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IN THE COURT OF APPEALS OF IOWA

RUSSELL LEE JONES,
Plaintiff-Appellant, Cross-Appellee,

vs.

ALDEN F. WILEY, M.D., AND WILLIAM HEIDENREICH, M.D.,
Defendants-Appellees,

and

VETERAN'S MEMORIAL HOSPITAL, WAUKON, IOWA,
Defendant-Appellee/ Cross-Appellant.

8-693 / 88-255

Appeal from the Iowa District Court for Allamakee (21284), George L. Stigler, Judge.

Plaintiff appeals an adverse jury verdict in this medical malpractice case. **AFFIRMED.**

Rand S. Wonio of Lane & Waterman, Davenport, for plaintiff-appellant/cross-appellee.

Michael H. Figenshaw and Steven M. Augspurger of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for defendant-appellee Wiley.

Raymond R. Stefani and Richard A. Stefani of Gray, Stefani & Mitvalsky, Cedar Rapids, for defendant-appellee Heidenreich.

Edward J. Gallagher, Jr., and E.J. Gallagher III of Gallagher, Langlas & Gallagher, Waterloo, for defendant-appellee/cross-appellant.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J.

The plaintiff in this medical malpractice case, Russell Lee Jones, appeals after an adverse jury verdict. He contends the trial court erred by: (1) sending a piece of demonstrative evidence into the jury room; (2) allowing counsel for the defendants to examine friendly witnesses with leading questions; (3) denying a motion for change of venue; (4) taxing certain deposition costs and expert witness fees against him; (5) inadequately instructing the jury on plaintiff's comparative fault; and (6) allowing certain doctors to testify as to proximate cause. On cross-appeal, defendant Veteran's Memorial Hospital contends the trial court erred by reinstating it as a defendant after granting its earlier motion to dismiss. We affirm.

In the early morning hours of October 10, 1982, plaintiff Russell Lee Jones was thrown from his car and badly injured after apparently falling asleep while driving. About two hours later he was discovered, taken to the defendant hospital, and given emergency treatment for which the defendant doctors were responsible. The incident left Jones a permanent quadriplegic. At issue in this medical malpractice case is whether Jones' paralysis was caused by his own negligence or by medical mismanagement. A jury found that all four of the parties were negligent but that the defendants' negligence was not a proximate cause of Jones' injuries. The jury therefore assessed 100% of the fault against Jones.

Our scope of review in this matter is for the correction of errors at law. Iowa R. App. P. 4.

I. On appeal, Jones first contends that the trial court erred by sending into the jury room an allegedly inaccurate and misleading model of the cervical section of the spine which had been used as a demonstrative exhibit during trial. Specifically, Jones urges that the spinal cord model misrepresented the relationship of the cord to the spinal canal and this misrepresentation was highly prejudicial to Jones. Furthermore, Jones claims that this type of exhibit should not have been allowed in the jury room because of the risk that the jury would manipulate and experiment with the model "far beyond the limits of the evidence."

Iowa Rules of Criminal Procedure 18(5)(e) provides, in part, that "[u]pon retiring for deliberations the jury may take with it all papers and exhibits which have been received in evidence, and the court's instructions." The trial court has considerable discretion to either grant or deny the submission of exhibits to the jury. State v. Baumann, 236 N.W.2d 361, 366 (Iowa 1975). Reversal is warranted only if the trial court abuses its discretion in sending evidence to the jury room and prejudice results. State v. Jackson, 387 N.W.2d 623, 629 (Iowa App. 1986) (emphasis added). Under State v. Shea, 218 N.W.2d 610, 615 (Iowa 1974), the court considers the following factors in exercising its discretion:

> (i) whether the material will aid the jury in a proper consideration of the case;
> (ii) whether any party will be unduly prejudiced by submission of the material; and
> (iii) whether the material may be subjected to improper use by the jury.

In this case, the cervical spine model was used at trial by a number of doctors for demonstrative purposes to illustrate to the jury certain testimony relating to anatomical structures in the cervical spine area, the location of Jones' injury. At the conclusion of the evidence, the model was introduced as an evidentiary exhibit. The trial court admitted it into evidence and allowed it in the jury room. As a general rule, demonstrative evidence which tends to explain or prove any issue in the case is admissible. Permitting an experiment and introduction of demonstrative evidence is discretionary with the trial court, Schuller v. HyVee Food Stores, Inc., 328 N.W.2d 328, 331 (Iowa 1982), and we find no abuse of discretion by the trial court in admitting a purportedly accurate representation of the cervical spine into evidence in a complicated medical malpractice case such as this.

We further fail to find any error in allowing such an exhibit to be taken into the jury room during jury deliberations. There is no indication in the record that this exhibit alone induced or substantially swayed the jury's verdict, or that any improper uses or experiments "beyond the limits" of the evidence presented at trial took place. In a highly technical case such as this, it was proper, and within the scope of the trial court's discretion to allow this exhibit, for purposes of illustration and clarity, as an aid to the jury in understanding the issues in this case.

Jones next contends that the trial court erred by allowing counsel for the defendants to examine friendly witnesses with leading questions. He claims that because the trial court allowed this over his standing objections, that the "courtroom simply became a forum for the suggestive questions and statements of defense counsel and this denied him a fair trial."

The trial court has considerable discretion in admitting or excluding answers to leading questions and there must be a clear abuse of discretion to justify a reversal, with apparent material prejudice to the rights of the objecting party resulting. Giltner v. Stark, 219 N.W.2d 700, 706 (Iowa 1974). Our review of the record in this case indicates that defense counsel was allowed, in many instances, to ask leading questions of witnesses who were identified in interest with the defendants; however, we do not find that the court clearly abused its discretion in allowing such questioning, and furthermore that defendant's case was materially prejudiced by this error.

Jones further assigns error in the trial court's denial of plaintiff's motion for change of venue. Jones moved for a change of venue on the basis that Veteran's Memorial Hospital is a city-owned hospital and is the only hospital located in Waukon, Iowa. Jones alleged that the adverse parties in this case, including the hospital, had such undue influence in the community that Jones could not obtain a fair trial.

A decision to grant or to deny a motion for change of venue rests in the sound discretion of the trial court under Iowa Rule of Civil Procedure 167. Iowa Rule of Civil Procedure 168(d) provides: "Changes of venue shall not be allowed . . . after a continuance, except for a cause arising since such continuance or not known to movant prior thereto. . . ."

The record indicates that this lawsuit was filed in 1984. Jones filed his first motion for change of venue on July 6, 1987, after three continuances had been granted. The motion asserted two grounds in support of changing venue: 1) that any potential jurors in the local community were unduly influenced by the defendants, including Veterans Memorial Hospital; and 2) that local newspaper coverage, dating from May 27, 1986, through May 26, 1987, relating to the Hospital's financial problems and insurance coverage, was highly prejudicial to Jones' case.

We find no abuse of discretion in the trial court's denial of Jones' motion. First, as defendants point out, Jones' request to change the place of trial did not assert that the grounds for change of venue arose only after the continuances had been granted, or that those grounds were unknown to him prior thereto. As the Iowa Supreme Court stated in Locksley v. Anesthesiologists of Cedar Rapids, 333 N.W.2d 451, 454 (Iowa 1983), "[W]e cannot believe that plaintiff's knowledge of the defendants or their possible effect on a jury occurred to him suddenly in [1987]." Second, the record indicates that none of the newspaper articles upon which Jones relies mentioned plaintiff or his particular lawsuit. Furthermore, as the supreme court in Locksley stated: "Exposure to news accounts does not establish ipso facto a substantial likelihood of prejudice in the minds of prospective jurors." Id. at 454. Here, as in Locksley, the trial court's extensive voir dire conducted on the issues of prejudice and undue influence as well as the court's precautions in this case to assure that the jury remain impartial indicates that no prejudice resulted. We find no abuse of discretion.

Jones next claims that the trial court erred in taxing certain deposition costs and expert witness fees against him. Iowa Rule of Civil Procedure 157(a) provides:

> Costs of taking and proceeding to procure a deposition shall be advanced by the party taking it, and he cannot use it in evidence until such costs are paid. The costs shall be noted in the return or certificate, and taxed by the clerk.

> The judgment shall award against the losing party only such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial.

The trial court's determinations under this rule involve an exercise of discretion, and we reverse only on a finding of an abuse of that discretion. Vothman v. Keith E. Myers Enterprises, 296 N.W.2d 772, 779 (Iowa 1980).

We disagree with plaintiff's contention that the court erred in 1) taxing costs of deposition transcripts of various witnesses called at trial, and 2) taxing Dr. Ajir's expert witness fee against Jones. As the Iowa Supreme Court recently stated in Woody v. Machin, 380 N.W.2d 727, 730 (Iowa 1986):

> The admissibility of a deposition in our courts is not affected by whether it was taken for discovery or for use at trial. Osborn v. Massey-Ferguson Inc., 290 N.W.2d 893, 897 (Iowa 1980). An award of deposition costs against the losing party at trial is nevertheless limited by rule 157(a) to the portion of those costs "necessarily incurred for testimony offered and admitted upon the trial." We believe this means that a cost award may include only the costs of depositions which are introduced into evidence in whole or in part at trial. See Moritz v. C & R Transfer Co., 266 N.W.2d 568, 572-73 (S.D. 1978). (Emphasis added.)
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> We do not mean the trial court lacks discretion to limit the award of deposition costs further. The court, for example, might find the offer of deposition testimony was not made for a useful purpose in the trial of the case. Or the court might find that only a part of the costs met the necessity standard. Introduction at trial is a threshold requirement and is not conclusive.

The record here indicates that the deposition costs, including Dr. Ajir's fee for testifying at his deposition were "necessarily incurred" for testimony introduced into evidence in whole or in part at trial. Therefore, the trial court did not err in assessing these costs against plaintiff.

Jones next contends that the trial court erred in improperly submitting the issue of comparative fault to the jury and erroneously instructing the jury on a patient's duty to cooperate with medical personnel. Specifically, Jones claims that the jury was improperly instructed on the manner of assessing his fault because "the instruction did not in any way inform the jury they were to consider the physical and medical ailments of Jones which may have affected his ability to look out after his own safety."

A trial court is free to phrase instructions in its own words as long as the instructions fully and fairly inform the jury of the issues and applicable law. Clinton Land Co. v. M.S. Associates, Inc., 340 N.W.2d 232, 234 (Iowa 1983). Jury instructions must be read and considered together, not in isolation, in determining their sufficiency. Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 425 (Iowa 1977).

In the case at bar, we do not agree with Jones that the jury needed a more complete explanation of what Jones' duty was under the circumstances, and that the jury should have been instructed to take into consideration his physical and mental condition as a result of the injuries he sustained in the auto accident. Taken as a whole, the jury instructions given fully and fairly instructed the jury on the issues and the applicable standards of care in this case. Furthermore, we find that the comparative negligence issue was properly submitted to the jury. See Goetzman v. Wichern, 327 N.W.2d 742, 746 (Iowa 1982). We find Jones' claim on this issue to be without merit.

Finally, Jones contends that the trial court erred in allowing Dr. Wiley and Dr. Withers, two general practitioners, to testify as expert witnesses on the issue of proximate cause. The trial court permitted both doctors, over plaintiff's objection, to testify that the spinal cord injury occurred in the auto accident or at the accident scene, rather than in the hospital.

The law is well settled that a doctor need not be a specialist in a particular field of medicine in order to be qualified to give expert testimony. DeBurkarte v. Louvar, 393 N.W.2d 131, 138-39 (Iowa 1986). 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. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). The source of expert knowledge "is not significant, and knowledge from experience is every bit as good as that acquired academically." DeBurkarte, 393 N.W.2d at 138 (citation omitted).

The trial judge in this case ruled that based upon their experience, training, and education, both doctors were qualified to give their expert opinions regarding the cause of Jones' injuries. Based upon our review of the record, we fail to find abuse of the trial court's discretion in permitting both doctors to testify on the issue of proximate cause.

II. **Defendant Hospital's Cross-Appeal**. On cross-appeal, defendant hospital raises a separate issue. In December 1984, the district court dismissed the hospital as a defendant because it was operated by a municipality within the provisions of Iowa Code Chapter 613A (which governs tort claims against local governments), and no notice was served as required by that statute. In 1986, pursuant to our supreme court's decision in Miller v. Boone County Hospital, 394 N.W.2d 776, 780 (Iowa 1986), however, the trial court permitted the reinstatement of the hospital as a defendant. The hospital now contends that its reinstatement should have been barred by the general two-year statute of limitations adopted in Miller.

In Miller, the Iowa Supreme Court found that the notice provisions of Iowa Code section 613A.5, which requires a person claiming damages to commence an action within six months after injury or cause a written notice to be presented to the local government within sixty days after injury, are unconstitutional and that the statute of limitations found in Iowa Code Chapter 614 is the applicable statute of limitations for all actions arising under Chapter 613A. Id. at 781. In overruling the hospital's motion to dismiss, however, the trial court found that the filing of the original petition tolled the statute of limitations as to all parties who could be assessed a percentage of fault under Iowa Code section 668.8. Additionally, the trial court stated that because the case here was pending at the time of the decision, the application of Miller was prospective only.

We find that the trial court did not err in overruling defendant hospital's motion to dismiss. We agree with the plaintiff that when the original petition was filed, the hospital was a "party" defendant as defined by Iowa Code section 668.2(2). As a named defendant in this case, the filing of the original petition tolled the statute of limitations as to all parties. We find no merit in plaintiff's arguments.

We affirm the trial court in toto.

AFFIRMED.