FILED
JUN 24 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RUTH MARIE PETERSEN,

Plaintiff-Appellant,

vs.

RONALD LEMMONS, M.D.,

Defendant-Appellee.

Filed June 24, 1980

0-163
2-63835

Appeal from Emmet District Court - Tom Hamilton, Judge.

Plaintiff appeals judgment on jury verdict for defendant-doctor on plaintiff's medical malpractice claim. - REVERSED AND REMANDED.

David H. Correll, of Price, Correll & Sheerer, Cedar Falls, for plaintiff-appellant.

Greg Knoploh and Don N. Kersten, of Kersten, Opheim, Carlson & Estes, Fort Dodge, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiff appeals from a judgment on a jury verdict for defendant-doctor on plaintiff's claim of medical malpractice. Plaintiff contends the trial court erred in overruling plaintiff's motion for a change of venue, in failing to grant a mistrial or a new trial because of the combined impact of defendant's conversation with a juror and the disruptive conduct of a jury panel member during trial, in allowing certain opinion testimony, in allowing defendant to give allegedly repetitive testimony on redirect examination, and in denying plaintiff's motion for a new trial after the jury verdict. We conclude the trial court erred in allowing opinion testimony regarding defendant's general reputation as a surgeon, and reverse and remand for a new trial.

Plaintiff brought this medical malpractice action against defendant-doctor alleging that defendant was negligent in the care and treatment of plaintiff and that defendant's negligence in performing a surgical excision of a lymph node in the back of plaintiff's neck resulted in permanent injury to plaintiff's spinal accessory nerve resulting in diminished strength of the lower portion of her trapezius muscle in her left shoulder. After trial, the jury returned a verdict for defendant. Plaintiff filed a motion for a new trial which was overruled by the trial court.

The trial court allowed over plaintiff's timely objection, two of defendant's expert witnesses to testify about defendant's general reputation as a surgeon. We think the trial court committed reversible error in allowing that testimony. An individual's character for care, competence, or professional skill is generally inadmissible as a defense to a claim of negligence on a particular occasion. 1 Jones on Evidence § 4.30 (6th ed. S. Gard 1972); 7 J. Wigmore, Evidence § 1984 (J. Chadbourn rev. 1978); see Christianson v. Kramer, 255 Iowa 239, 250-51, 122 N.W.2d 283, 290 (1963); Fed. R. Evid. 404(a). Consequently, testimony of a physician's professional reputation is generally inadmissible in a malpractice action. Thomas v. Lobrano, 76 So.2d 599, 605-06 (La. Ct. App. 1955); Green v. Shaw, 136 S. C. 56, 59-63, 134 S.E. 226, 226-28 (1926); French v. Brodsky, 521 S.W.2d 670, 674 (Tex. Civ. App. 1975); 70 C.J.S. Physicians and Surgeons § 62, at 999 (1951). We conclude the prejudice to plaintiff of favorable opinion testimony concerning defendant's general reputation as a surgeon outweighed its probative value concerning whether defendant acted negligently in performing the particular act of surgery on plaintiff. Thus, the testimony was inadmissible as being

irrelevant. The prejudice of the error in admitting improper evidence is presumed unless the absence of prejudice is firmly established. Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 863 (Iowa 1974). We cannot conclude the prejudice of allowing the jury to hear the testimony on defendant's general reputation was overcome by anything in the record. Thus, the admission of that testimony constituted reversible error. Id.

Since the above-stated error constitutes grounds for reversal and a new trial, we limit our review of the remaining issues to those we consider to be likely to arise again on retrial. Regarding the issue of whether one of defendant's medical experts was improperly permitted to express an opinion based on prior testimony rather than in response to a hypothetical question, we conclude that plaintiff's objection to that testimony for lack of foundation was not sufficiently specific to alert the trial court of the claimed error. See Fischer, Inc. v. Standard Brand, Inc., 204 N.W.2d 579, 583 (Iowa 1973). We parenthetically note, however, that trial courts have a great deal of discretion in determining the admissibility of opinion testimony based on prior testimony. Ganrud v. Smith, 206 N.W.2d 311, 317 (Iowa 1973).

With regard to plaintiff's contention of error in denying her motion for a change of venue, a ruling on a change of venue is largely within the discretion of the trial court who is in a better position to appraise the situation than we are. Castner v. Wright, 256 Iowa 638, 643, 127 N.W.2d 583, 586 (1964). However, without deciding the question, we note the closeness of the venue issue and the similarity factually with the case of Thompson v. Rozeboom, 272 N.W.2d 444 (Iowa 1978). Moreover, this problem may well be exacerbated by the fact that a retrial is necessary so that a reexamination of the question should be made by the trial court. Finally, with regard to plaintiff's contention that the trial court erred in allowing defendant to substantially repeat on redirect examination his testimony regarding the surgical procedure he used on plaintiff, we cannot conclude the trial court's ruling constituted an abuse of discretion. Whether to allow the repetition of testimony is a matter that is necessarily within the discretion of the trial court. Mennenga v. Mennen, 182 Iowa 1147, 1156, 166 N.W. 486, 489 (1918). Under the circumstances here, in which defendant testified on redirect examination a day after he gave his direct testimony, we think the trial court could

have properly concluded that the value of the repetitive testimony for clarification and memory refreshing purposes outweighed any undue emphasis that might be attached to the repetition.

We reverse the judgment for defendant and remand for a new trial.

REVERSED AND REMANDED.