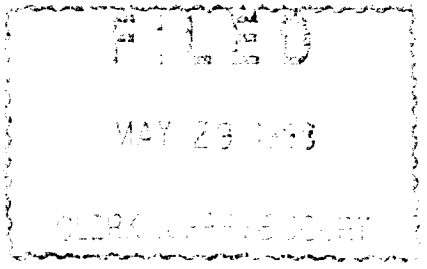
# IN THE COURT OF APPEALS OF IOWA

No. 8-077 / 97-0304
Filed May 29, 1998

**RITA M. ARENSDORF and GERALD M. ARENSDORF,**
Appellants,
vs.

**THE MEDICAL ASSOCIATES CLINIC, PROFESSIONAL CORPORATION, THOMAS M. JOHNSON, KARIN L. LOUKINEN, and MERCY HEALTH SERVICES, f/k/a SISTERS OF MERCY HEALTH CORPORATION, d/b/a MERCY HEALTH CENTER,**
Appellees.




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Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Plaintiffs appeal from a district court order denying their motion for new trial following a jury verdict in favor of defendants on plaintiffs' negligence claims.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Hugh G. Albrecht and Tom Riley of Tom Riley Law Firm, P.L.C., Iowa City, for appellants.

Charles A. Blades and Lawrence E. Blades of Blades, Carmichael, Rosser & Benz, Cedar Rapids, for appellees-Medical Associates Clinic, Johnson, and Loukinen.

Kerry A. Finley and Thomas A. Finley of Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, for appellee-Mercy Health Services.

Heard by Cady, C.J., and Huitink and Streit, J.

**HUITINK, J.**

Rita and Gerald Arensdorf appeal a district court order denying their motion for new trial following a jury verdict in favor of Drs. Thomas Johnson and Karin Loukinen and Mercy Health Services (Mercy). We affirm in part, reverse in part, and remand.

## *I. Background Facts and Proceedings.*

In May 1993, Rita Arensdorf was hospitalized at Mercy Health Center[1] in Dubuque. Drs. Thomas Johnson and Karin Loukinen were Rita's treating physicians. Following cardiac catheterization and angioplasty, Arensdorf experienced bleeding around her spine resulting in paralysis. The Arensdorfs sued Drs. Johnson and Loukinen contending her internal bleeding was caused by excessive doses of a blood-thinning drug, Heparin. Arensdorfs alleged the doctors were negligent because they failed to take frequent PTT[2] tests after surgery. Arensdorfs alleged Mercy failed to properly monitor the levels of Heparin in Rita Arensdorf's blood by not taking a baseline PTT test upon her admission and another PTT test before surgery.

Prior to trial, Mercy filed a motion in limine seeking, in part, to exclude evidence of subsequent changes in hospital rules, policies, or protocols. The motion requested the court prohibit counsel and witnesses from any reference to subsequent

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[1] Mercy Health Center is operated by defendant Mercy Health Services.

[2] PTT is a partial thromboplastin time test which monitors anticoagulation levels in the blood.

remedial measures without first obtaining a definitive ruling on admissibility of such evidence. The district court granted Mercy's motion. Any definitive ruling on the admissibility of such evidence was deferred until an offer was made at trial.

The record includes the following exchange between defense counsel and Dr. Johnson:

> Q. Well, now, as you sit here you've thought about this case a lot, haven't you?
> A. Yes.
> Q. And with the luxury and benefit of hindsight and the risk and benefit weighing you've talked about, would you manage Mrs. Arensdorf's medical care any differently than you did?
> A. No. You always think knowing the final result, how would you do it differently if you could go back and do it again. I don't see anything I could have changed to prevent the bleeding without sacrificing her heart. I would have done it the same.

Plaintiffs' counsel later questioned Nurse Lisa Frasher, a defense witness:

> Q. Dr. Johnson has been asked by defense counsel whether he would do anything differently today in management of cases like Mrs. Arensdorf and he said no. The fact is that both he and Dr. Loukinen now always get a PTT test every four to six hours, don't they, after a dosage change?
> A. That's correct.

Neither counsel for the doctors or Mercy objected to this testimony or requested it be stricken. On the next trial day, counsel for both the doctors and the hospital sought and obtained a ruling prohibiting plaintiffs' further reference to Frasher's answer during witness examinations or in closing arguments. The objectionable testimony was not stricken. It remained a part of the record.

The jury returned a verdict in favor of all defendants, finding Drs. Johnson and Loukinen were not at fault. Although the jury found Mercy was at fault, it concluded Mercy's fault was not a proximate cause of Rita Arensdorf's injuries. Arensdorfs' motion for new trial was denied.

On appeal, Arensdorfs contend they are entitled to a new trial. They argue Frasher's testimony was admitted without objection and it was reversible error for the district court to prohibit reference to this evidence in final argument. The Arensdorfs also contend the district court erred by allowing Dr. Loukinen's testimonial reference to a medical publication that was not disclosed during discovery.

***II. Standard of Review.***

Our review is for an abuse of discretion. We will reverse a district court's ruling for an abuse of discretion only when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Rowen v. LeMars Mut. Ins. Co.*, 357 N.W.2d 579, 583 (Iowa 1984). A district court's evidentiary ruling will not be disturbed unless attended by an abuse of discretion *and* a substantial right of a party has been affected. *Vaughn v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996) (emphasis added).

***III. Nurse Frasher's Testimony.***

Arensdorfs argue the district court erred in prohibiting counsel from commenting on Frasher's testimony in argument.

If the [incompetent] evidence is received without objection, it becomes part

> of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. *The incompetent evidence, unobjected to, may be relied on in argument, and alone or in part may support a verdict or finding.* This principle is almost universally accepted, and it applies to any ground of incompetency under the exclusionary rules.

*McCormick on Evidence*, ch. 6, §54 at 219 (4th ed. 1992).

Frasher's testimony was admitted without timely objection, and neither defense counsel moved to strike her testimony. Under these circumstances counsel was free to revisit the evidence in argument. *See Id.; see also In re Marriage of Meyers*, 228 N.W.2d 64, 65 (Iowa 1975)(any testimony which is part of the record evidence in a case is usable as proof to the extent of its rational persuasive power). The district court abused its discretion when it concluded otherwise.

Moreover, we cannot say the foregoing error was harmless. One of the specific allegations of negligence Arensdorfs asserted against Dr. Johnson was his failure to order a follow-up PTT test after a change in Rita's Heparin dosage. Dr. Johnson testified he could not see anything different to do in managing Rita's care. Frasher testified Dr. Johnson has altered his procedures since Rita's surgery to include more frequent PTT testing. By prohibiting counsel from exploiting this contradiction in argument, the district court denied Arensdorfs the substantial rights recognized by the foregoing authorities. We reverse on this issue as against Drs. Johnson and Loukinen and remand for new trial on Arensdorfs' theories of recovery against them.

With respect to Mercy, we find any prejudice the Arensdorfs suffered due to the district court's error was harmless. Frasher's testimony implicated the doctors' breach of the relevant standard of care, and not the causal relationship between Mercy's conduct and Rita Arensdorf's injuries. Accordingly, a remand for new trial on the Arensdorfs' theory of recovery against Mercy is unnecessary.

***IV. Medical Publication.***

The defendants' case also included testimony from Dr. Loukinen concerning PTT levels, the use of Heparin, and patient care *following* angioplasty. Dr. Loukinen based her testimony on a medical journal article titled "The Relationship of Anticoagulation Level and Complication After Successful Percutaneous Transluminal Coronary Angioplasty." *The American Heart Journal* published the article in 1992.

On appeal Arensdorfs renew their argument made at trial. They contend the district court erred by allowing Dr. Loukinen to present testimony based on the article because it was not disclosed during discovery. Our earlier determination obviates the need for our review of this issue as it concerns the Arensdorfs' claims against the doctors. We limit our consideration of this issue to the Arensdorfs' claims against Mercy.

Assuming without deciding the district court abused its discretion in admitting this evidence, we find Dr. Loukinen's testimony regarding the article at issue did not prejudice the Arensdorfs. Arensdorfs' claims against Mercy involved Mercy's standard of care in presurgical monitoring and preparation. As stated before, the jury

found Mercy's breach of the necessary standard of care was not the proximate cause of Rita Arensdorf's injuries. Because Dr. Loukinen's testimony concerning surgical and post-operative patient care was not relevant to plaintiffs' theory of recovery against Mercy, its admission was harmless. We affirm on this issue.

*V. Summary.*

We reverse the district court's judgment in favor of Drs. Johnson and Loukinen and remand for a new trial on Arensdorfs' claims against them. We affirm the district court's judgment in favor of Mercy.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**