

IN THE COURT OF APPEALS OF IOWA

No. 5-314 / 93-1829

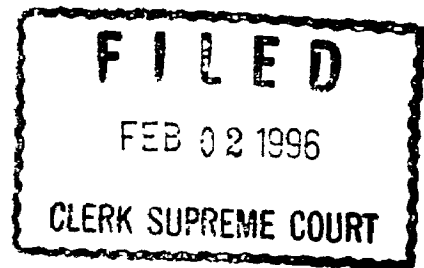
KELLI KENDRICK, A Minor By and Through her
Natural Parents and Next Best Friends, **STEVE**
DOUGLAS KENDRICK and **PAMELA S. KENDRICK**;
STEVE DOUGLAS KENDRICK, Individually;
and **PAMELA S. KENDRICK**, Individually,

Plaintiffs-Appellants,

vs.

ST. ANTHONY REGIONAL HOSPITAL, INC., a
Corporation; and **JEFFREY K. LARKIN, M.D.**,
d/b/a **CARROLL MEDICAL CENTER**,

Defendants-Appellees.



Appeal from the Iowa District Court for Carroll County, Joel E. Swanson,
Judge.

Plaintiffs filed a medical malpractice suit against defendants alleging
negligence in the performance of a cesarean section. The jury found in favor of the
defendants. ~~Plaintiffs~~ appeal. **AFFIRMED.**

Marc A. Humphrey and Kathleen J. Beebout of Humphrey and Haas, P.C., Des
Moines, for appellants.

John A. McClintock and David L. Brown of Hansen, McClintock & Riley, Des Moines, for appellee St. Anthony Regional Hospital, Inc.

John D. Hilmes and Glenn Goodwin of Finley, Alt, Smith, Scharnberg & May, P.C., Des Moines, for appellee Larkin d/b/a Carroll Medical Center.

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

Pamela and Steve Kendrick filed a medical malpractice action against St. Anthony Regional Hospital, Inc. and Dr. Jeffrey K. Larkin d/b/a Carroll Medical Center. The Kendricks alleged their newborn baby has brain abnormalities which substantially disable her due to negligence by defendants in delivering the baby via a cesarean section. The Kendricks claimed the surgical incision should have been, but was not, made within thirty minutes of the decision to perform surgery.

Prior to trial, plaintiffs sought to change the venue three times but their motions were overruled. Plaintiffs also filed a motion to exclude certain defense experts for failure to timely respond to interrogatory answers. The district court overruled plaintiffs' motions being satisfied that all requests for production and all interrogatories had been answered. Plaintiffs and defendants filed motions in limine. Some were sustained; others were overruled; and in several instances, the court observed, from the record before it, that it was impossible to issue a ruling. Plaintiffs sought to admit two exhibits at trial. The district court held the exhibits to be inadmissible.

The jury returned a verdict in favor of defendants. Plaintiffs appeal.

I. *Change of Venue.* Plaintiffs contend the district court erred in denying their motion for a change of venue. They argue a change of venue should have been

granted since many of the jurors allegedly had a health care relationship with St. Anthony Regional Hospital.

We review the question of a denial of a motion for a change of venue for an abuse of discretion. *Peters v. Vander Kooi*, 494 N.W.2d 708, 711 (Iowa 1993); *Locksley v. Anesthesiologists of Cedar Rapids*, 333 N.W.2d 451, 454 (Iowa 1983). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

Plaintiffs made three motions for a change of venue. The first motion, prior to trial, was supported by affidavits alleging undue influence on the part of both defendants. The district court denied the motion finding no undue influence. Plaintiffs then commissioned a change of venue survey which they contend showed undue influence. A motion to reconsider the motion for a change of venue was overruled. After voir dire, but before jury selection, a renewed motion for a change of venue ~~was~~ made.¹ In overruling the motion for the final time, the district court stated:

¹ While plaintiffs make extensive arguments regarding voir dire, they failed to have the proceedings reported. They also did not avail themselves of the bill of exceptions procedure set out in Iowa Rule of Civil Procedure 241. Therefore, we have no record to examine regarding the voir dire.

The court would agree with Mr. McClintock [attorney for St. Anthony] and also what I previously said that the questions and answers posed to the prospective jurors deal with in many cases remote connection with the hospital. That there have been discussions about connections with the physician Dr. Larkin and members of his group but there has been no showing that would give rise to a cause for any of the jurors for lack of failure to be fair and impartial.

After the ruling by the court, additional voir dire was conducted by defendants.

Plaintiffs rely rather heavily on *Peters*. As in *Peters*, the question before us is whether there has been an abuse of discretion. As previously noted, we do not have a record before us to determine whether, in fact, the jurors who were finally seated had similar connections with defendants as existed in *Peters*. We do know that eighty-four potential jurors were ordered to appear. Plaintiffs were granted six strikes and each defendant was granted three. The parties agreed on one alternate juror. From the jury panel, twenty-three prospective jurors were selected. When examined by counsel, each of the twenty-three jurors stated they had not heard of this case. We also know from the trial judge's ruling on plaintiffs' motion for new trial the court was present during the examination of each of the jurors, and of the twenty-three, only four were excused for cause. When the final nine jurors were selected, the court in its ruling ~~found~~ stated none of those were challenged for cause and each stated under oath that he or she could and would remain impartial.

It is true *Peters* was reversed. However, our supreme court made it clear reversal was grounded on improper instructions. The following comment by the

supreme court in *Peters* bears on the venue question before us:

If the issue presented were only whether a reversal might be ordered as a result of the district court's overruling of plaintiff's motion for change of venue, we are not convinced that such relief would be granted. Rulings of this nature are based on an abuse-of-discretion standard based on the record made by the moving party.

Peters, 494 N.W.2d at 711.

That leaves us with the two motions prior to voir dire for a change of venue. In ruling on the first motion, the district court noted St. Anthony was one of two hospitals in the county; Dr. Larkin was a member of the smaller of two clinics in Carroll; and there were a number of other independent physicians in the county. We find no abuse of discretion in the first ruling. On the motion to reconsider, the district court found the survey had no bearing on whether a jury of impartial people could be chosen. We find the district court did not abuse its discretion in so ruling. In conclusion, we find the district court did not abuse its discretion in ruling on any of the motions for a change of venue.

II. Discovery Sanctions. Plaintiffs contend the district court erred in failing to impose ~~discovery~~ discovery sanctions. With a trial date of September 14, 1993, plaintiffs filed a ~~motion~~ to exclude defendants' expert witnesses on September 8, 1993. The basis for this motion was defendants failed to file timely expert witness interrogatory answers from all eleven of their specified expert witnesses. Iowa Rule of Civil Procedure 125(c) provides such answers and supplements are to be filed thirty days

prior to the trial date.² The motion was denied and no sanction was imposed.

The district court has broad discretion in ruling on matters involving expert testimony under rule 125. *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 253 (Iowa 1993); *Security Mut. Ins. Ass'n v. Board of Review*, 467 N.W.2d 301, 306 (Iowa App. 1991). We will not disturb a district court's decision under this rule unless there was an abuse of discretion. *Preferred Marketing Assocs. v. Hawkeye Nat'l Life Ins. Co.*, 452 N.W.2d 389, 393 (Iowa 1990). An abuse of discretion occurs only when discretion is exercised on grounds clearly untenable or to an extent clearly unreasonable. *Id.* Our supreme court has been slow to find an abuse of discretion in cases involving discovery sanctions. *Beeman*, 496 N.W.2d at 254; *Sullivan v. Chicago & N.W. Transp. Co.*, 326 N.W.2d 320, 324 (Iowa 1982).

The purpose of rule 125 is to avoid surprise and to permit issues to become both defined and refined before trial. *Mercy Hosp. v. Hansen, Lind & Meyer, P.C.*, 456 N.W.2d 666, 670 (Iowa 1990).

² ~~The rule~~ specifically provides:

~~If~~ **If** a party expects to call an expert witness when the identity or the ~~subject~~ **subject** of such expert witness' testimony has not been previously disclosed in ~~response~~ **response** to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the information described in subdivisions (a)(1)(A)-(C) of this rule, as soon as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court. If the identity of an expert witness and the information described in subdivisions (a)(1)(A)-(C) are not disclosed in compliance with this rule, the court in its discretion may exclude or limit the testimony of such expert, or make such orders in regard to the nondisclosure as are just.

Iowa R. Civ. P. 125(c).

It is well settled that the mere designation of the name of the expert does not satisfy the requirements of the discovery rule. Rule 125(c) makes it clear that if a party expects to call an expert witness, in addition to naming the expert and giving his address, “the subject of the expert’s testimony, the expert’s qualifications, the mental impressions and opinions held by the expert, and the underlying facts which form the basis of the expert’s opinion” must be revealed by way of a supplement to the original response, and that supplement must take place as soon as practicable but in no event less than thirty days prior to the beginning of trial except on leave of court.

Mills v. Iowa Dep’t of Transp., 462 N.W.2d 300, 302 (Iowa App. 1990). Exclusion of the expert’s testimony is the most severe sanction available under the rule. *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). This sanction is not to be imposed lightly and is justified only when prejudice would result. *Id.*

In this case, we are considering a situation where the answers to interrogatories are filed late. It is not a question of designation, since plaintiffs were made aware of the expert witnesses’ identity in a timely manner. Plaintiffs contend the late filing of the answers to the interrogatories prejudiced them in terms of trial preparation.³

We have no doubt that tardy responses to rule 125 interrogatories could conceivably put the other party at a severe disadvantage in terms of preparing for trial. In this case ~~however~~, the identities of the witnesses were known many months prior

³ In a July 20, 1993 letter to the attorneys for defendants, plaintiffs’ attorney made the comment, “I assume that we are all operating on the assumption that we will continue with discovery up until shortly before the trial. If you have any objections to this assumption, please let me know immediately and I will file a formal pleading.” Without so ruling, we note this type of informal agreement by the parties can serve as a basis for waiving the right to seek sanctions against the other party for the failure to meet deadlines set out in the rules. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993).

to trial and plaintiffs have failed to identify any substantial information provided in the answers which was unexpected or surprising. We find plaintiffs were not prejudiced by the late filing and, therefore, the district court did not act in an unreasonable manner in denying the request to exclude defendants' expert witness testimony. We find no abuse of discretion by the district court in denying plaintiffs' request for sanctions.

III. Evidentiary Issues. Plaintiffs contend the district court erred in ruling on a number of evidentiary issues. Plaintiffs argue the district court erred in (1) admitting certain testimony, and (2) in the exclusion of two of plaintiffs' exhibits.

We review rulings on the admissibility of evidence for an abuse of discretion. *Oberreuter v. Orion Industries, Inc.*, 398 N.W.2d 206, 210 (Iowa App. 1986). Wide discretion is allowed in ruling on the admissibility of evidence. *Id.* Such rulings will not be disturbed unless there is a clear and prejudicial abuse of discretion. *Id.*

Plaintiffs attempted to show a thirty-minute decision-to-incision rule existed for emergency cesarean deliveries as described by both the American College of Obstetrics ~~and~~ Gynecology and the Iowa Department of Public Health. Defendants presented ~~that~~ the thirty-minute decision-to-incision time frame was established by the American College of Obstetrics and Gynecology and the Iowa Department of Public Health as merely a guideline and not as a rule or standard. Expert testimony presented at trial was conflicting as to whether it was possible to go from decision to incision within thirty minutes.

Plaintiffs assert on appeal the court erred in receiving certain portions of testimony of Nurse Papke. We note Nurse Papke did testify the thirty-minute rule was a mere guideline and the standards developed are minimal standards for each hospital level. She also testified if the thirty-minute rule was a hard and fast rule, there would be very few hospitals in Iowa delivering babies.

We need not determine the relevancy or the prejudicial effect of this testimony. We note all of this testimony and much more came into evidence without objections from plaintiffs. In addition, we note many of the matters testified to by Nurse Papke were covered in her cross-examination by plaintiffs. Plaintiffs' exhibit 57 was offered into evidence by plaintiffs and received by the court without objections from defendants.

As it relates to Nurse Papke's testimony, in the absence of a timely or specific objection, any error in the admission of evidence is waived. Iowa R. Evid. 103(a)(1).

We turn next to plaintiffs' objections that certain portions of Dr. Herman Hein's testimony should not have been received into evidence. Plaintiffs, for the first time on appeal, ~~in~~ addition to questioning those portions of the objection on relevancy grounds ~~also~~ assert the testimony was unfairly prejudicial.

As it relates to Dr. Hein's testimony, objections to the admission of evidence must be timely and state the specific ground for the objection unless the specific ground for the objection is apparent from the context. Iowa R. Evid. 103(a)(1). A specific objection is required so the trial court is not left to speculate whether the

evidence is subject to some infirmity the objection does not identify. *State v. Taylor*, 201 N.W.2d 724, 727 (Iowa 1972). In the absence of a timely and specific objection, any error in the admission of evidence is waived. Iowa R. Evid. 103(a)(1). Every objection that is not particularly specified is abandoned. If an objection is based on unfair prejudice, the objection must be sufficiently specific to alert the court to the objector's theory of undue prejudice. *State v. Harmon*, 238 N.W.2d 139, 144 (Iowa 1976). A party cannot assert one reason for an objection at trial and rely on another on appeal. *State v. LeGear*, 346 N.W.2d 21, 24 (Iowa 1984).

Plaintiffs direct our attention to certain portions of Dr. Hein's testimony they claim is objectionable. Dr. Hein teaches at the medical school at the University of Iowa and developed a program called the Statewide Perinatal Care Program. Under that program, an obstetrician, an obstetric nurse, a newborn care nurse, and Dr. Hein visited all of the hospitals in Iowa and attempted to assess the care they give. The purpose of this statewide program, according to Dr. Hein, is to improve the outcome of pregnancies and insure mothers and babies in Iowa receive the best possible care so, from a medical nursing standpoint, there is assurance they are getting the very best. When asked as to how many hospitals they visited, he testified without objection that when the program started there were 140 hospitals and this amount is now down to a little over 100. He further testified this number varies from time to time because hospitals drop their obstetric services and later come back in. Dr. Hein

further testified he was on the committee that developed the standards for perinatal centers. As it relates to the thirty-minute provision, he testified without objection that although reference is made to standards,⁴ "They really aren't standards. They are just guidelines." He further testified the timing of the decision to deliver plaintiffs' baby was in keeping with the guidelines. He further testified the doctors, the nurses, and the hospital did everything proper. All of this testimony came in without objection.

Dr. Hein was then asked if he had an opinion as to what occurs to the "structures in the perinatal system" in terms of delivering babies "if a thirty-minute standard is the standard and cannot be anything other than thirty minutes for C-sections." The objection made by plaintiffs was, "I'm going to interpose an objection without having the ability to review records from each and every one of those hospitals to determine what their response time is. I think it is a totally unfair question. Further, he is asking this witness to speculate. And I think it is totally an improper question, and I would object on that basis." As to that objection, the doctor was permitted to testify. He testified in essential part the result would be the closing of the ~~majority~~ of the small hospitals in Iowa.

⁴ The source for the thirty minutes from decision-to-incision standard is guidelines implemented by the Iowa Department of Public Health entitled Standards for Perinatal Centers. In the preface of these standards it is stated:

These standards were approved by the Iowa State Board of Health on July 12, 1989. The standards do not have the force of law or rule but do represent what are considered to be guidelines for acceptable practices in Iowa at this time.

Plaintiffs contend this testimony is unfairly prejudicial and should not have been allowed under Iowa Rule of Evidence 403. While an objection was made, we find nothing in the objection referring to unfair prejudice or relevancy. The district court did not have the opportunity to rule on a relevancy or prejudicial objection for none was made. Since the proper objection was not raised, we decline to consider the relevancy or prejudicial effect of this testimony.

There is one other reason why plaintiffs' objection on appeal to this testimony must fail. Our supreme court has stated:

If the grounds for the objection are disclosed only after the testimony is given, the proper procedure is to move to strike and have the jury admonished to disregard the objectionable statement. John W. Strong, *McCormick on Evidence*, § 52, at 200-01 (4th ed. 1991). "The initiative is placed on the party, not on the judge. . . ." *Id.* at 200.

Milks v. Iowa Oto-Head and Neck Specialists, 519 N.W.2d 801, 806 (Iowa 1994).

If there is an objectionable unresponsive answer, the proper technique for such an objection is to phrase a motion to strike out the objectionable evidence and to request an instruction to the jury to disregard the evidence. *McCormick on Evidence*, § 52, at 201-44th ed. 1991). Thus, even if the answers to the question as propounded are ~~excluded~~, the trial court had no opportunity to make such a ruling because plaintiffs made no motion to strike immediately following each answer.

Plaintiffs next contend the locality rule was improperly included in the case through the admission of testimony concerning the ability of other rural hospitals to

perform within the thirty-minute guideline. The locality rule has been rejected in cases involving hospitals and the following standard has been adopted.

We are convinced the correct standard of care to which hospitals should be held is that which obtains in hospitals generally under similar circumstances. In deciding what are “similar circumstances,” the jury may consider the customs and practices followed in the particular community and like communities as one element, but these are not conclusive.

Dickinson v. Mailliard, 175 N.W.2d 588, 596-97 (Iowa 1970). We find the district court properly applied the rule set out in *Dickinson* and did not apply the locality rule in this case.

Plaintiffs' final argument is two exhibits were improperly excluded by the district court. The exhibits involved information regarding cesarean deliveries at St. Anthony in prior years. Plaintiffs argued for the admission of these exhibits on a number of grounds. The district court found the exhibits to be potentially confusing to the jury, a waste of judicial time, and irrelevant since there did not appear to be any defined standard. We find no abuse of discretion by the district court in excluding the exhibits. We affirm the district court.

We ~~have~~ considered all arguments raised by the parties on appeal, whether mentioned in this opinion or not, and we affirm the district court.

AFFIRMED.