

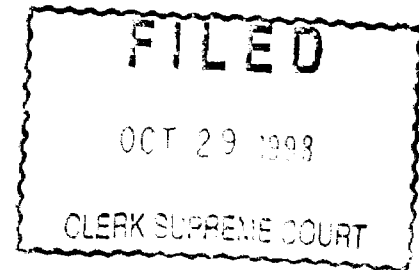
IN THE COURT OF APPEALS OF IOWA

No. 8-395 / 97-0461  
Filed October 29, 1998

**CAROLYNN E. GUENTHER and  
WILLIAM E. GUENTHER,**  
Appellants,

vs.

**NOUFAL JAJEH and PE-HSUN TUNG,**  
Appellees.



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Appeal from the Iowa District Court for Johnson County, L. Vern Robinson,  
Judge.

The plaintiffs appeal a judgment entry of the district court, following a jury trial, dismissing their petition against the defendant physicians for damages allegedly sustained as a result of negligent medical treatment. **AFFIRMED.**

David A. Hirsch and Marlis Robberts Kirk of Beckman & Hirsch, Burlington,  
for appellants.

Kerry A. Finley and Jack Hilmes of Finley, Alt, Smith, Scharnberg, May &  
Craig, P.C., Des Moines, for appellee Pe-Hsun Tung.

Thomas F. Ochs and Raymond R. Stefani of Gray, Stefani & Mitvalsky,  
P.L.C., for appellee Noufal Jajeh.

Heard by Cady, C.J., and Streit and Vogel, JJ., but decided by Huitink, P.J.,  
and Streit and Vogel, JJ.

**STREIT, J.**

Carolynn Guenther, in her medical malpractice case, appeals the trial court's refusal to preclude the defendants' expert witnesses from testifying and to submit an instruction on abandonment. The trial court did not abuse its discretion in refusing to preclude the witnesses from testifying. The abandonment instruction was not supported by substantial evidence in the record. For these reasons, we affirm.

***I. Background Facts & Proceedings.***

Carolynn Guenther had a four-year history of abdominal pain following meals. She sought medical treatment from the defendant Noufal Jajeh, M.D., on a referral from her general practice physician. Dr. Jajeh discussed the possibility of endoscopic retrograde cholangiopancreatography (ERCP) with Carolynn, which is a scope inserted through the patient's mouth and into the abdominal cavity to see and diagnose various illnesses. Carolynn decided to have the surgery.

Dr. Jajeh first performed the ERCP on June 1, 1993. Due to complications after surgery, Dr. Jajeh recommended she undergo a laparoscopic cholecystectomy, a procedure designed to remove the gall bladder in the least invasive manner. He referred Carolynn to Dr. Tung for the surgery. Dr. Tung performed the surgery on July 23, 1993. Carolynn again had complications after surgery and Dr. Tung referred Carolynn back to Dr. Jajeh.

On July 27, 1993, Dr. Jajeh performed his second ERCP. He located a bile leak, which had been the source of Carolynn's complications. He inserted a small

plastic drainage tube in Carolynn's bile duct to seal off the leak. Carolynn spent several days recuperating.

Carolynn's condition improved after the second ERCP. She began eating and having normal bowel movements. Her vital signs were stable and she had no fever. Dr. Jajeh discharged on July 31, 1993. Four days after her discharge she returned to the hospital because she was jaundiced, had pain, weakness, and shortness of breath. She was diagnosed with pneumonia.

On May 26, 1995, Carolynn and her husband filed a petition alleging various negligence claims against Drs. Jajeh and Tung. During the discovery stage of the trial the defendants timely designated seven expert witnesses. The defendants did not supplement their expert witness designations until five weeks before trial. The plaintiffs sought to have all the experts' testimony precluded as a discovery sanction.

At the close of trial, the plaintiffs requested a jury instruction on abandonment. The trial court refused to submit the instruction. The jury found in favor of the defendant doctors. The plaintiffs motioned for new trial alleging only that the trial court erred in refusing to preclude the defendants' experts testimony. The trial court denied the motion. The plaintiffs appeal.

## ***II. Scope of Review.***

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. In ruling upon motions for new trial, the trial court has broad but not unlimited discretion. Iowa R. App. P. 14(f)(3). Consequently, we will reverse only upon a

finding of an abuse of that discretion. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996). An abuse of discretion is shown only where such discretion was exercised by the court on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Carolynn v. Hill*, 553 N.W.2d 882, 885 (Iowa 1996).

### ***III. Defendants' Expert Testimony.***

The Guenther's contend the trial court abused its discretion in not excluding the defendants' experts' testimony as a discovery sanction for defendants' ambush tactics.

Iowa courts are committed to a liberal rule on admissibility of expert testimony, *Wick v. Henderson*, 485 N.W.2d 645, 648 (Iowa 1992), and the admission of such testimony rests within the sound discretion of the district court. *Carolynn v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996). We will not reverse the district court's admission of expert testimony "absent a manifest abuse of that discretion to the prejudice of the complaining party." *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 827 (Iowa 1993). Our review of discovery sanctions is also for an abuse of discretion. *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). An abuse of discretion occurs when the ruling rests on grounds or reasons clearly untenable or unreasonable. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 681 (Iowa 1995).

The plaintiff argues the expert witnesses' testimony should have been excluded under Iowa Rule of Civil Procedure, Rule 125(c):

(c) If a party expects to call an expert witness when identity or the subject of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented . . . as soon as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court. If [such] information . . . is not disclosed in compliance with this rule, the court in its discretion may exclude or limit the testimony of such expert . . . .

The defendants timely disclosed the identity of seven expert witnesses in October of 1995. Dr. Jajeh identified only the names of his experts. Dr. Tung designated the names of the experts and summaries describing the nature of each expert's testimony. The plaintiffs objected to the interrogatory answers alleging they were not complete answers signed by the experts under Iowa Rule 125. The plaintiffs did not file a motion to compel or seek court intervention of any kind. Plaintiffs never sought to depose the doctors' experts.

Approximately five weeks before trial the doctors supplemented their interrogatory answers regarding expert witnesses. The plaintiffs filed motions to preclude all defendants' expert testimony. The Guenthers did not serve Dr. Tung with the motion until the pretrial conference when the motion was to be argued. The district court declined to impose the sanction of preclusion upon defendants.

The district court was well within its broad discretion to deny the requested sanctions. *See Sullivan v. Chicago & Northwestern Transp. Co.*, 326 N.W.2d 320,

324 (Iowa 1982) (holding that imposition of discovery sanctions is discretionary and will not be disturbed unless there has been an abuse of discretion). The defendants violated neither the pretrial order or Rule 125(c) of the civil rules of procedure and the district court gave cogent reasons for denying the imposition of sanctions. The district court stated in its ruling denying sanctions:

Plaintiff asserts that the Defendants should have supplemented their answers well in advance of the time that they did and that the court should prohibit the Defendant from calling their expert witnesses. The court has no doubt that the Plaintiff asked opposing counsel on a number of occasions that complete expert interrogatory answers be filed. No request was made to the court prior to the motion to exclude testimony . . . . [E]xclud[ing] witnesses for violations of discovery rules . . . is not appropriate in the instant case. No motion to compel or seek court intervention was filed. Supplemental answers to interrogatories were filed more than 30 days prior to the commencement of trial. I believe it would be an abuse of discretion to strike the Defendants' experts. The court will not do so.

This is not a case like *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299 (Iowa 1998), where the parties failed to disclose their expert by the expert witness deadline agreed upon by the parties and the deadline established by the pretrial scheduling order. In *Olson* the plaintiffs had no way to prepare for the expert's testimony because the expert had not been disclosed. *Olson*, 579 N.W.2d at 305. In this case, the experts were timely disclosed and it was the choice of the plaintiffs not to depose them.

We do not sanction the tardy filing of supplemental information for defendants' answers to interrogatories. However, because the court did not abuse its

discretion in refusing to impose the sanction of preclusion upon the defendants, we affirm.

#### ***IV. Jury Instruction on Abandonment.***

The Guenthers argue the trial court erred in refusing to submit an instruction on abandonment. They argue Dr. Jajeh abandoned Mrs. Guenther. The plaintiffs did not assert a claim for abandonment in their petition or any other pleading.

To give a proposed jury instruction, the evidence must be sufficient to warrant submission to the jury. *Cerro Gordo Hotel Co. v. City of Mason City*, 505 N.W.2d 509, 511 (Iowa App. 1993). Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. *AMCO Mut. Ins. Co. v. Lamphere*, 541 N.W.2d 910, 913 (Iowa App. 1995). Conversely, failure to submit issues that are supported by substantial evidence also is error. *Id.*

A medical malpractice action based upon professional negligence is a separate cause of action from abandonment. *See Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990); *Surgical Consultants, P.C. v. Ball*, 447 N.W.2d 676, 682 (Iowa App. 1989). To establish a prima facie case under the theory of abandonment the plaintiff must show: (1) an intent to terminate the physician-patient relationship; (2) a termination of the relationship; (3) the termination occurred at a critical stage of the patient's treatment; (4) the termination occurred without reason or an opportunity for

the patient to secure another physician; and (5) injury to the patient as a result of being left without medical care. *Surgical Consultants, P.C.*, 447 N.W.2d at 682. Expert evidence is generally necessary to establish a patient was at a critical stage in treatment when the abandonment occurred. *Id.*

Expert testimony was needed to establish Mrs. Guenther was at a critical stage in her treatment. The stage of Mrs. Guenther's treatment was not so obvious that a lay person could interpret whether it was critical or not. *See Oswald v. LeGrand*, 453 N.W.2d at 636. Mrs. Guenther had a series of complicated and ongoing health problems. When Dr. Jajeh discharged her, the condition she had been hospitalized for had been successfully treated. Mrs. Guenther was walking, had regained some of her appetite, was tolerating a normal diet and had normal bowel movements. Her vital signs were stable and she had no fever. The Guenthers' admit they have offered no expert testimony to establish Mrs. Guenther was at a critical stage in her treatment. Because expert testimony was needed to establish the critical stage element of abandonment and the Guenthers offered none, their abandonment claim is not supported by substantial evidence. *See AMCO Mut. Ins. Co.*, 541 N.W.2d at 913; *Meyer v. City of Des Moines*, 475 N.W.2d 181 (Iowa 1991).

For these reasons, the trial court did not err in refusing to submit an abandonment instruction to the jury.

***V. Sufficiency of Evidence to Support Jury Verdict.***

The Guenthers claim there was not substantial evidence supporting the jury verdict. They did not file a motion for a judgment notwithstanding the verdict under Iowa Rule of Civil Procedure 243(b) and the trial court was not afforded the opportunity to rule on whether the verdict was supported by the evidence. *See Nesbit v. Myers*, 576 N.W.2d 613, 613-14 (Iowa App. 1998). For this reason, the substantial evidence claim has not been preserved for our review and we do not address it. *Id.*

**AFFIRMED.**