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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-271 / 91-338

JOANNE CONROY,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

The plaintiff, Joanne Conroy, appeals an adverse jury verdict and judgment for defendant in an action for damages resulting from a lack of informed consent concerning periodontal surgery at the University of Iowa Dental College. **REVERSED AND REMANDED.**

John T. Nolan of Rate, Nolan, Moen & Parsons, Iowa City, for appellant.

Bonnie J. Campbell, Attorney General, and Charles S. Lavorato and Craig Kelinson, Assistant Attorneys General, for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Plaintiff, Joanne Conroy, appeals the judgment upon a jury verdict for the defendants in this dental malpractice action based on informed consent. We reverse and remand for a new trial.

In 1984 Conroy sought dental treatment at the University of Iowa College of Dentistry. After lesser treatments were unsuccessful, Dr. Annette Marme informed Conroy periodontal surgery was necessary. In June of 1986 Dr. Marme performed surgery on three of four quadrants of Conroy's teeth and gums. Surgery on the fourth quadrant was canceled after Conroy complained of severe pain.

On July 9, 1987, Conroy filed a petition at law seeking damages from the State. The petition alleged Conroy had suffered permanent dentin hypersensitivity and dysfunction of her teeth and gums as a result of the periodontal surgery. Conroy claimed Dr. Marme and the university dental staff had failed to adequately inform her of the risks associated with the surgery and of an available nonsurgical alternative.

The case proceeded to trial on November 27, 1990. Prior to submission of the case to the jury, Conroy objected to submission of jury instruction number twelve concerning affirmative defenses. Instruction twelve states, in pertinent part:

INSTRUCTION NO. 12

The law recognizes as an affirmative defense to an informed consent action certain exceptions

> to the duty to disclose. In order to establish their affirmative defense, the Defendant must prove by a preponderance of the evidence one of the following exceptions:
>
> 1. That the risk **or** alternative treatment was either known to the patient or was so obvious as to justify a presumption on the part of the dentist that the patient had knowledge of the risk **or** alternative treatment; or . . . .

(Emphasis added.) The district court overruled plaintiff's objection.

On December 13, 1990, the jury returned a verdict for the defendant. Conroy filed a motion for a new trial on December 18, 1990, renewing her challenge to instruction number twelve and contending she was entitled to a new trial due to defense counsel's misconduct, unreasonable delays in the course of the trial, and the jury's erroneous verdict and failure to award adequate damages. The district court denied the motion on February 15, 1991, and entered judgment for the defendant.

Conroy appeals. She contends the district court erred in submitting instruction number twelve to the jury because (1) both risks and alternatives must be disclosed to the patient and (2) there was insufficient evidence to support giving the instruction. Conroy also argues the district court erred in refusing to grant a new trial because the jury awarded inadequate damages and the verdict was not supported by the evidence.

Conroy further maintains she is entitled to a new trial because of defense counsel's misconduct in (1) commenting

Conroy was accusing "two major institutions" (the University of Iowa and the University of Nebraska), of failing to properly inform her of risks and alternative procedures, (2) stating her witness, Dr. Keyes, was not a licensed periodontist, (3) erroneously stating an article used in the cross-examination of her witness had been published, (4) objecting to the admissibility of certain exhibits in alleged contravention of his previous position on their admissibility, and (5) allegedly exaggerating Dr. Marme's credentials.

Finally, Conroy alleges she was prejudiced by the district court's hostility towards her and her counsel as evidenced by the court's facial expressions and tone of voice.

The State responds, inter alia, that Conroy waived error by failing to timely object with regard to several claims raised on appeal and the statements made by defense counsel were not falsifications.

In ruling on a motion for a new trial, the district court has broad discretion to determine whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). This court is slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

I. Conroy contends the district court erred in instructing the jury on affirmative defenses. Specifically Conroy claims instruction twelve misstates Iowa law because

it bars recovery by her if the jury finds either the risk or alternative treatment was known to her.

Jury instructions will be considered on appeal only if objections have been presented to the district court. Keller v. People's Natural Gas Co., 352 N.W.2d 688, 692 (Iowa App. 1988). We note Conroy has preserved this issue for appeal.

"A 'misstatement of law in a jury instruction is reversible error.'" Norton v. Adair County, 441 N.W.2d 347, 358 (Iowa 1989) (quoting Clinton Land Co. v. M/S Assocs. Inc., 340 N.W.2d 232, 234 (Iowa 1983)). Iowa Civil Jury Instruction 1600.12 provides:

> A physician is required to obtain an informed consent from a patient prior to performing any procedure upon the patient. To obtain an informed consent, a physician must disclose to the patient all known material information concerning the (name of procedure or treatment) that would be significant to a reasonable patient's decision to consent to the procedure. Material information includes the [risks of] [alternatives to] [consequences of failing to have] the procedure or treatment.

(Emphasis added.) Iowa law requires informed consent to a medical procedure must be based on knowledge of reasonably available treatment alternatives and material risks. Doe v. Johnston, 476 N.W.2d 28, 31 (Iowa 1991). The Iowa Supreme Court stated in Doe:

> Under the [patient] rule, the patient's right to make an informed decision about submitting to a particular medical procedure places a duty on the doctor to disclose all material risks involved in the procedure. That duty is shaped, not by what the medical community would deem material, but by the patient's need for information sufficient to make a truly informed and intelligent decision.

* * *

> As defined in Cowman and Pauscher, the patient rule does not specifically require the doctor to inform the patient of alternative methods of treatment. Because the rule's underlying premise is full disclosure, however, we believe any kind of truly informed consent must be based on knowledge of reasonably available treatment alternatives.

Id. (citing Pauscher v. Iowa Methodist Medical Ctr., 408 N.W.2d 355, 358 (Iowa 1987); Cowman v. Hornaday, 329 N.W.2d 422, 425-26 (Iowa 1983)) (Emphasis added.)

The Iowa Supreme Court has held a doctor's duty to disclose includes all relevant information relating to the nature of the ailment, the nature of the proposed treatment, the probability of success of the contemplated therapy and its alternatives, and the risk of unfortunate consequences associated with such treatment. Van Iperen v. Van Bramer, 392 N.W.2d 480, 483 (Iowa 1986) (citation omitted); Cowman, 329 N.W.2d at 425 (citations omitted). It is apparent instruction twelve was a misstatement of Iowa law and is reversible error.

The giving of instructions which are confusing is also reversible error. Sammons v. Smith, 353 N.W.2d 380, 385 (Iowa 1984). In considering the jury instructions as a whole we conclude instruction twelve is confusing. Conroy was also prejudiced by the erroneous instruction. It permitted the jury to find the doctor only had a duty to either warn of risks or alternatives rather than requiring the jury to find the doctor had duty to inform her of both the risks and the alternatives.

Under the facts of this case the trial court should have instructed the jury Conroy's right to recover was barred if it found both the risk and alternative treatment were known to her. Iowa Rule of Civil Procedure 244(h) provides if a party's substantial rights have been affected, accompanied by an error of law, such a party is entitled to a new trial. Iowa R. Civ. P. 244(h). We hold the instruction given constituted reversible error and the trial court erred in denying Conroy's motion for a new trial. See Brown v. Lyon, 142 N.W.2d 536, 539 (Iowa 1966). We reverse on this issue and remand for a new trial.

II. On appeal Conroy contends the district court erred in denying her motion for new trial based on surprise. Conroy claims defendant had indicated prior to trial Hawkins deposition exhibits one through five accurately represented the dental college practice and procedure for the year 1985. Defendant denies making such a representation and claims Conroy was given information available at the time of her request. At trial defendant objected to the admission of the exhibits, claiming the exhibits were irrelevant because they were not in effect at the time of Conroy's surgery.

A party cannot obtain a new trial on the basis he was surprised by certain evidence, unless he applied for a postponement or continuance. Dunlavey v. Watson, 38 Iowa 398, 401 (Iowa 1874). Where information is introduced which surprised a party he should move for a continuance of

the trial and not wait until after a verdict is rendered against him and then apply for a new trial. Patton v. Town of Sanborn, 133 Iowa 650, 655, 110 N.W. 1032, 1034 (Iowa 1907). Conroy failed to move for a continuance. Evidence of the intended purpose of exhibits or their effective dates could also have been discovered before trial by Conroy through routine discovery procedures. See Countryman v. McMains, 381 N.W.2d 638 (Iowa 1986). The trial court is affirmed on this issue.

III. Conroy contends defendant's counsel made "misstatements or deliberate falsifications throughout the trial." She claims the district court erred in denying her motion for a new trial on the basis of this misconduct. Conroy makes another claim based on these alleged misstatements. Specifically she contends the district court abused its discretion in sustaining defendant's objections to plaintiff's inquiry into the basis for these misstatements. She contends further inquiry for an offer of proof was improperly denied by the district court. We will address whether the statements constituted falsifications and whether further inquiry should have been granted to plaintiff.

Iowa Rule of Civil Procedure 244(b) allows for a new trial if there has been misconduct by the prevailing party. Iowa R. Civ. P. 244(b). Falsifications constitute misconduct of counsel which provide a basis for the granting of a new trial. Id.; Myers v. George, 271 F.2d

168, 173 (8th Cir. 1959). It is not error to refuse to grant a new trial on account of misconduct of counsel in argument, where no objection was interposed at the time the argument was made. See Crandall v. Mason, 198 Iowa 139, 144, 197 N.W. 454, 456 (Iowa 1924).

A. In closing arguments defendant's counsel stated "[Conroy] is now accusing two major dental institutions [University of Nebraska at Lincoln and University of Iowa] of failing to tell her about treatments that she consented to undergo and tell her about . . . ." Plaintiff's counsel objected to this statement claiming there was no evidence Conroy accused the University of Nebraska of any wrongdoing. Defendant claims the statement is a proper inference drawn from Conroy's testimony. We disagree with the defendant's argument that this statement was a fair inference. At trial Conroy testified she had received only nonsurgical treatment from the University of Nebraska staff. When shown a release form from that university which provided for the possibility of periodontic surgery, Conroy admitted the signature was hers. She stated, however, she did not recall executing the release or giving the University of Nebraska permission to perform periodontic surgery. Conroy testified the University of Nebraska staff never discussed any risks or complications of surgery.

We fail to see how the alleged inference which defendant's counsel argued to the jury can be drawn from

this scenario. Defendant counsel's statement Conroy was accusing the University of Nebraska staff of failing to inform her about risks of surgery was an improper inference. It is obvious Conroy did not undergo surgery by any staff member of the University of Nebraska. Thus there was no reason for the staff to inform Conroy of the risks of a procedure which she did not undergo. Conroy testified she understood why the staff had not discussed risks of surgery with her:

> Q. So that exhibit appears to at least indicate on its face that since you have consented to have the surgery performed, that was at the University of Nebraska? A. I would like to read it more thoroughly before I say that, but it appears that that at least was a possibility.
>
> Q. And do you recall -- I would make a guess that the answer is that you don't recall that and that they never discussed with you any of the risks and complications then of that surgery? A. No, because we never got to surgery. . . .

A trial court has broad discretion in deciding on the propriety of closing arguments to the jury, and an appellate court will not reverse unless there has been a clear abuse of discretion. Lange v. City of Des Moines, 404 N.W.2d 585, 587 (Iowa App. 1987) (citations omitted). "Before a new trial will be granted for misconduct in argument it must appear prejudice resulted or a different result could have been probable but for such misconduct. Id. (quoting Laguna v. Prouty, 300 N.W.2d 98, 102 (Iowa 1981)). In this case the district court abused its discretion in deciding the propriety of closing arguments.

Plaintiff was prejudiced by the statement made by defendant's counsel. The district court should have sustained plaintiff's objection as it was timely and properly made. We trust upon retrial defendant's counsel will refrain from making this assertion in closing arguments. We reverse on this issue.

B. Conroy claims defendant's counsel misstated Dr. Keyes' professional status in stating he was not a periodontist. Dr. Keyes testified during cross-examination he was not a periodontist.

> Q: Doctor [Keyes], you are not a periodontist, are you? A. No.

Defendant did not misstate the facts. In addition, plaintiff's counsel raised no objection. Where no timely objection was made until motion for new trial, claimed misconduct is not a ground for reversal. Andrews v. Struble, 178 N.W.2d 391, 401 (Iowa 1970).

C. During cross-examination of Dr. Keyes, defendant's counsel referred to a scientific paper indicating it was published. The article, however, was unpublished. Misconduct consisting of misstatements may be cured through the action of the offending counsel by promptly withdrawing or correcting the misstatement. Lange, 404 N.W.2d at 587. Defendant's counsel acknowledged his error before the jury and stated the article was unpublished. These actions were sufficient to cure the misstatement. There was no prejudice to Conroy by defendant's counsel's initial misidentification of the article.

D. At the pretrial conference the parties agreed exhibit M would be introduced into evidence. Defendant claims, however, the exhibit was only intended to generally show how the particular flap of a gum is elevated so the root and gum are exposed; it was not intended to represent the nature and extent of Conroy's surgery. None of the testimony regarding exhibit M indicated it was Conroy's mouth area. Defendant never represented the exhibit was a fair and accurate representation of the nature and extent of surgery performed on Conroy. The use of this exhibit was not misleading. We affirm on this issue.

E. In opening statements defendant's counsel stated Dr. Marme was licensed in fifteen states. Plaintiff did not object to this alleged misstatement. By failing to raise a timely objection, plaintiff waived any error based on defendant's statement. Andrews, 178 N.W.2d at 401. Where no timely objection was made until motion for new trial, claimed misconduct is not ground for reversal. Id.; see also Blair v. Madison County, 81 Iowa 313, 46 N.W. 1093 (Iowa 1890). "Only if probable harm or resulting prejudice cannot be rectified by admonition or further instruction will the alleged misconduct be passed on in absence of timely objection." Id. The claimed misconduct here, however, is not of that kind. We affirm on this assignment of error.

IV. Conroy contends the district court judge improperly made facial expressions and used a tone of voice which showed hostility and prejudice toward plaintiff and her case.

> [A] trial court may not telegraph to a jury, by purposeful exclamations, gestures or facial expressions, his approval or disapproval, belief or disbelief, in the testimony of witnesses or arguments of counsel.

State v. Larmond, 244 N.W.2d 233, 236 (Iowa 1976) (citations omitted). The State argues the issue of judicial misconduct was not preserved.

The Iowa Supreme Court has addressed error preservation in a judicial bias claim. In State v. Windsor it stated:

> Ordinarily error is not preserved unless a timely objection is made. In [State v.] Larmond the claim of bias was made for the first time in defendant's motion for new trial. This court found that the oppressiveness of the trial judge deterred the inexperienced defense attorney from making a proper record and that the judge's conduct had irretrievably demolished the defendant's chance for a fair trial before defense counsel could have been expected to object. In these circumstances, the court held that the belated raising of the issue in the new trial motion was sufficient to preserve error. The issue was not raised at any time in the trial courts in the present case, and no circumstances like those in Larmond existed. No excuse for failing to make a proper record at trial has been established.

State v. Windsor, 316 N.W.2d 684, 687 (Iowa 1982) (citing Larmond, 244 N.W.2d at 237). Circumstances like those in Larmond do not exist in this case. Conroy failed to raise the issue of judicial misconduct in the district court. This issue was not preserved for appeal.

> At least two reasons exist for requiring a timely objection to alleged judicial bias. One is that it gives the judge an opportunity to correct or explain his conduct before the defendant has been denied a fair trial. Another reason is that it precludes a defendant from delaying an objection in order to gamble on a favorable verdict.

Windsor, 316 N.W.2d at 687 (citation omitted).

We observe the above holdings and principles of Windsor and Larmond involved defendants in criminal trials. They are no less applicable to all parties in any litigation. Iowa Code of Judical Conduct Cannon 3A(3) instructs our judiciary:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . .

In the circumstances of this case, plaintiff's failure to raise the issue in the trial court bars our consideration of the issue. We do not intimate any view on the merits of her contention.

This case is reversed and remanded for a new trial.

REVERSED AND REMANDED.