

IN THE COURT OF APPEALS OF IOWA

No. 4-334 / 93-790

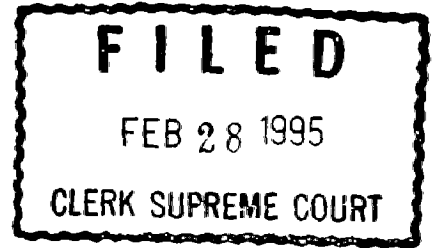
DELORES BROYLES f/k/a Delores Wagner,
As Parent and Next Friend of Tomra
Wagner, A Minor Child, and DELORES
BROYLES, Individually,

Plaintiff-Appellant,

vs.

TERRY J. SUTTON, M.D., D.W. WETRICH,
M.D., and JAMES WATSON, D.O.,

Defendants-Appellees.



460070

Appeal from the Iowa District Court for Jefferson
County, James Jenkins, Judge.

In this medical malpractice action, the plaintiff
appeals from the entry of judgment on a jury verdict in the
defendant doctors' favor. **AFFIRMED.**

William J. Minks, Johnston, and Edward F. Noyes,
Fairfield, for appellant.

M.H. Pothoven and Randall Stravers of Pothoven,
Blomgren & Stravers, Oskaloosa, for appellee Sutton.

Jack Hilmes and Glenn Goodwin of Finley, Alt, Smith,
Scharnberg, May & Craig, P.C., Des Moines, for appellee
Wetrich.

Michael Figenshaw and Karl T. Olson of Bradshaw,
Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee
Watson.

Heard by Donielson, C.J., Cady, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving
on this court by order of the Iowa Supreme Court.

CADY, J.

Delores Broyles brought a malpractice action against Terry J. Sutton, M.D., D.W. Wetrich, M.D., James Watson, D.O. and Jefferson County Hospital. She claimed the doctors were negligent in the diagnosis, care and treatment of her pelvic inflammatory disease (PID). The hospital settled prior to the jury trial. The jury rendered a verdict in favor of the Defendants and Broyles appealed. On our review, we affirm the trial court order on the jury verdict.

The first relevant doctor visit occurred on January 18, 1989. At that time, Dr. Sutton diagnosed Broyles with menorrhagia, heavy bleeding during menses, and noted she had no abdominal pain. Dr. Sutton next saw Broyles in the emergency room in March 1989. She was suffering from lower abdominal pain and nausea. Dr. Sutton diagnosed Broyles with PID, prescribed Keflex, and advised her to return as needed.

Broyles visited Dr. Watson in April complaining of back and stomach pain. Dr. Watson diagnosed and treated her for somatic dysfunction and a spastic colon. In May 1989, Dr. Watson saw Broyles in the emergency room and referred her to Dr. Wetrich due to an abnormal ultrasound of her pelvis. Dr. Wetrich diagnosed PID and prescribed antibiotics.

Broyles saw Dr. Wetrich again on May 18 and June 5. On the June 5 visit, Broyles no longer had abdominal pain

000041

or tenderness, however, her ovaries were still enlarged. Dr. Wetrich concluded the infection had resolved.

Broyles next visit with a physician was June 26, 1989. Dr. Sutton saw her in the emergency room for abdominal pain, vomiting, nausea, and diarrhea. Dr. Sutton performed a physical examination, determined she had gastroenteritis and discharged her with instructions to return if necessary.

Broyles returned the next morning and was hospitalized with extreme abdominal pain. Later that day, she was transferred to the University of Iowa Hospitals and Clinics where she underwent exploratory surgery revealing a severe abdominal infection.

Broyles claimed the infection resulted in several medical and psychological difficulties including a respiratory illness, a lung laceration, vocal cord paralysis, a colostomy placement, myositis ossiticans, possible brain calcifications and permanent damage to her mind. She asserted these difficulties were the result of improper diagnosis, care and treatment.

A jury returned a verdict in favor of the defendant doctors. The court entered judgment on the jury's verdict.

Broyles appeals on numerous grounds. She asserts the trial court erred in granting Defendants six strikes and allowing her only four, not granting her challenges for cause, failing to submit requested jury instructions,

overruling objections to jury instructions, and ruling in Defendants' favor on several evidentiary issues.

I. Number of Strikes

Broyles contends the district court erred in granting her four strikes and Defendants six strikes. She argues because each of the Defendants had common interests they should be considered as one party and granted only four strikes collectively. Defendants respond that Broyles failed to raise an objection to the allocation of strikes among the parties and therefore, did not preserve error on this issue.

We are not convinced Broyles preserved error on this issue. Nonetheless, we will address it on the merits.

Iowa Rule of Civil Procedure 187(g) grants the court discretion to authorize additional strikes where there are two or more parties represented by different counsel. Thus, our standard of review is for an abuse of discretion. Nichols v. Schweitzer, 472 N.W.2d 266, 274 (Iowa 1991). We will find an abuse of discretion where the trial court's actions are clearly unreasonable. Id.

In Wilson v. Ceretti, 210 N.W.2d 643 (Iowa 1973), we addressed the effect of error in granting excessive peremptory strikes to defendants. We held the offended party is entitled to relief upon a showing of actual resultant prejudice, or a clear and convincing probability of resultant prejudice. Nichols, 472 N.W.2d at 273 (citing Wilson, 210 N.W.2d at 646. A verdict adverse to

the complaining party does not, alone, demonstrate either prejudice or clear and convincing proof of probable prejudice. Wilson 210 N.W.2d at 647.

In this case, the district court determined the number of strikes prior to trial. Defendants Sutton, Wetrich, and Watson were all represented by separate counsel and under rule 187(g) were each entitled to four strikes. See Nichols, 472 N.W.2d at 273. The court, however, granted them each two strikes which they exercised individually. We find the court's decision was not unreasonable and considered whether the Defendants shared any similar interests. Moreover, on the record before us, Broyles has failed to demonstrate actual prejudice or a clear and convincing probability of resultant prejudice.

II. Challenge for Cause

Broyles asserts she is entitled to a new trial because the trial court did not grant her challenges for cause in the jury selection process and forced her to use three of her four preemptory strikes to strike those venire members challenged for cause. Specifically, she asserts venire member Jennabelle Borgomainerio was a current patient of Dr. Wetrich. Another venire member, Delores Clements, was a former patient of Dr. Wetrich and Dr. Sutton. Still another venire member, Sandra Jean Anderson, was a former patient of Dr. Sutton, and venire member Laura Belgarde was a former employee of Jefferson County Hospital.

Defendants assert Broyles failed to preserve error on this issue. They assert Broyles is required to file a bill of exceptions because the voir dire was not reported and her challenge was overruled.

We find Broyles preserved error on this issue. Under Iowa Rule of Appellate Procedure 10(c) if no report of the evidence or proceedings is made appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement and any objections are then submitted to the trial court for settlement and approval. Iowa R. App. P. 10(c). Broyles sufficiently complied the requirements of rule 10(c) and preserved error on the challenge for cause issue. We now address the merits.

The trial court is vested with broad discretionary power in acting on challenges for cause. Nichols, 472 N.W.2d at 273; State v. Houston, 206 N.W.2d 687, 689 (Iowa 1973). We find no abuse of discretion by the trial court in overruling Boyer's challenges for cause. The record indicates each of the venire members was questioned and stated they could fairly and impartially evaluate the evidence. The relationship between Defendants and the venire members Broyles challenges on appeal was minimal. Clements saw Dr. Wetrich one time for a second opinion eight to ten years prior to trial. Belgarde was a former employee of Jefferson County Hospital, which settled prior to trial, and had no relationship with the remaining

Defendants. No objection was made to Anderson prior to this appeal. Additionally, Dr. Watson and Dr. Sutton no longer practice in Iowa, eliminating prejudice which might arise from an ongoing physician-patient relationship.

III. Evidentiary Issues

Broyles alleges three evidentiary errors within issue III and seven subissues within issue III(a). Our review of evidentiary issues is for an abuse of discretion. State v. Weatherly, 519 N.W.2d 824, 825 (Iowa 1994) (citing State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985)). In order to show an abuse of discretion, appellant must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Weatherly, 519 N.W.2d at 825.

A. Learned Treatises

In this section, Broyles asserts the trial court erred in approximately seven instances when it precluded Broyles from using learned treatises in the cross-examination of Defendants' experts. After reviewing each alleged instance of error we find no abuse of discretion. In each instance, the information Broyles sought to admit was either: elsewhere in the record without objection, See Gavlock v. Coleman, 493 N.W.2d 94, 97 (Iowa App. 1992) ("It is elementary that admission of evidence is not prejudicial error where substantially the same evidence is in the record without objection."); Mens Wear v. Stille-Pierce Agency, 329 N.W.2d 295, 298 (Iowa 1983); or the article

Broyles was attempting to use in cross-examination was not properly identified as a learned treatise by Broyles own witness or the witness being cross-examined. Iowa R. Evid. 803(18). Furthermore, Broyles failed to properly preserve error by making an offer of proof, See Graen's Mens Wear v. Stille-Pierce Agency, 329 N.W.2d 295, 298 (Iowa 1983).

B. Cross-examination of Dr. Briggs

Broyles asserts the trial court erred when it refused to require the defendants' witness Dr. Briggs to read from the Physicians Desk Reference (PDR) during cross-examination. Defendants again counter that Broyles failed to preserve error. We agree.

After the court sustained Defendants' relevancy objection to Broyles request that Dr. Briggs read from the PDR, Broyles failed to make an offer of proof. Upon the whole record, we do not believe what Broyles sought to prove was so apparent that a proffer was unnecessary. Graen's Mens Wear, 329 N.W.2d at 298.

C. Demonstrative Aids

Broyles contends the court erred when it refused to allow him to use demonstrative aids during closing argument. The demonstrative aids Broyles sought to use included enlarged pages from textbooks, charts, and tables some of which were not previously admitted into evidence. The trial court was first made aware of this issue shortly before closing arguments and had no method of separating the material which was submitted into evidence from that which was excluded.

We find no abuse of discretion by the trial court. It is improper to comment on or read from evidence stricken from the record. See State v. Mayes, 286 N.W.2d 387, 392 (Iowa 1979). Moreover, Broyles was not prejudiced by the court's ruling. The court permitted him to summarize the evidence he sought to include and a portion of the evidence in the demonstrative aids was previously presented to the jury.

IV. Jury Instructions

Broyles argues the court erred in failing to submit jury instructions regarding fiduciary duty and abandonment. She further asserts the court erred in overruling her objections to jury instructions fourteen (14) and eighteen (18).

A. Fiduciary Duty Instruction

Error in giving or refusing to give an instruction does not warrant reversal unless the error is prejudicial. Vachon v. Broadlawns Medical Found., 490 N.W.2d 820, 821 (Iowa 1992); Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 685 (Iowa 1990). In this case, we find the trial court's failure to instruct the jury on fiduciary duty as requested by Broyles was not prejudicial.

We acknowledge physicians owe their patients a fiduciary duty. Baines v. Blenderman, 223 N.W.2d 199, 202 (Iowa 1974). Broyles, however, did not plead or prove a breach of fiduciary duty caused her damages. Anderson v. Low Rent Housing Comm'n, 304 N.W.2d 239, 249, (Iowa) cert.

denied, 454 U.S. 1086 (1981). (holding parties' legal theories will be submitted to the jury as long as they are supported by the pleadings and substantial evidence). Moreover, the concepts Broyles sought to have presented to the jury were embodied in other instructions on negligence and duty of care. See Stover v. Lakeland Square Owners Ass'n, 434 N.W.2d 866, 868 (Iowa 1989) (holding the court must grant requested instructions that state correct rules of law unless the concept is embodied in other instructions).

B. Abandonment Instruction

We next consider the trial court's refusal to give an instruction on abandonment. Abandonment is a recognized basis of physician-patient liability. Manno v. McIntosh, 519 N.W.2d 815, 820 (Iowa App. 1994). It is the duty of a physician who takes charge of a case to follow the case and give proper instructions to a patient as to his or her future actions and conduct. Id.; Surgical Consultants, P.C. v. Ball, 447 N.W.2d 676, 682 (Iowa App. 1989). The physician's employment continues until ended by mutual consent, his dismissal, or until his services are no longer necessary. Id. Abandonment gives rise to actions for both negligence and breach of contract. Manno, 519 N.W.2d at 820 (quoting Estate of Smith v. Lerner, 387 N.W.2d 576, 579 (Iowa 1986)).

To prove abandonment, a plaintiff patient must prove more than a mere termination of a patient-physician

(CONFIDENTIAL)

relationship. Id. at 821. There must be evidence that the physician has intentionally terminated the relationship at a critical stage of the patient's treatment, the termination was done without reason or sufficient notice to enable the patient to procure another physician, and the patient has resultant injuries. Manno, 519 N.W.2d at 821.

Broyles bases her abandonment claim against the doctors on their alleged failure to schedule appropriate follow-up visits and to provide proper treatment when attending her. While a physicians failure to see the patient at intervals necessary for proper treatment may be considered abandonment, Broyles has failed to provide substantial evidence to support her claim. Broyles did not demonstrate any of the doctors had an intent to terminate the physician-patient relationship. Each of the doctors saw her regularly until she was transferred to the University Hospitals in Iowa City. The evidence Broyles adduced more accurately applies to the quality of care provided then to abandonment. We conclude the trial court correctly refused to give an instruction on abandonment. See Vachon, 490 N.W.2d at 822.

C. Instruction 14.

Broyles asserts the trial court erred in overruling her objection to jury instruction 14. Instruction 14 provides:

The rules of law with respect to the liability of any party are the same whether the injury complained of is serious or slight. In arriving at your verdict, you should first decide if there

is any negligence on the part of the Defendant without allowing the nature of the injury complained of to influence you in any manner.

Broyles' counsel objected as follows:

The only thing that might be confusing, your Honor, is using the term about allowing the nature of the injuries. My understanding this has to do with the extent of the injuries is what this -- what this instruction is really saying versus serious versus slight. Because I think the nature of the injury is a part of this case as far as what was an injury. That would be the only objection I would have to it.

Objections to jury instructions must specify the matter objected to and the grounds for the objection. Iowa R. Civ. P. 196; Moser v. Stallings, 387 N.W.2d 599, 603-04 (Iowa 1986). The objection must be sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury. Moser, 387 N.W.2d at 604. Broyles objection at trial that "the nature of the injury is a part of the case" was not sufficiently specific to alert the trial court to a deficiency in the instruction. It provides no explanation as to what manner the jury will be prejudiced or confused by inclusion of the instruction. The trial court correctly overruled Broyles objection to instruction 14.

D. Instruction 18

Broyles next contention concerns instruction eighteen (18). Instruction 18 states:

Physicians may disagree in good faith on what would be the proper treatment or diagnosis of a medical condition in a given situation. It is for the physician to use his or her professional

judgment to select which recognized method of treatment to use in a given situation.

If you determine that there were two or more recognized alternative courses of action which have been recognized by the medical profession as proper methods of treatment, and which views are supported by reputable, respectable, and reasonable medical experts, and the defendant, in the exercise of his best judgment, elected one of these proper alternatives, then the defendant was not negligent.

At trial, Broyles objected to instruction 18 on the grounds that it is embodied in instruction sixteen (16), relating to the physician's duty of care, and is a distortion of the law. On appeal, Broyles renews these objections and adds that the instruction does not apply to any factual issue in the case.

We address Broyles third objection first. The only grounds or objections that may be asserted or considered on appeal are those specified in the objections to the trial court. Iowa R. Civ. P. 196. Thus, Broyles additional claim that the instruction does not apply to any factual issue may not be considered because it is raised for the first time on appeal. Moser, 387 N.W.2d at 604.

We now turn to the objections Broyles made at trial. A trial court is not required to word jury instructions in any particular way. State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985). If an instruction correctly states the applicable law it will be deemed proper even though an alternative wording is possible. Id. Trial courts have much discretion in framing jury instructions. Schuller v.

Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa App. 1987). We look to the jury instructions as a whole in determining whether or not they are proper. Schuller, 407 N.W.2d at 351. We recognize, however, that giving instructions which are conflicting or confusing is reversible error. Id. (citing Sammons v. Smith, 353 N.W.2d 380, 385 (Iowa 1984)).

We find instruction 18 is not embodied in instruction 16. Instruction 16 is a standard duty of care instruction issued in medical malpractice cases. It instructs the jury "a physician must use the degree of skill, care, and learning ordinarily possessed and exercised by other physicians in similar circumstances." Iowa Civil Jury Inst. 1600.2 (1993). In contrast, instruction 18 gives the jury specific directions on physician's duties when, as in this case, alternative courses of treatment are available.

Broyles also asserts instruction 18 distorts the law by improperly emphasizing an individual expert's thoughts on acceptable medical practice over those of the medical community. We believe a plain reading of the language in instruction 18 does not support Broyles contention. Instruction 18 properly emphasizes the requirement for alternative treatments recognized by the medical community. See Estate of Smith, 387 N.W.2d at 581. The instruction states, "If you determine that there were two or more recognized alternative courses of action which have been recognized by the medical profession as proper methods

of treatment . . . and which views are supported by reputable, respectable, and reasonable medical experts " This language in no way suggests if one expert supports the Defendant's actions the jury cannot find negligence. It refers to the medical profession and multiple experts.

The instruction states the applicable law on alternative methods of treatment as previously recognized in Peters v. Vander Kooi, 494 N.W.2d 708, 713 (Iowa 1993), Vachon, 490 N.W.2d at 823, and Estate of Smith, 387 N.W.2d at 581. The trial court did not abuse its discretion by submitting jury instruction 18.

V. Limitation on Cross-examination of Dr. Watson

Broyles contends the trial court erred when it refused to allow her to impeach Dr. Watson with regard to alleged false and inconsistent statements he made under oath. Broyles contends Dr. Watson, in his Answers to Interrogatories filed November 7, 1991, and in his telephonic deposition taken January 30, 1992, stated his license had never been revoked, suspended, or refused for renewal. Broyles then asserts a May 1, 1992 memorandum from the Iowa Board of Medical Examiners (Board) and a December 23, 1991 order show Watson's license had been refused for renewal.

The trial court held there was no inconsistency in Dr. Watson's statements and the Board's order and refused to allow Broyles to question Dr. Watson about them. After

reviewing the record, we agree with the trial court's ruling.

First, the Board's order had not yet been published at the time of the interrogatories. Dr. Watson was not aware of its contents. Thus, there could be no inconsistency. Second, according to the December 30 order Watson's license was never suspended, revoked or refused renewal by the Board. Rather, Dr. Watson and the Board reached a probation agreement regarding his license to practice in Iowa. Thus, Dr. Watson's answer to Broyles interrogatory and deposition question whether his license had ever been suspended, revoked, or refused renewal was true. Moreover, when deposed on whether his license had been placed on probation Dr. Watson truthfully responded "yes." As the offer of proof contained no evidence that Watson had made prior inconsistent statements, the trial court did not abuse its discretion in excluding the evidence.

VI. Admissibility of Evidence

Broyles asserts the trial court erred by admitting evidence of her sexual history, use of nonprescription drugs, and medical history. We must first resolve the preservation of error issue presented by Defendants.

Prior to trial Broyles filed a motion in limine requesting exclusion of references to her sexual history, use of nonprescription drugs, and medical history. In an oral ruling the trial court denied the motion. It is unclear whether the trial court's ruling was an unequivocal

holding. At trial, Broyles occasionally objected on relevance and unfair prejudice grounds when Defendant's raised the controverted issues. We conclude error was preserved in the instances when Broyles objected.

We must next decide whether the trial court abused its discretion in admitting this evidence and if it did err, whether substantial rights of Broyles were affected. Kalell v. Petersen, 498 N.W.2d 413, 415 (Iowa App. 1993) (quoting Shawhan v. Polk County, 420 N.W.2d 808, 809 (Iowa 1988)). After reviewing the record, we conclude the evidence was relevant and its probative value was appropriately balanced against its potential for prejudice. In many instances, Broyles raised the asserted prejudicial evidence herself in advance of Defendants' cross-examination inquiries. The trial court did not abuse its discretion in admitting this evidence on cross-examination and Broyles suffered no substantial prejudice.

VII. Multiple Evidentiary Rulings

Broyles final issue asserts the trial court abused its discretion in sustaining Defendant's objections, overruling her objections, allowing alleged misstatements into evidence, allowing improper evidence, and limiting testimony from her experts. In this section Broyles alleges over seventy instances of error. She does not however explain how each ruling was error; nor does she cite any authority in support of her arguments. Our

Supreme Court has previously held "omnibus or blanket" assignments of error do not comply with the Iowa Rules of Appellate procedure. Allerton-Clio-Lineville Comm. Sch. Dist. V. County Bd. of Educ., 258 Iowa 846, 848, 140 N.W.2d 722, 723 (1966). Arguments which consist of nothing more than a bald assertion of error will not be considered on appeal. Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 693 (Iowa App. 1984). Matters contained in a brief point must be sufficient in and of themselves to lay before the court, without independent investigation, the precise ruling complained of and the law applicable. Cook v. State, 431 N.W.2d 800, 804 (Iowa 1988). We find Broyles waived the asserted errors.

AFFIRMED.