

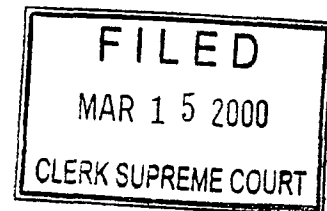
IN THE COURT OF APPEALS OF IOWA

No. 0-46 / 99-707
Filed March 15, 2000

BARBARA JOYE,
Plaintiff-Appellant,

vs.

MICHAEL R. ROSMANN, RONALD BENDORF,
PRAIRIE ROSE MENTAL HEALTH CENTER,
ALEGENT HEALTH-IMMANUEL MEDICAL
CENTER,
Defendants-Appellees.



Appeal from the Iowa District Court for Shelby County, Timothy O'Grady,
Judge.

Barbara Joye appeals the district court's order denying her motions for
mistrial and for new trial in her tort action. **AFFIRMED.**

Lawrence L. Marcucci of Marcucci and Conger, P.L.C., West Des Moines,
and Michael A. Dee of Pingel & Templer, P.C., West Des Moines, for appellant.

Edward F. Noethe of Sodoro, Daly & Sodoro, Omaha, Nebraska, for
appellees- Ronald Bendorf and Alegent Health-Immanuel Medical Center.

Hayward Draper of Nyemaster, Goode, Voigts, West, Hansell & O'Brien,
Des Moines, for appellee- Michael R. Rosmann.

Michael W. Ellwanger of Rawlings, Nieland, Probasco, Killinger,
Ellwanger, Jacobs & Mohrhauser, Sioux City, for appellee- Prairie Rose Mental
Health Center.

Heard by Sackett, C.J., and Streit and Miller, JJ.

STREIT, J.

Two jurors, in Barbara Joye's suit against her treating physicians and the hospitals they worked for, were co-employees with one of the hospital's board members. Joye, only learning of this relationship after the jury was sworn, claims the trial court erred in denying her motions for a mistrial and new trial. Because all alleged errors were waived, the trial court is affirmed.

I. Background Facts & Proceedings.

Barbara Joye brought suit against Dr. Michael Rosmann, Dr. Ronald Bendorf, Prairie Rose Mental Health Center (Prairie Rose), and Alegent Health-Immanuel Medical Center (Alegent Health), alleging her former therapist, Dr. Rosmann, and psychologist, Dr. Bendorf, implanted in her mind false memories of ritualized satanic abuse. She claimed the doctors' actions constituted therapeutic malpractice, intentional infliction of emotional distress, and assault and battery. She additionally alleged Prairie Rose and Alegent Health were negligent in failing to properly supervise its doctors.

The case went to trial in early February of 1999. During Prairie Rose's opening statement, trial counsel either introduced or described the members of the Prairie Rose board of directors, including their current employment.¹ One member, Allen Hjelle, served voluntarily on the board and was also the superintendent of the Elk Horn-Kimballton Community School District. Two of

¹ Opening statements were not recorded. The recollections of the parties differ as to the manner in which trial counsel referred to the board members. Appellant recalls the board members were somewhat informally introduced to the jury; whereas the appellees claim the jury was advised that the evidence would show the board of directors was comprised of the individuals recited in the opening statement.

the empanelled jurors were also employees of the Elk Horn-Kimballton School District. After opening statements, Joye moved for a mistrial claiming the jury became tainted when Prairie Rose's counsel mentioned Hjelle and his place of employment. The court denied the motion finding "all challenges, both those known and those which could have been ascertained by questioning, are waived if no challenge is made before the jury is sworn." See *Turner v. Jones*, 215 N.W.2d 289, 291 (Iowa 1974). The jury later returned a verdict in favor of the defendants, and the court denied Joye's motion for a new trial. Joye appeals, claiming: (1) the opening statement of Prairie Rose was improper; (2) the district court erred in concluding she knew or should have known about Hjelle's tie to the jurors; and (3) the employment relationship between the two jurors and Hjelle necessitated the jurors be challenged for cause.

II. The Opening Statement.

Joye first claims Prairie Rose's opening statement was improper because the mention of Hjelle and his place of employment was not a good faith recitation of admissible evidence. We do not reach the merits of this first claim as it is barred on procedural grounds.

In order to address the propriety of an opening statement, there must be some record of the statement for this court to review. See *State v. Romeo*, 542 N.W.2d 543, 552 (Iowa 1996). If the alleged error does not appear in the court files, entries, or legally certified shorthand notes of the trial, a bill of exceptions must be filed recounting the facts surrounding the unrecorded claim of error. Iowa R. Civ. P. 241(a), (c). The bill, if signed by the trial judge or attested to by

two bystanders, will then become part of the record and can be relied upon for appellate review. See Iowa R. Civ. P. 241(c). Failure to make a record of an alleged objectionable statement normally preserves nothing for review. See *State v. Horsey*, 180 N.W.2d 459, 460-61 (Iowa 1970). The only exception to that general prohibition is if the parties agree as to what was said. *Machmer v. Fuqua*, 231 N.W.2d 606, 608 (Iowa 1975). Because Joye did not file a bill of exceptions and the parties do not agree on the substance of the opening statement, we have no record to review.

III. The Voir Dire Examination.

Joye next claims the trial court abused its discretion in finding she waived any objection to the two jurors and in failing to dismiss the two jurors for cause.

A. Standard of Review. We review the trial court's denial of motions for mistrial and new trial for an abuse of discretion. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 873 (Iowa 1989). "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." *Carolan v. Hill*, 553 N.W.2d 882, 885 (Iowa 1996) (citation omitted).

B. Waiver. All alleged errors arising out of jury empanelment are waived, if the grounds for challenging a juror were known or could have been ascertained by questioning and the jury has been sworn. *Turner v. Jones*, 215 N.W.2d 289, 291 (Iowa 1974). The failure of a party to diligently inquire "as to the qualifications of prospective jurors on voir dire waives later objections based on facts that might have been disclosed by such inquiry." *Sayers Acres, Inc. v.*

Middle Republican Natural Resources Dist., 287 N.W.2d 692, 693-94 (Neb. 1980) (finding waiver despite trial counsel subsequently learning one of the jurors had a brother on defendant corporation's board of directors).

Joye knew Hjelle was a member of the Prairie Rose board of directors but failed to inquire in voir dire as to his possible connections with the jurors. In response to interrogatories requesting the identity of all individuals who had knowledge of the events surrounding Joye's allegations, Prairie Rose identified each board member, including Hjelle, by name. Therefore, Joye had specific knowledge of Hjelle's identity and his position within Prairie Rose. Joye's petition specifically alleged Prairie Rose was negligent in hiring and supervising the doctors involved in her treatment, thus enmeshing Hjelle and the other board members in the very fabric of the allegations pled in the petition. Armed with Hjelle's name, position, and role in the alleged acts of negligence, Joye failed to inquire as to possible connections between the jurors and Hjelle. The relationship between Hjelle and the two jurors could have been unearthed through inquiry in voir dire. Joye did not challenge these jurors. The trial court properly concluded the issue waived, and there was no abuse of discretion.

C. Challenge for Cause. Iowa Rule of Civil Procedure 187(f)(5) permits a juror to be challenged for cause if the juror is an employee of the adverse party. Challenging an individual juror, however, must be made before the jury is sworn. Iowa R. Civ. P. 187(e). As discussed immediately above, Joye failed to inquire into any potential relationship between the jurors and Hjelle prior to the jury being sworn. Their subsequent assertion that the jurors should be challenged for

cause was untimely under Iowa Rule of Civil Procedure 187(e) and is therefore waived. Irrespective of Joye's waiver, these jurors' relationship to Hjelle is not governed by Iowa Rule of Civil Procedure 187(f)(5). First, Hjelle was not the employer of the two jurors.² The school district was the jurors' employer. Hjelle was a co-employee. Second, as a Prairie Rose board member, Hjelle was not an adverse party. Prairie Rose was the named party in the suit. If a verdict adverse to Prairie Rose were announced, Hjelle would befall no legal consequences. Rule 187(f)(5) is inapposite to the present case. Thus, Joye's challenge of the jurors was not only waived on procedural grounds, but lacked substantive value as well. Finding no merit to Joye's assignments of error, the trial court is affirmed.

AFFIRMED.

² As superintendent of schools, it could be argued Hjelle had a supervisory role over the two jurors. Other than Hjelle's job title, the record does not reflect the day-to-day relationship between Hjelle and the jurors.