IN THE COURT OF APPEALS OF IOWA

No. 9-532 / 89-93

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CLERK SUPREME COURT

DAVID A. BERG,

Plaintiff-Appellant,

vs.

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DES MOINES GENERAL HOSPITAL CO., DR. DAVID L. FRIEDGOOD, DR. PATRICK LEONG, JACOB W. MILLER, JR., and UNIVERSITY OF OSTEOPATHIC MEDICINE AND HEALTH SCIENCES,

Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

In this medical malpractice action, the jury returned a verdict in favor of the defendant health care providers. The plaintiff has appealed from the resulting judgment challenging discovery rulings and evidentiary rulings. **REVERSED AND REMANDED.**

Davis L. Foster of Barker, Cruise, Kennedy, Houghton & Foster, Iowa City, for the appellant.

David H. Luginbill of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, Des Moines, for the appellee Friedgood.

Kevin M. Reynolds of Whitfield, Musgrave & Eddy, Des Moines, for the appellees Leong and Des Moines General.

Michael Figenshaw, of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for the appellees Miller and University of Osteopathic Medicine & Health Sciences.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ., but considered by Oxberger, C.J., and Schlegel and Sackett, JJ. Hayden, J., takes no part.

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SCHLEGEL, P.J.

In this medical malpractice action, the jury returned a verdict in favor of the defendant health care providers. The plaintiff has appealed the resulting judgment. He challenges discovery rulings and evidentiary rulings.

David Berg was taken to the emergency room of Des Moines General Hospital, suffering from a variety of physical complaints. Tests eventually revealed that he had suffered a heart attack. Berg alleges that delay in reaching this diagnosis caused irreparable damage to his heart muscle due to impaired circulation.

Berg filed this medical malpractice action against the hospital and several doctors and medical students involved in his care. The allegations of negligence concerned delay in reaching a diagnosis. The primary factual dispute was whether Berg had complained of chest pains from the outset and had been ignored, as he alleged, or whether his primary complaint for the first several hours was a complaint of a severe headache, as the defendants alleged.

The jury returned a verdict in favor of the defendants, and Berg has appealed the resulting judgment.

Berg contends the district court abused its discretion by denying his motion to compel discovery. He argues he should have been allowed to obtain, for discovery purposes, written summaries of his hospital care prepared in anticipation of litigation by two of the nurses involved in his care.

Berg also contends the district court abused its discretion by allowing one of the defendant doctors to testify that he routinely and frequently orders electrocardiograms and cardiac injury tests for his emergency room patients. Berg argues this evidence should have been excluded because he had previously been barred, during discovery, from obtaining hospital records showing the frequency with which the doctor in question ordered such tests. In a separate issue, Berg challenges as erroneous the district court's order barring him from obtaining these hospital records.

Finally, Berg contends he was irreparably prejudiced when one of the defendant doctors made an unsolicited reference during his testimony to the defendant hospital's financial problems. The jury was admonished to disregard this remark, but Berg contends such an admonition was insufficient; he asserts the remark was so prejudicial that he is entitled to a new trial.

This is an action at law and as such our scope of review would ordinarily be only for errors at law. However, certain issues relating to discovery matters are reviewed under an abuse of discretion standard. The trial court has wide discretion in ruling upon the discoverable nature of requested information and will not be reversed unless an abuse of discretion is found. See Jones v. Iowa State Highway Commission, 261 Iowa 1064, 1067, 157 N.W.2d

86, 87 (1968); Rhiner v. City of Clive, 373 N.W.2d 466, 478 (Iowa 1985). Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent. Ashmead v. Harris, 336 N.W.2d 197, 199 (Iowa 1983).

I. Discovery of the Nurses' Statements. There are three nurses' statements but only two are at issue in this case. The trial judge held, and all parties agree, that those statements were prepared in anticipation of litigation. Iowa Rule of Civil Procedure 122(c) sets out what is required in order to obtain such statements during discovery.

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The district court ruled that the requisite showing had been made as to one nurse's statement only. This was based on the apparent lack of memory shown by that nurse during her deposition. There is no question the information possibly contained in those statements is important. The entire case turned on whether the defendant doctor knew the

plaintiff was experiencing chest and arm pain, and those statements, made only a few days after admittance of the plaintiff to the hospital, could have provided the proof.

The importance of the evidence goes partly toward establishing the substantial need requirement. The substantial need and the undue hardship requirements are partially intertwined. It seems clear that the undue hardship requirement is satisfied if the substantial equivalent of the nurses' statements cannot be obtained. The failure of one of the nurse's memory was enough to satisfy this requirement for the district court. An additional requirement for showing substantial need is the diligence of counsel in pursuing an alternate form of the evidence. See Schaffer v. Rogers, 362 N.W.2d 552, 556 (Iowa 1985). In Schaffer, the plaintiffs made no efforts to obtain the substantial equivalent of the evidence sought, nor did plaintiffs offer any explanation for their lack of diligence. This case is a complex medical malpractice action. Berg contends that the necessity of making sure the claim was sound and the need to find and question experts in this matter required a substantial delay. In addition, the defendant would not let Berg examine the nurses other than in a deposition setting which could not be done until the investigation was completed and a sound claim could be filed. The hospital's interrogation of the nurses took place before Mr. Berg had taken any

action to file suit. The plaintiff is not guilty of a lack of diligence in this case.

The next question is whether the nurses' depositions were the substantial equivalent of the earlier statements. The substantial lapse of time between the incident and the depositions significantly decreases their value when compared to the written statements. Even though only one nurse admitted to a lack of memory the other two were certainly guilty of it. They were able to remember very little without reference to hospital records. The Iowa Supreme Court has recognized that the federal rules should be used for guidance in the interpretation of Iowa Rule of Civil Procedure 122(c). Ashmead, at 199. The federal cases have clearly placed emphasis on the passage of time and lapse of memory as a basis for satisfying the substantial need and undue hardship requirements. See Southern Railway Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968); United States v. Murphy Cook and Co., 52 F.R.D. 363 (E.D. Pa. 1971). The lapse of time in this case is over two years and the lack of memory is obvious. The depositions were not the substantial equivalent of the earlier signed statements.

Discovery rules are to be liberally construed to effectuate disclosure of all relevant and material information to the parties. Hutchinson v. Smith Laboratories, Inc., 392 N.W.2d 139, 140-41 (Iowa 1986).

The requirements of Iowa Rule of Civil Procedure 122(c) are clearly satisfied. The district court abused its discretion by not allowing access to the nurses' statements.

II. Discovery of the Hospital Records. The district court did not require production of the hospital records because their production would be too burdensome and would reveal privileged information. General discovery principles require the production of these records.

Once again the importance of the records is unquestioned. The frequency of certain tests would tend to prove whether or not the ministering of such a test would only be done when a heart attack is suspected. The plaintiff's experts testified that such testing is unlikely on a routine basis and yet the defendant doctor testified that he did it routinely. The only solid evidence to contradict the doctor would be contained in those medical records.

The privilege of the information cannot protect the defendant given the importance of the information. In fact, the only real privilege that is in danger is the revelation of the patients' names, which can be taken care of with a black magic marker. Iowa Rule of Civil Procedure 123 provides that a court may protect a party by permitting discovery on such terms and conditions as are just. Certainly striking the names from the records is within the

power of the district court and should have been used in this instance.

The defendant hospital claims that researching the requested documents would place an undue burden on it. In Pollock v. Deere and Co., 282 N.W.2d 735, 739 (Iowa 1979), the defendant presented uncontroverted evidence of the tremendous inconvenience that would be incurred through discovery of certain records. It would require months of screening documents and impose large costs. The court held that "a certain amount of inconvenience inheres in discovery and must be tolerated by the parties." Id. The court also stated that rare would be the occasion that discovery of documents would properly be precluded rather than limited. Id. The burden in this case may have been a proper basis for limiting the number of records or for imposing the costs on the plaintiff, but it was not such a severe burden that it required a protective order. The trial court abused its discretion by granting a protective order preventing the discovery of the hospital records. The failure of the district court to allow discovery of the nurses' written statements and of the hospital records unfairly prejudiced the plaintiff, thereby requiring a new trial.

We need not decide the issue as to whether the testimony of the doctor concerning the frequency of the tests was proper. In addition, the district court is aware

that the statement concerning the hospital's financial situation was improper and because a new trial must be granted anyway, we need not reach the merits of that issue. We reverse and remand for a new trial after provisions have been made for the discovery of the materials in question. Costs are to be taxed against the defendants.

REVERSED AND REMANDED.