and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages. Defendants Estate of Gregario Lauz, Dr. Neeru Aggarwal, and Medical Associates of Clinton, Iowa, P.L.C. are to be treated as a single party for the purpose of determining their percentage of fault.
>
> . . . .
>
> INSTRUCTION NO. 19
>
> If you find Lisa Burke is entitled to recover damages as the result of the death of her son, Durelle Burke, it is your duty to determine the amount. In doing so you shall consider the following items:
>
> 1. The reasonable value of the past loss of services, which include loss of companionship and society of the child, from the date of death, October 22, 2002 to October 2, 2007, the date the child would have attained the age of 18 years minus the probable cost of the child's board and maintenance during that time period.
>
> Item 1 includes Lisa Burke's right to the intangible benefits of companionship, cooperation and the affection of Durelle Burke until he attained 18 years of age on October 2, 200[7]. They do not include Lisa Burke's mental anguish caused by Durelle Burke's injuries or death.
>
> In determining loss of companionship and society, you may consider the circumstances of the life of the child including:
>
> 1. The child's age, health, strength, intelligence, character, interests and personality.
>
> 2. Activities in the household and community.
>
> 3. All other facts and circumstances bearing on the issue.
>
> The amount you assess for loss of services in the past cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant as provided by the evidence and by the State of Iowa, who has been released.
>
> . . . .
>
> The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Concluding the issue that mental anguish was not recoverable as an item of damage was adequately explained in instruction 19, the court rejected defendants' requested instruction 5 (quoted in full later in opinion).

After reading the instructions to the jury, but prior to submitting the case to them, the district court amended the special verdict form, which we set out in full here (absent the caption and juror signature lines).

> We find the following verdict on the questions submitted to us:
>
> **GREGORIO LAUZ, M.D., Deceased**
>
> QUESTION NO. 1: Was Gregorio Lauz, M.D. deceased, an employee of Medical Associates of Clinton, Iowa, P.L.C., at fault?
>
> Answer "yes" or "no."
>
> ANSWER: _____
>
> [If your answer is "no," do not answer Question No. 2.]
>
> QUESTION NO. 2: Was the fault of Gregorio Lauz, M.D. deceased, a proximate cause of any item of damage to plaintiffs?
>
> Answer "yes" or "no."
>
> ANSWER: _____
>
> [If your answer to either Question No. 1 or No. 2 is "no," then you shall not assign any fault to Gregorio Lauz, M.D., deceased.]
>
> **MEDICAL ASSOCIATES OF CLINTON, IOWA, P.L.C.**
>
> QUESTION NO. 3: Was Medical Associates of Clinton, Iowa, P.L.C., as the employer of Neeru Aggarwal, M.D., at fault?
>
> Answer "yes" or "no."
>
> ANSWER: _____
>
> [If your answer is "no," do not answer Question No. 4.]
>
> QUESTION NO. 4: Was the fault of Medical Associates of Clinton, Iowa, P.L.C. as the employer of Neeru Aggarwal, M.D., a proximate cause of any item of damage to the plaintiffs?
>
> Answer "yes" or "no."
>
> ANSWER: _____
>
> [If your answer to either Question No. 3 or No. 4 is "no," then you shall not assign any fault to Neeru Aggarwal, M.D.]
>
> **STATE OF IOWA WHO HAS BEEN RELEASED**
>
> QUESTION NO. 5: Was the State of Iowa, acting through its physicians and hospital staff employed at the University of Iowa Hospitals and Clinics at fault?
>
> Answer "yes" or "no."
>
> ANSWER: _____
>
> [If your answer to Question No. 5 is "no," do not answer Question No. 5.]
>
> QUESTION NO. 6: Was the fault of the State of Iowa, acting through its physicians and hospital staff employed at the University of Iowa Hospitals and Clinics a proximate cause of any item of damage to plaintiffs?
>
> Answer "yes" or "no."

ANSWER: _____

[If your answer to either Question No. 5 or 6 is "no," then you shall not assign any fault to the State of Iowa, acting through its physicians and hospital staff employed at the University of Iowa Hospitals and Clinics.]

QUESTION NO. 7. What percentage of the total fault do you attribute to the defendants Dr. Lauz and Dr. Aggarwal as employees of Medical Associates, and the State of Iowa, a party who has been released? The percentages must total 100%.

[If you previously found that the party was not at fault, or did not proximately cause damage to plaintiff, then enter "0" after the name.]

ANSWER:

GREGORIO LAUZ, M.D., Deceased _____%

NEERU AGGARWAL, M.D. _____%

MEDICAL ASSOCIATES OF CLINTON, IOWA, P.L.C., AS THE EMPLOYER OF GREGORIO LAUZ, M.D., DECEASED, AND NEERU AGGARWAL, M.D. _____%

STATE OF IOWA _____%

TOTAL % OF FAULT OF MEDICAL ASSOCIATES OF CLINTON, IOWA, P.L.C., AND STATE OF IOWA MUST TOTAL 100% 100%

QUESTION NO. 8. State the amount of damages, if any, sustained by the plaintiffs for each of the following items of damage. If plaintiffs have failed to prove any item of damage, enter zero for that item.

1. Durelle Burke's pain and suffering from August 19, 2002 to September 2, 2002. _____
2. Durelle Burke's loss of function from August 19, 2002, to September 2, 2002. _____
3. Lisa Burke's loss of services from August 19, 2002, to October 2, 2007. _____

TOTAL (add the separate items of damages) _____

Defendants objected to the change to question 7 of the verdict form, noting that they would "stick by the original form that we have, and if you wish to give Defendants' proposed A4, I have no objection to that."[6] Plaintiffs' counsel stated that "this whole scenario started because [counsel for defendants] wasn't comfortable with the original verdict form" and that "I understood [counsel] to say there was some kind of need to break out Dr. Lauz because he may have a separate [liability] policy." The court ruled:

> Well, the proposed verdict form by the defense was that Dr. Lauz would be given a percentage of fault and then Dr.—the Medical Associates as employer of Dr. Neeru Aggarwal would also be given a percentage of fault. That to me was more confusing than it was enlightening in that the Court has instructed the jury that Dr. Lauz's fault and the Medical Associates' fault are to be merged, and to set out Dr. Lauz and then a separate finding of percent for Medical Associates on behalf of Dr. Aggarwal to me would be more confusing than it would be helpful. *Defense counsel did indicate—and I'm not sure exactly why, but for insurance issues, and I'm not sure they have different coverage, the percentage of fault of Dr. Aggarwal and Dr. Lauz needed to be identified*, so in order to accommodate that, I have submitted this verdict form to counsel for their review. And I understand that sometimes these verdict forms can be confusing, but the way I have it designed is that on Question 7 the jury is to find what percentage of fault is attributable to Dr. Lauz versus that percentage of fault, if any, of Dr. Aggarwal to come *to a total amount of fault to be attributed to Medical Associates*, and then compared to the State of Iowa. That way Counsel does have the ability to find out what percentage of fault is attributable to each individual doctor, and also the jury is, given the design, able to *surmise those two percentages are to be added to*

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[6] Proposed A4 is not included in the appellate record, but was described by counsel for defendants as follows:

> A4 . . . starts out "Damages may be the fault of more than one person" appropriately addressed all the concerns so that it would be clear to the jury that Dr. Lauz and Medical Associates would be treated as a single party for the purpose of determining Dr. Lauz's percentage of fault, if any, and that on the other hand, Medical Associates and its physician employee Neeru Aggarwal would be treated—were to be treated as a single party for the purpose of determining the percentage of fault, if any with regard to Plaintiffs' claim against Medical Associates that Dr. Aggarwal was also at fault . . . .

> *come to the conclusion of what, if any, liability Medical Associates has* in terms of percentage of fault.

(Emphasis added.)

The jury returned the special verdict form, answering "yes" to questions 1 through 5, and "no" to question No. 6. Thus, the jury found Dr. Lauz, Medical Associates as employer of Neeru Aggarwal, and the State of Iowa at fault, but only Dr. Lauz and Medical Associates to be the proximate cause of damages to plaintiffs. The jury found Lisa Burke's damages for loss of consortium were $2.5 million.[7]

Defendants now appeal.

II. Discussion.

A. Expert testimony.

> 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. We are committed to a liberal rule on the admission of opinion testimony. Moreover, the source of expert knowledge is not significant, and knowledge from experience is every bit as good as that acquired academically. A physician need not be a specialist in a particular field of medicine to give an expert opinion.

Smith v. Haugland, 762 N.W.2d 890, 899 (Iowa Ct. App. 2009) (citation omitted).

Defendants moved to strike Dr. Brown's testimony at the end of the plaintiffs' case in chief.[8] On appeal, defendants assert under Iowa Code

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[7] The jury placed zeros in lines 1 and 2 of question 8. In closing argument, counsel for plaintiffs indicated that the damages listed in question 8, lines one and two, were Durelle's damages and

> I have been told we don't want it. I never took anything from Durelle while he was alive, I'm not going to take anything from him now, and those are his damages, not mine. So we will ask you in the first two lines of damages to put zeros.

[8] Burke asserts that defendants failed to preserve error on this issue. Generally, to preserve error, an objection should be made when corrective action can be taken.

section 147.139 (2003) Burke's expert witness, Dr. Finley Brown Jr., was not qualified to provide expert testimony as he had never had a patient with a malfunctioning VP shunt.

Iowa Code section 147.139 provides:

> If the standard of care given by a physician . . . is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical . . . qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case.

An expert witness must be generally qualified in a field of expertise and must also be qualified to answer the particular question propounded. *Tappe v. Iowa Methodist Med. Ctr.*, 477 N.W.2d 396, 402 (Iowa 1991).

We agree with the district court that Dr. Brown was qualified to answer questions as to the standard of care provided by Durelle's primary care physicians. *See Smith*, 762 N.W.2d at 899 (upholding trial court's allowance of plaintiff's expert to testify as to appropriateness of particular treatment and discussing Iowa Code section 147.139 and Iowa R. Evid. 5.702). Durelle was a shunt-dependent pediatric patient who presented with symptoms to his primary physician whose responsibility it was to diagnose those symptoms and determine appropriate care. Dr. Brown is board certified in family practice, which includes pediatrics. He has practiced for thirty-eight years and has cared for shunt-dependent pediatric patients. He is well qualified to testify about the standard of care concerning a physician's diagnostic responsibilities. Thus, his qualifications

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Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006). However, because Dr. Brown's qualifications are relevant to our subsequent discussion, we choose to address the merits of the claim.

related "directly to the medical problem or problems at issue and the type of treatment administered in the case."

Defendants also assert that Dr. Brown impermissibly commented upon the credibility of other witnesses. We have reviewed the testimony complained of and conclude the defendants mischaracterize the testimony. Burke's expert testified that he did not agree with the conclusions of the treating physicians or defendants' expert. This does not constitute a statement as to the truthfulness of a witness, which was disavowed in *State v. Meyers*, 382 N.W.2d 91, 97 (Iowa 1986). Additionally, the first question objected to by the defendants was revised to a hypothetical question rather than seeking an opinion related to the testimony of a specific witness. The second objection was untimely as it followed the witness's answer. To preserve error where an objection follows the answer requires a motion to strike and an application to have the objection precede the answer. *State v. Washington*, 356 N.W.2d 192, 194 (Iowa 1984). No such motion or application is of record.

B. Evidentiary Rulings.

Trial courts are granted broad discretion concerning the admissibility of evidence. *Horak v. Argosy Gaming Co*., 648 N.W.2d 137, 149 (Iowa 2002). We will reverse only if the trial court clearly abused its discretion to the prejudice of the complaining party. *Id*.

1. Learned Treatises.

The defendants complain that the district court erred in admitting medical literature. Much of their argument in this regard focuses on their contention that Dr. Brown, because he was not a qualified expert, was not qualified to testify as

to the reliability or authority of the medical literature. We have already rejected this claim.

Iowa Rule of Evidence 5.803(18) states that the following is not excluded by the hearsay rule:

> *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by that witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

See Ward v. Loomis Bros. Inc., 532 N.W.2d 807, 812 (Iowa Ct. App. 1995).

We have reviewed the record concerning the medical literature relied upon, referred to, and read into the record by both Burke's and the defendants' experts. The district court did not err in allowing the evidence. Dr. Brown's testimony established that the materials were reliable authority. Defendants' expert did not testify otherwise. The weight to be accorded the expert testimony was for the jury. *See Heth v. Iowa City*, 206 N.W.2d 299, 302 (Iowa 1973) (noting that once the test of admissibility has been met, the weight to be accorded the evidence rests with the jury). We find no abuse of discretion.

2. Discharge Instructions—Exhibit J.

Defendants also argue the trial court erred in failing to admit defendants' exhibit J, which is UIHC's home care instructions for patients with "clues for a malfunctioning shunt." The district court ruled the exhibit was not admissible as to the standard of care.

Even were we to assume, for the sake of argument, that this ruling was erroneous, defendants cannot establish they were prejudiced by the ruling. Defendants repeatedly referred to these instructions and the absence of neck pain from the list of "clues" to a malfunctioning shunt. Various witnesses testified about the contents of the exhibit. We find no abuse of discretion to the prejudice of the complaining party. *Horak*, 648 N.W.2d at 149.

C. Verdict Form.

Defendants argue that the trial court erred in adding a non-party to the special verdict form. We first note that pursuant to the verdict form, the jury was required to answer questions pertaining to the fault of "Dr. Gregorio Lauz," "Medical Associates," and "State of Iowa." The jury was to determine what percentage of fault was attributed to Medical Associates and the State of Iowa, which "must total 100%." The jury determined that 100% of the fault was attributed to "Medical Associates of Clinton, Iowa, P.L.C. as the employer of Gregorio Lauz, M.D. Deceased, and Neeru Aggarwal, M.D." Medical Associates is a party to this action, and thus no fault has been assigned to a non-party.

Pursuant to Iowa Code section 668.3(2) and rules of civil procedure, it is impermissible to allocate fault to nonparties. *See Selchert v. State*, 420 N.W.2d 816, 819 (Iowa 1988).

> "[L]imitation to the parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. . . . *An attempt to settle these matters in a suit to which he is not a party would not be binding on him."*

Id. (quoting *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 493 (Iowa 1985)) (emphasis added).

Question 7 does ask, "What percentage of the total fault do you attribute to the defendants Dr. Lauz and Dr. Aggarwal as employees of Medical Associates, and the State of Iowa, a party who has been released? The percentages must total 100%." Dr. Aggarwal is not a defendant in this action, and the question implies otherwise. However, as noted above, the findings of this jury are not binding upon Dr. Aggerwal as she is not a party to this action. *See id*.[9]

Perhaps more importantly, any error here was invited by the defendants and may not now be asserted as a ground for reversal. *See Horak*, 648 N.W.2d at 150 (noting that the complained of "instruction given by the court mirrored not only defendant's pleading but was nearly identical to the instruction it proposed before trial"). Here, the record shows that the defendants sought a finding of the percentage of fault of Dr. Aggarwal as an employee of Medical Associates for "insurance issues."

> [I]n order to accommodate that, I have submitted this verdict form to counsel for their review. And I understand that sometimes these verdict forms can be confusing, but the way I have it designed is that on Question 7 the jury is to find what percentage of fault is attributable to Dr. Lauz versus that percentage of fault, if any, of Dr. Aggarwal to come *to a total amount of fault to be attributed to Medical Associates*, and then compared to the State of Iowa. That

[9] Dr. Aggarwal has filed an amicus curiae brief asserting, that because of the verdict form, she "may be held liable and face serious professional repercussions by a verdict that was clearly in error and would never be considered binding upon her in a court of law." She asks that the decision of the district court be reversed. This is not a case where the non-party's fault siphoned off a portion of the aggregate fault. *See Pepper v. Star Equip., Ltd*., 484 N.W.2d 156, 158 (Iowa 1992). Rather, the jury's consideration of the respective fault between Dr. Lauz and Dr. Aggarwal was mere surplusage to, and does not impair, the jury's fault determination between the parties. We have already noted that the jury attributed 100% of the fault to Medical Associates—not Dr. Aggarwal, a non-party. We have also noted, and Dr. Aggarwal acknowledges, that no finding of this jury is binding upon her. We are not persuaded this constitutes grounds for reversal.

> way Counsel does have the ability to find out what percentage of fault is attributable to each individual doctor, and also the jury is, given the design, able to *surmise those two percentages are to be added to come to the conclusion of what, if any, liability Medical Associates has* in terms of percentage of fault.

(Emphasis added.) Although the accommodation to the defendants may have been more suitable as a special interrogatory, we conclude that any error so invited cannot be asserted as grounds for reversal.

D. Requested Jury Instructions.

Courts must give requested jury instructions when they correctly state the law applicable to the facts of the case and if the legal concept is not embodied in other instructions. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994). Error in giving or refusing to give instructions is reversible, only if prejudicial. *Id.*

Defendants assert that the court erred in rejecting their proposed instruction 5, which reads:

> The law provides that the parents of a deceased child cannot recover monetary damages for grief, mental anguish or mental suffering because of the death of their child. You shall disregard all such in considering any of the damage issues in this case.

Instruction No. 19, set forth in full above, stated that the "reasonable value of the past loss of services, which include loss of companionship and society of the child . . . do not include Lisa Burke's mental anguish caused by Durelle Burke's injuries or death."

Iowa Rule of Civil Procedure 1.206 authorized Lisa Burke as a parent to "sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child." In *Wardlow v. City of Keokuk*, 190 N.W.2d 439, 448 (Iowa 1971), the supreme court reviewed a district court's

ruling that struck from wrongful death petitions allegations concerning loss of companionship and society and those relating to mental anguish of the parents as not constituting proper measure of damages. The court held that "loss of companionship and society of the minor during his minority is a proper element to be considered by the trier of fact in fixing the amount awarded for 'loss of services.'" *Wardlow*, 190 N.W.2d at 448. The court also held that "mental anguish incurred by the parent[] as a result of the death of their children" is not a proper matter of consideration. *Id*. The court remanded to the district court to "reinstate the allegations of loss of companionship, society and affection of the deceased children during their minority." *Id.*

We find the legal concept defendants assert was adequately embodied in Instruction 19 and thus the court did not err in rejecting the proposed instruction. *Olson*, 522 N.W.2d at 287.

E. Motion for New Trial.

Defendants next assert that they are entitled to a new trial because the damages awarded were excessive.

> The standard of review of a denial of a motion for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the court. If the motion and ruling are based on a discretionary ground, the trial court's decision is reviewed on appeal for an abuse of discretion. We review the district court's denial of a motion for a new trial based on the claim a jury awarded excessive damages for an abuse of discretion. An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree.

WSH Props., L.L.C. v. Daniels, 761 N.W.2d 45, 49 (Iowa 2008) (internal quotations and citations omitted). An award that is flagrantly excessive or

unsupported by the evidence may be set aside or altered on appeal. *Schmitt v. Jenkins Truck Lines, Inc.,* 170 N.W.2d 632, 659 (Iowa 1969).

The assessment of damages is peculiarly a jury, not a court, function. *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999). A jury's decision should be disturbed only for the most compelling reasons. *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1999). A jury award should be reduced or set aside

> only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice, or other ulterior motive; or (4) is lacking in evidentiary support.

Id. (citation omitted).

The jury awarded $2.5 million in damages on Burke's claim for loss of consortium. The defendants contend this award was excessive and without evidentiary support, noting Durelle's age, physical limitations, and the median income of the area.

As noted above, the jury was instructed:[10]

> If you find Lisa Burke is entitled to recover damages as the result of the death of her son, Durelle Burke, it is your duty to determine the amount. In doing so you shall consider the following items:
>
> 1. The reasonable value of the past loss of services, which include loss of companionship and society of the child, from the date of death, October 22, 2002 to October 2, 2007, the date the child would have attained the age of 18 years minus the probable cost of the child's board and maintenance during that time period.
>
> Item 1 includes Lisa Burke's right to the intangible benefits of companionship, cooperation and the affection of Durelle Burke until he attained 18 years of age on October 2, 200[7]. They do not include Lisa Burke's mental anguish caused by Durelle Burke's injuries or death.

[10] Generally, a jury is presumed to follow its instructions. *State v. Simpson*, 438 N.W.2d 20, 21 (Iowa Ct. App. 1989).

> In determining loss of companionship and society, you may consider the circumstances of the life of the child including:
>
> 1. The child's age, health, strength, intelligence, character, interests and personality.
> 2. Activities in the household and community.
> 3. All other facts and circumstances bearing on the issue.
>
> The amount you assess for loss of services in the past cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties.

Durelle was described by one witness: "He brought sunshine to everything." He knew many people and was involved in a number of activities. He loved to bowl. He participated in the Special Olympics and qualified in wheelchair races to go to world competitions in Switzerland. Many of his caregivers considered themselves his friend. With respect to her relationship with Durelle, Lisa Burke testified:

> Durelle was my first thought in the morning, my last thought at night. I love all three of my kids, but Durelle was special. He needed me, but I think I needed him more than he needed me. When I lost him, I was lost. I still partially am. He—for 12 years—13 years, actually, that's what I did. It was my job, and my pay was his love, his appreciation he gave me. I've never been more appreciated by anyone in my life than Durelle appreciated me.

In closing arguments, plaintiffs suggested $5 million would be a fair figure for Burke's loss. Defendants, on the other hand, suggested that should the jury need to reach the issue, a figure of $200,000 would be on "the high end." The jury awarded $2.5 million.

The district court concluded:

> the evidence produced at trial showing the close relationship between this mother and child, which is not only supported by the Plaintiffs' witnesses, but also the Defendant Dr. Lauz through his

> deposition, supports the verdict in this case and is well within the reasonable range of damages as contained in [] Instruction No. 19.

We give weight to the district court's refusal to grant a new trial. *See WSH Props.,* 761 N.W.2d at 52. Each parent-child relationship differs, and this mother and child were "joined at the hip." The verdict in this case, although large, does not shock the conscience or go beyond the evidence. We are not willing to disturb the finding of the jury.

III. Conclusion.

Plaintiff's expert was qualified to testify as to the standard of care of a treating physician's duty of differential diagnosis and what may be considered learned treatises. The trial court did not abuse its considerable discretion in its evidentiary rulings. The verdict form submitted did not prejudice the defendants, and the jury instructions adequately stated the law relating to Burke's consortium claim. Finally, though large, the jury verdict was not excessive, and the court did not err in denying the motion for new trial. Finding no prejudicial error, we affirm.

AFFIRMED.

Vaitheswaran, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I would reverse and remand. I believe that the district court erred in failing to give an instruction requested by the defendants. The error prejudiced the defendants and appears to have resulted in an excessive verdict.

The jury awarded damages of $2,500,000 based on one item of damage, Lisa Burke's loss of the services of her child from October 22, 2002 to October 2, 2007. Defendants on appeal contend, and I agree, that the district court erred in denying to give their requested jury instruction on determining damages for loss of services. Defendants requested the following instruction:

> The law provides that the parents of a deceased child cannot recover monetary damages for *grief, mental anguish or mental suffering* because of the death of their child. You shall disregard all such in considering any of the damages issues in this case.

(Emphasis supplied.)

The instruction the district court gave, and that the majority has found to be sufficient, provided that the amount of damages for loss of services do not include Lisa Burke's mental anguish caused by her child's injuries or death. The instruction the district court gave omitted the words "grief" and "mental suffering" that the defendants had requested be included. "Grief" and "mental suffering" are two of the three words mandated to be included in such an instruction in *Wardlow v. City of Keokuk*, 190 N.W.2d 439, 448 (Iowa 1971). There, the court said that the trial court should tell the jury it cannot consider "grief, mental anguish or suffering" in assessing damages for loss of companionship and society. *Wardlow*, 190 N.W.2d at 448.

In *Pagitt v. City of Keokuk*, 206 N.W.2d 700, 703 (Iowa 1973), the court stated the above language had been mandated in *Wardlow* and also said:

> We readily agree a parent may suffer as much or more mental anguish and grief over the death of a handicapped child than over one who has no disability. However, this is not a factor in the award of damages. These items are specifically excluded.

In *Iowa-Des Moines National Bank v. Schwerman Trucking Co.*, 288 N.W.2d 190, 204 (Iowa 1980), our supreme court reaffirmed its position that loss of services does not include grief, mental anguish, or suffering.

The record is replete with evidence of Lisa's grief and mental suffering. The instruction should have been given so the jury would have known they were not to be considered in computing damages. The jury award is excessive, at least in part, because of the error and the defendants are clearly prejudiced.