**IN THE COURT OF APPEALS OF IOWA**

No. 0-035 / 99-474
Filed April 12, 2000

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CLERK SUPREME COURT

**RODNEY J. BROWN and SHERRIE E. BROWN,**
**Plaintiffs-Appellants,**

**vs.**

**MARK POSPISIL, MARION FAMILY PRACTICE, P.C., and RICHARD HODGE,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

Plaintiffs appeal from the judgment entered upon a jury verdict in defendants' favor in plaintiffs' medical malpractice action. **AFFIRMED.**

Timothy S. White and William G. Nicholson of White & Johnson, P.C., Cedar Rapids, for appellants.

Steven K. Schamberg and Kerry A. Finely of Finley, Alt, Smith, Schamberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee Pospisil.

James E. Shipman and Chad M. Von Kampen of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellees Hodge and Marion.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

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VAITHESWARAN, J.

Rodney Brown filed a medical malpractice action and his wife Sherrie filed a loss of consortium claim against Defendants Mark Pospisil and Richard Hodge as well as Marion Family Practice, P.C. The jury returned a verdict in favor of each of the defendants. On appeal, the Browns contend the district court abused its discretion in limiting the testimony of their expert witness and treating physician and in giving a jury instruction requested by Dr. Pospisil. We affirm.

*I. Background Facts and Proceedings*

Before dawn on June 24, 1993, thirty-nine year old Rodney awoke in his Marion home with chest pain, shortness of breath, and right shoulder pain. When a pain reliever afforded no relief, Rodney's wife took him to the emergency room at Mercy Medical Center, where he was seen by Dr. Pospisil. Dr. Pospisil ordered an electrocardiogram (EKG) and blood tests. He determined the EKG was not performed properly and labeled it "abnormal." He also noted an abnormally high blood glucose level. Dr. Pospisil diagnosed Rodney with musculoskeletal pain and released him with instructions to make an appointment with his family physician.

Later that day, Rodney saw Dr. Hodge at Marion Family Practice, who diagnosed Rodney with pleuritis, an inflammation of the chest lining. He prescribed anti-inflammatory and pain medications and told Rodney to take time off from work. For the next ten months, Rodney did not seek any medical treatment for chest pain.

On April 24, 1994, Rodney's symptoms recurred. Rodney saw Dr. Hodge on April 29, and again on May 9, 1994. Another member of the practice saw him

on May 14, and 16, 1994. On May 20, 1994, Rodney decided to seek treatment at the Mayo Clinic in Rochester, Minnesota. Staff at the clinic determined he had recently sustained a massive heart attack and he suffered from congestive heart failure.

On February 27, 1995, the Browns filed suit against Drs. Pospisil, and Hodge, and Marion Family Practice. In August 1995, the Browns filed a designation of expert witnesses pursuant to Iowa Code section 668.11. They also filed answers and supplemental answers to expert interrogatories, although certain requests for supplementation remained unanswered.

In June 1997, Dr. Hodge and Marion Family Practice filed motions in limine. The court held the Browns' expert, Dr. Gramlich, would not be permitted to testify regarding the standard of care used by Dr. Hodge and Marion Family Practice after April 1994. Trial was set, reset, then reset again, after the defendants learned on the day before trial that one of Rodney's treating physicians, Dr. Cook, intended to expand the scope of his testimony to include statements about the appropriate standard of care and causation.

In July 1997, the Browns filed a motion to extend the time for disclosure of expert witnesses, to permit formal supplementation of their prior disclosures concerning Dr. Cook's testimony. They also sought reconsideration of the court's ruling limiting Dr. Gramlich's testimony. On August 28, 1997, the district court denied their motions. Following trial and a defense verdict, the Browns appealed.

*II. Preservation of Error*

The defendants argue that the Browns failed to make offers of proof concerning excluded testimony and, accordingly, did not preserve error. We conclude the district court's August 1997 ruling limiting Dr. Gramlich's testimony and excluding Dr. Cook's standard of care and causation testimony was an unequivocal holding on the issues, obviating the need for an offer of proof at trial. *See Kalell v. Petersen*, 498 N.W.2d 413, 415 (Iowa App. 1993). Accordingly, we proceed to the merits.

*III. Dr. Gramlich's Testimony*

The Browns contend the district court abused its discretion in excluding certain proposed testimony of Dr. Gramlich under Iowa Rule of Civil Procedure 125 on the grounds the testimony exceeded the scope of opinions disclosed during discovery. Specifically, they maintain that Dr. Gramlich should have been allowed to testify concerning the standard of care applicable to the defendants' treatment of Rodney on two dates in May 1994. Our review of a ruling excluding expert testimony under rule 125 is for abuse of discretion. *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 611 (Iowa App. 1998).

Rule 125 entitles a party to discover known facts, mental impressions and opinions of any expert the other party expects to call as a witness at trial that were developed in anticipation of litigation or for trial. Iowa R. Civ. P. 125(a). The rule also imposes on a party the duty to supplement responses where the substance of the expert's testimony has been "updated, revised or changed." Iowa R. Civ. P. 125(c). If the party fails to disclose or supplement the facts and

opinions following an appropriate request, the trial court may impose a sanction limiting or excluding the expert's testimony. *Id.*

In excluding portions of Dr. Gramlich's testimony, the district court stated,

> Dr. Gramlich did not testify that the omission of the EKG on May 9, 1994, and May 16, 1994, was a violation of the standard of care. Plaintiffs did not supplement Dr. Gramlich's Rule 125 Answers subsequent to the deposition, even though they could have done so. Plaintiffs were again alerted to the problem when Dr. Hodge and Marion Family Practice filed a Motion for Partial Summary Judgment. Again, Plaintiffs took no action to supplement Dr. Gramlich's responses to the Rule 125 Interrogatory.

Although Dr. Gramlich did not expressly state the defendants breached the standard of care in May 1994, the Browns argue that opinion was implicit in her report. They highlight references in the report to Rodney's treatment in May 1994, and emphasize that Dr. Gramlich only described one standard of care for evaluation of patients with complaints of chest pain and shortness of breath. The report does suggest Dr. Hodge or his colleagues should have taken an EKG on May 16, 1994, after detecting an elevated fasting blood sugar similar to the elevation in June 1993. However, we conclude the defendants were entitled to rely on the final sentence of Dr. Gramlich's report which stated, "[t]he substandard care by Dr. Pospisil on 6/23/93, by Dr. Hodge on 6/23/93 and by Dr. Hodge on 4/29/94 as outlined all contributed to increasing damage by infarction to the patient Rodney Brown." Because Dr. Gramlich failed to disclose in her report, answers to interrogatories, or deposition that, in her opinion, the defendants' breached the standard of care on two dates in May 1994, we conclude the district court did not abuse its discretion in limiting her testimony to opinions about care on or before April 29, 1994.

***IV. Dr. Cook's Testimony***

The Browns next contend the district court abused its discretion in refusing to extend the time for certifying Rodney's treating physician, Dr. Cook, as a standard of care and causation expert and in excluding certain other testimony.

***A. Standard of Care/Causation Testimony.*** We review the district court's denial of the Browns' application to extend the expert witness deadline for abuse of discretion. *Hill v. McCartney*, 590 N.W.2d 52, 54 (Iowa App. 1998).

In cases against licensed professionals, Iowa Code section 668.11(1)(a) (1995) requires plaintiffs to disclose their experts "within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time for disclosure." Parties must substantially comply with this provision. *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). The sanction for failure to disclose experts within this time frame is exclusion of their testimony "unless leave for the expert's testimony is given by the court for good cause shown." Iowa Code § 668.11(2). In determining whether good cause exists, the court considers: "(1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant's counsel's actions." *Hill*, 590 N.W.2d at 55 (citation omitted). "Good cause" must be "more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect." *Thomas v. Fellows*, 456 N.W.2d 170, 172 (Iowa 1990). Lack of prejudice alone does not excuse a late designation. *Nedved v. Welch*, 585 N.W.2d 238, 241 (Iowa 1998) (quoting *Dealers Warehouse Co. v. Wahl & Assocs.*, 216 N.W.2d 391, 394 (Iowa 1974)).

The Browns essentially concede they did not comply with Iowa Code section 668.11 in designating Dr. Cook, but maintain good cause existed for a

late certification. They specifically argue that "since Defendants already had many expert witnesses of their own on this issue there was no prejudice." The Browns' contention is no more than a desperate, unsupported plea for more time. On August 2, 1995, the Browns certified Dr. Cook as a treating physician. Dr. Cook did not notify them until nearly two years later that he could also provide standard of care and causation testimony. In the interim, the defendants twice took his deposition and relied on the absence of any standard of care or causation testimony. They also relied on the absence of any written disclosures that Dr. Cook intended to expand the scope of his testimony. Under these circumstances, we conclude the district court did not abuse its discretion in refusing to extend the expert certification deadline under Iowa Code section 668.11.

***B. Limitation of Testimony.*** The Browns also contend the district court should not have excluded Dr. Cook's testimony concerning the existence and relative size of heart attacks suffered by Rodney in 1993 and 1994. They maintain the excluded information was admissible without prior disclosure because it related to Dr. Cook's treatment of Rodney. The defendants counter that the testimony was subject to disclosure under Iowa Rule of Civil Procedure 125 as testimony developed in anticipation of litigation, and the Browns' failure to comply with the rule warranted exclusion. We review the court's ruling for an abuse of discretion. *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 253-54 (Iowa 1993).

Rule 125(a) states in pertinent part:

> Nothing in this rule shall be construed to preclude a witness from testifying as to (1) knowledge of the facts obtained by the witness prior to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge.

We must determine whether the challenged evidence "irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation." *Carson v. Webb*, 486 N.W.2d 278, 280-81 (Iowa 1992); *see also Day by Ostby v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991).

The Browns responded to an expert witness interrogatory served by Dr. Pospisil. They stated Dr. Cook

> [w]ill testify as to the medical treatment and care rendered to Plaintiff, Rodney Brown, as a result of his heart condition and treatment expected to be rendered in the future. Dr. Cook will also testify to his opinion as to damages to Mr. Brown's heart and his ability to function.

In its August 1997 ruling on the Browns' motion to extend the expert disclosure deadline, the court concluded Dr. Cook's opinion that Rodney would need a heart transplant in five years constituted "expert opinion testimony formulated for purposes of issues in pending litigation." The court accordingly ruled that the Browns had a duty to supplement expert witness interrogatories under rule 125(c) to include the new opinion, and the court gave the Browns an opportunity to do so. Dr. Cook conceded in a deposition taken after this ruling was entered that Rodney's 1993 heart attack had no bearing on his treatment of Rodney. In light of that deposition testimony, Dr. Pospisil's attorney moved at

trial to extend the court's August 1997 ruling to Dr. Cook's proposed testimony about the 1993 heart attack and apportionment of heart damage between the various heart attacks. The court granted the motion. The court, however, permitted Dr. Cook to testify about Rodney's medical history as reflected in records he received from Mayo Clinic and information the Browns conveyed to him at an initial conference.

We find no reason to overturn these rulings. Dr. Cook was given the opportunity to testify about the medical history he initially received and considered in treating Rodney. His testimony about the size of Rodney's heart attacks and the extent of tissue damage caused by the attacks was opinion testimony formulated by Dr. Cook after he stopped treating Rodney. *Cf. Morris-Rosdail*, 576 N.W.2d at 612 (allowing testimony of doctor who was active treating physician at time of trial). The Browns did not disclose this testimony to the defendants, despite repeated requests for supplementation. Accordingly, we conclude the district court did not abuse its discretion in limiting Dr. Cook's testimony.

***V. Jury Instruction***

The Browns contend the district court erred in giving Instruction No. 13, requested by Dr. Pospisil. They maintain the instruction duplicated Instruction Nos. 7 and 12, gave undue emphasis to expert witness testimony, and misstated the law. We review challenges to jury instructions for prejudicial error. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999). We consider the instructions as a whole and we will not reverse unless the jury was misled. *Id.*

Instruction No. 13 states:

> You must determine the standard of professional learning, skill and care required of Defendant Mark Pospisil, M.D. on June 24, 1993 and Defendant Richard Hodge, M.D., on June 24, 1993 and April 29, 1994 only from the opinions of those who were witnesses who have testified as expert witnesses as to such standards.
>
> You should consider each such opinion and should weigh the qualifications of the witness and the reasons given for the opinion. Give each opinion the weight to which you deem it entitled.
>
> You must resolve any conflict in the testimony of the witnesses by weighing each of the opinions expressed against the others, taking into consideration the reasons given for the opinion, the facts relied upon by the witness, the witness' relative credibility, and special knowledge, skill, experience, training and education.

Instruction No. 12 states:

> A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances.
>
> A violation of this duty is negligence.

Instruction No. 7 states:

> You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.
>
> Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

We agree with the Browns that Instruction No. 13 duplicates certain information contained in Instruction Nos. 7 and 12. However, the instruction clarifies that expert testimony was required to determine the standard of care, a proposition the Browns have conceded. *See Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992). Additionally, the instruction states expert witnesses must

possess qualifications relating directly to the problems at issue. *See* Iowa Code §147.139. Neither of these concepts explicitly appear in Instruction Nos. 7 or 12. Finally, as Dr. Pospisil correctly points out, the instruction does not imply the jury should consider the number of experts testifying on each side. We conclude the instruction adds new information, does not misstate the law, does not unduly emphasize expert testimony, and did not prejudice the Browns. Accordingly, the district court did not err in using it.

We affirm the district court's evidentiary rulings.

**AFFIRMED.**