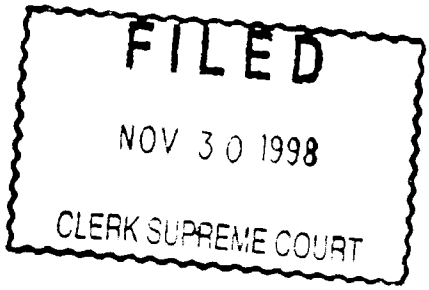
IN THE COURT OF APPEALS OF IOWA

No. 8-468 / 97-1346



MARY COLLEEN POHLMANN and THOMAS POHLMANN,
Appellants,

vs.

DANIEL P. CONGREVE and DAVENPORT SURGICAL GROUP,
Appellees.

Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge.

The plaintiffs appeal the jury verdict in defendants' favor on their medical malpractice claims. **AFFIRMED.**

Stuart R. Lefstein and John F. Doak of Katz, McHard, Balch, Lefstein & Fieweger, P.C., Rock Island, Illinois, for appellants.

Jack L. Brooks of Anderson & Nelson, P.C., Davenport, for appellees.

Heard by Streit, P.J., Mahan, J., and Habhab, S.J.*

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Mary Pohlmann and her husband, Thomas, brought a medical malpractice action against Dr. Daniel Congreve and the Davenport Surgical Group. The Pohlmanns sought damages for Dr. Congreve's alleged failure to biopsy a cancerous mass in Mary's right breast. They appeal the jury verdict in defendants' favor, asserting the district court should have granted their motion for judgment notwithstanding the verdict or, alternatively, their motion for new trial. We affirm.

Mary has a family history of breast cancer. She was diagnosed with fibrocystic disease and has been treated by doctors at the Davenport Surgical Group since 1986. In May 1993, she was seen by Dr. Congreve and informed him of her concern about a tender lump on her right breast, an area which she brought to another doctor's attention in November 1992. Dr. Congreve informed her it was a result of the fibrocystic disease. Due to increased pain, Mary scheduled another examination with Dr. Congreve on November 10, 1993. Dr. Congreve performed a biopsy on November 16, 1993, after a needle aspiration of the mass did not draw fluid. Dr. Congreve located and marked the mass before surgery and did not ask for Mary's assistance in locating the mass. After making the incision, Dr. Congreve palpated the area locating the mass, removed the mass, then palpated again and removed additional tissue.

Because Mary's symptoms continued, she had another appointment on December 29 and informed Dr. Congreve of her symptoms, but not of her suspicion

that he did not perform the biopsy correctly. He believed the pain was a typical result of the trauma of the biopsy and could take six months to abate.

In May 1994, a mammogram was performed by Mary's employer, Dr. McElhenney. A large mass was discovered. Another doctor, Dr. Durr, performed a biopsy and, as a result, a mastectomy was performed. Dr. Durr believed the cancerous mass had existed for at least two years. The pathology report revealed tissue from the chest wall, indicating the mass was deep inside the breast, against the chest wall.

Mary and Thomas filed a petition against Dr. Congreve and the Davenport Surgical Group. Numerous experts testified in the March 1997 trial. The fighting issues were: (1) whether Dr. Congreve performed the biopsy according to the requisite standard of care and removed the correct mass; and (2) whether the cancerous tumor removed later existed at the time of the biopsy performed by Dr. Congreve, or whether the tumor developed after the biopsy by Dr. Congreve.

The jury determined the defendants were not negligent, and Dr. Congreve did not fail to remove the intended mass in the November biopsy. This latter conclusion was determined by a special interrogatory to the jury.[1] The Pohlmanns' motions for judgment notwithstanding the verdict and for a new trial were denied. In support of

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[1] The jury returned a verdict in favor of the defendants. Question No. 1 on the verdict form was "Do you find the Defendant Daniel P. Congreve, M.D., negligent?" The jury answered that question, "No." This special interrogatory was also submitted: "Do you find that Dr. Congreve, in performing the biopsy of Mary Coleen Pohlmann's breast on Nov. 16, 1993, failed to remove the one 2 cm mass which was intended to be removed by that biopsy?" The jury answered, "No."

their motions, the Pohlmanns alleged juror misconduct and submitted an affidavit from one of the jurors. She stated that jury foreperson, Margaret Hilmer, said during deliberations that she "had this" which Daufeldt interpreted as meaning she had cancer and had to have a lumpectomy. Hilmer did not disclose this fact during voir dire. Additionally, Daufeldt claimed Hilmer's experience was discussed during deliberations. Daufeldt also said Hilmer and another juror, Margaret Judge, discussed the testimony prior to deliberations, and commented upon the witnesses' character and credibility. Judge also allegedly admitted she discussed the trial with her husband.

Motion for JNOV. Contrary to the Pohlmanns' assertion that our review is de novo, we review the district court's grant or denial of a motion for JNOV for the correction of errors at law. Iowa R. App. P. 4; *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). We view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly and reasonably be made. Iowa R. App. P. 14(f)(2); *Bredberg*, 551 N.W.2d at 326. The motion must stand or fall on the grounds raised in the motion for directed verdict. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996). Our only inquiry is whether there is sufficient evidence to justify submitting the case to the jury. *Bredberg*, 551 N.W.2d at 326. The motion should be denied if there is substantial evidence to support each of the claims. *Id.* Evidence is substantial when a reasonable mind would find the evidence presented adequate to

reach the same findings. *Willey v. Riley*, 541 N.W.2d 521, 526 (Iowa 1995). Evidence is not insubstantial merely because it could support contrary inferences. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988) (Citation omitted).

On appeal, the Pohlmanns argue the jury verdict reflects the impossible—that a large cancerous mass mysteriously appeared in just over four months after Dr. Congreve's biopsy. They claim the court should have entered judgment in their favor based upon the overwhelming evidence of liability. We disagree. The record contains sufficient evidence to justify submitting this case to the jury.[2] This is not an exceptional case to be decided as a matter of law. Iowa R. App. P. 14(f)(10). A

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[2] Several doctors testified for both parties. Dr. Riseman (plaintiff) testified it was possible but very highly improbable for a tumor to grow from undetectable on December 29 to five centimeters on the following May 11. He also testified the tumor found in May was a fast-growing type of cancer. Dr. Rosett (plaintiff) testified Mrs. Pohlmann noticed prior to the May 1994 mammography the mass seemed to have gone through a growth spurt in March or April and become a lot larger. Dr. Talamonti stated in his deposition one could argue it grew very rapidly or grew very little, depending on whether one assumes the mass was present when the defendant operated in November. He also stated growth rates accelerate as a tumor increases in size, becoming exponential. Small cancers can become big cancers very fast. A lot depends on one's baseline assumptions. Dr. Zaentz (defendant) testified the tumor was an atypical medullary carcinoma, which means it has a more rapid growth rate and it tends not to metastasize outside the breast cavity. He also testified the tumor was poorly differentiated and had necrotic areas, both implying rapid growth, so rapid it outgrows its blood supply. In November, at the time of the biopsy, the cancer could have been anything from a relatively few cells which were not aggregated into a discrete mass to a mass not firm enough to be detected by the biopsy. No one could put a size on the cancer at the time of the biopsy. Dr. Zaentz had no doubt the cancer could have grown from a microscopic or clinically undetectable size in November to five centimeters the following May.

district court should not grant a motion for JNOV merely because it reached a different conclusion than the jury.

The Pohlmanns claim the standard of care was "established conclusively and as a matter of law." They cite no authority for this assertion. *See* Iowa R. App. P. 14(a)(3). A review of the testimony of both plaintiff and defense experts reveals some disagreement, but most agree a surgeon need not seek a patient's help in locating a mass to be biopsied when the surgeon can locate it easily.[3] Dr. Congreve had examined Mrs. Pohlmann just days before the surgery and she had indicated where the lump was located. From the expert testimony, evidence of that examination and of Dr. Congreve's palpation before and during the surgery, a jury could find the

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[3] Dr. Rosett (plaintiffs' expert) testified it was not always necessary to have a patient help the surgeon locate a lump. Generally, if a physician felt comfortable he could palpate the mass he had palpated earlier, a patient would not have to assist.

Dr. Riseman (plaintiffs' expert) answered the question "Would most surgeons [have the patient assist] even there were no difficulty locating [the mass] with "Not if they knew exactly where it was." He also responded that if Dr. Congreve had no difficulty locating [the mass] he believed Dr. Congreve acted within the standard of care "for that biopsy" by not having the patient point out where to make the incision.

Dr. Talamonti (plaintiffs' expert) testified the standard of care in his practice is to have the patient assist, especially after a needle biopsy in a premenopausal woman. He stated he thought that was the standard of care "that we teach our medical students."

Dr. Atwell (defendants' expert) testified he felt "the great majority of surgeons who do breast biopsies would not have had the patient preoperatively help the surgeon locate the mass." He also testified the operative report indicated it was very easy to locate the mass.

Dr. Zaentz (defendants' expert) testified that under the standard of care "I do not feel that it was necessary to have the patient localize the mass."

requisite standard of care, that Dr. Congreve complied with that standard of care, that he knew where the mass was located, and properly located and removed it.

The Pohlmanns also cite statistical data to attempt to support their claim the jury verdict reflects an impossible conclusion—that the cancerous mass discovered and removed several months later had grown from clinically undetectable to several centimeters in size in four to five months. First we note that statistical information is not readily applicable at the individual level. What might be "normal" or "typical" has no particular relation to an individual's experience, except perhaps as a basis for comparison. Statistics are descriptive of the group data, not prescriptive of individual data. Dr. Durr testified no one could say when the cancerous mass first became clinically detectable. Mrs. Pohlmann had a fast-growing type of cancer. If the doubling rate of the cells was at the faster end of the statistical range, the mass could have grown from less than one centimeter to four or five centimeters in four months. The statistical data does not demonstrate "that Mrs. Pohlmann became the first woman in the history of medical science to have a 'huge' cancerous mass miraculously appear within a few months" near the site of a previous biopsy. We do not agree this is a case in which "the evidence is so overwhelming and the odds so great against the findings of a jury that it must be said certain facts have been established as a matter of law." Taking the evidence in the light most favorable to the defendants, we cannot conclude the district court committed legal error in refusing to grant judgment notwithstanding the verdict. The evidence in the record does not

so favor one party over the other to justify taking the fact finding duty away from the jury.[4] We therefore affirm the trial court's denial of the Pohlmanns' motion for judgment *non obstante veredicto.*

Motion for new trial. We review a denial of a motion for new trial for abuse of discretion. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 618 (Iowa 1991). If a jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice, a new trial may be ordered. *Thompson v. Rozeboom*, 272 N.W.2d 444, 446 (Iowa 1978). The reason for granting a new trial must fairly appear in the record. *Id.* The trial court has broad discretion in passing on motions for new trials, and it is only when there is a clear abuse of that discretion that we will interfere with the denial of such motion. Iowa R. App. P. 14(f)(7);*Boehm v. Allen*, 506 N.W.2d 781, 784 (Iowa App. 1993). A court has no right to set aside a verdict just because it might have reached a different

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[4] Part of the Pohlmanns' claim is that their experts were better qualified and had not dealt with them before, whereas at least one defense expert had testified for the defendants before. Once the "expert" threshold is reached, qualifying the witness to testify, "all further inquiry regarding the extent of his [or her] qualifications go to the weight that the fact finder can give such testimony under Rule 104(e)." *Carolan v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996). In cases involving medical issues, the expert need not be a specialist in a particular field of medicine to give an expert opinion. *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 886 (Iowa 1994) (citing *DeBurkarte v. Louvar*, 393 N.W.2d 131, 138 (Iowa 1986)). A jury has the duty to weigh evidence and ascertain the credibility of witnesses. *Meirick by Meirick v. Weinmeister*, 461 N.W.2d 348, 349-50 (Iowa App. 1990); *Eventide Lutheran Home v. Smithson Elec. and Gen. Constr. Co.*, 445 N.W.2d 789, 791 (Iowa 1989); *Daboll v. Hoden*, 222 N.W.2d 727, 726 (Iowa 1974). A jury is free to reject the testimony of one expert and accept the testimony of another. It is not for this court to invade the province of the jury.

conclusion. *Id.* We are slower to interfere with the grant of a new trial than with a denial. Iowa R. App. P. 14(f)(3).

The Pohlmanns argue the court should have granted their motion for new trial because: (1) the evidence overwhelmingly proves liability; (2) some of the jurors were untruthful during voir dire, were prejudiced against the Pohlmann's, and did not follow the court's admonition to refrain from discussing the case prior to deliberations; and (3) the court failed to allow evidence or submit an instruction regarding the fact that the defendants were not claiming contributory negligence.

Our discussion of the evidence above resolves the Pohlmanns' overwhelming-evidence claim. The evidence is not so one-sided as to justify deciding issues of negligence as a matter of law. *See* Iowa R. App. P. 14(f)(2) and (10). Substantial evidence in the record supports the verdict.

The Pohlmanns raise a claim of jury misconduct. They invite us to adopt the rule set forth in *Collier v. Westland Arena, Inc.*, "that a new trial must be granted when it is shown that a juror gave untruthful answers during voir dire and truthful answers would have revealed grounds for a successful challenge for cause." *Collier v. Westland Arena, Inc.*, 183 Mich. App. 251, 454 N.W.2d 138, 140 (Mich. App. 1990). We decline the invitation. The principle that the trial court has broad discretion in determining whether or not a verdict "effectuates substantial justice between the parties" has specific application when the new trial motion is based on

a claim of jury misconduct. Iowa R. App. P. 14(f)(3). The Iowa Supreme Court discussed this issue succinctly in *State v. Hennessey*:

> [J]ury misconduct justifies a new trial only if the defendant produces proof . . . that the misconduct 'was calculated to, and it is reasonably probable that it did, influence the verdict.' (quoting *State v. Cuevas*, 288 N.W.2d 525, 535 (Iowa 1980); *Harris v. Deere & Co.*, 263 N.W.2d 727, 730 (Iowa 1978)). We apply an objective rather than a subjective test in evaluating alleged misconduct. *State v. Rouse*, 290 N.W.2d 911, 916-17 (Iowa 1980).

State v. Hennessey, 405 N.W.2d 846, 849 (Iowa 1987). The Iowa rule requires: (1) the misconduct be calculated to influence the verdict; and (2) a reasonable probability it influenced the verdict. The Pohlmanns demonstrate neither.

The Pohlmanns offered an affidavit of juror Daufeldt to show juror misconduct. Juror affidavits have limited value in evaluating claims of jury misconduct. They can be used to expose outside influences on the jury, but not the internal workings of the jury:

> A distinction must be drawn between inquiries into the internal workings of the jury and external pressures brought to bear on the decision-making process. The internal workings include what parts of the record or instructions were or were not considered, the jurors' discussion, their motivations, mental or emotional reactions, their votes, or other evidence which seeks to show that the actual decision of the jury was, or should have been, something other than what the verdict indicates. Such matters are said to "inhere" in the verdict. In this context, it is appropriate to invoke the parol evidence rule to prevent assaults on a verdict. Upon the basis of the parol evidence reasoning, or upon general policy grounds, or both, this type of evidence is incompetent. In State v. Hahn, (statement by juror that he knew trial judge "hates" hung juries), this court stated the rule in very unequivocal terms:
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> > We are obliged to ignore statements or affidavits of jurors as to whether the communications influenced

> their verdict. The principle is well settled a juror may not by affidavit or testimony state what influenced the jury in reaching the verdict.
>
> On the other hand, evidence of external matters improperly brought to bear on the deliberations may be used to attack a verdict. These "objective" facts may be testified to by a juror. Examples would be an experiment by a juror, and a prejudicial comment by a bailiff to jurors in a criminal case. Because such matters do not "inhere" in the verdict, the parol evidence rule is not violated. Further, a countervailing policy is actually advanced by admission of such evidence to upset a verdict when the effect is to "purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them."

State v. Rouse, 290 N.W.2d 911, 916-17 (Iowa 1980) (citations omitted). The affidavit shows Ms. Daufeldt understood a comment by the foreperson that she "had this" to mean the foreperson had had breast cancer. Ms. Daufeldt does not even suggest this influenced her vote or the verdict itself. The affidavit also tells of comments made by another juror to others on the panel, such as describing Mrs. Pohlmann's daughters as "snooty." The Pohlmanns allege this demonstrates prejudice and hostility against them. This juror also discussed the case with her husband. However, the Pohlmanns do not show how these actions were calculated to influence the jury or any probability they influenced Ms. Daufeldt's vote or the jury's verdict. In addition, we cannot consider Ms. Daufeldt's statements which reveal her interpretations of juror motivations and mental or emotional reactions. *Id.* We conclude the claim of jury misconduct is without merit.

Finally, the Pohlmanns argue the court erred in the admission of evidence and in instructing the jury. Specifically, they claim it was error to reject their offer of

proof concerning the defendants' admission, "defendants do not claim that plaintiff was contributorily negligent" and to refuse to instruct the jury the defendants were not claiming the Pohlmanns were negligent. The determination to admit or to refuse to admit evidence lies in the discretion of the trial court, and we will not reverse except when an abuse of discretion is shown, as where the evidence is clearly irrelevant or prejudicial. *State v. Moore*, 276 N.W.2d 437, 441 (Iowa 1979); *State v. Cassady*, 243 N.W.2d 581, 583 (Iowa 1976). The trial court has a better perspective on the circumstances of the offer of proof and which proposed jury instructions adequately set forth the law to the jury. We cannot say from the record before us on appeal that the trial court abused its discretion. Because the verdict did not apportion fault between the parties, the Pohlmanns cannot show prejudice from the court's rulings.

Based on our resolution of the issues raised on appeal from the trial court's denial of the Pohlmanns' motion for a new trial, we affirm the trial court's denial of the motion.

AFFIRMED.