STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2377

Marc Brandt, as Trustee for the Heirs and Next of Kin
of Michelle Tschida, deceased,
Respondent,

vs.

Western Wisconsin Medical Associates, S.C.,
d/b/a River Falls Medical Clinic, et al.,
Appellants,

Michael D. McGonigal, M.D.,
Defendant.

Filed April 8, 2008
Affirmed
Johnson, Judge

Ramsey County District Court
File No. C5-05-3091

Michael A. Zimmer, M.A. Zimmer Law, 88 South Tenth Street, Suite 300, Minneapolis, MN 55403 (for respondent)

John M. Degnan, Scott G. Knudson, Valerie T. Herring, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2157 (for appellants)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Michelle Tschida died eight days after undergoing gastric bypass surgery. A Ramsey County jury found that Dr. Matthew C. Clayton was negligent in the post-operative care he provided to Tschida in the first three days following the surgery, and the jury further found that his negligence was one of the causes of her death. Dr. Clayton brought post-trial motions for judgment as a matter of law or, in the alternative, for a new trial, which the district court denied. On appeal, Dr. Clayton argues that the plaintiff's expert physician was not qualified to give expert testimony on the applicable standard of care, that the district court erred in admitting irrelevant evidence, and that the district court improperly instructed the jury on the issue of damages. We conclude that the district court did not commit error and, therefore, affirm.

FACTS

Michelle Tschida had gastric bypass surgery on January 22, 2002. Dr. Clayton performed the surgery at River Falls Area Hospital in River Falls, Wisconsin. Dr. Clayton also was responsible for Tschida's post-operative care. Following surgery Tschida showed positive signs of recovery, but on the day after the surgery, she began to experience respiratory distress. Her condition worsened, and she was put on a respirator. When it became clear that she needed to remain on a respirator for more than 48 hours, she was transferred to Regions Hospital in St. Paul pursuant to the River Falls hospital's policy.

The day after her transfer to Regions, Dr. Todd Morris examined Tschida, found that her stomach was distended, and suspected that she was suffering from an anastomotic leak, which is caused by a tear in the stomach lining near the staples that are inserted during gastric bypass surgery. Morris performed exploratory surgery and confirmed the existence of a leak. He removed a "fairly significant amount of fluid" from her abdomen and repaired the leak.

Again, Tschida initially appeared to be making a good recovery, but four days later, she began to exhibit signs of internal bleeding. At that time, she was under the care of Dr. Michael D. McGonigal. On January 30, 2002, as Tschida's condition worsened, Dr. McGonigal ordered emergency surgery. On her way to surgery with Dr. McGonigal, Tschida went into cardiac arrest. She was revived, but she died during the surgery.

The administrator of Tschida's estate, Marc Brandt, commenced a medical malpractice suit against Dr. McGonigal, Dr. Clayton, and Western Wisconsin Medical Associates, the clinic at which Dr. Clayton practices. (For purposes of this opinion, we will refer to Dr. Clayton and his clinic collectively as "Dr. Clayton.") Brandt settled his claim against Dr. McGonigal before trial. The case against Dr. Clayton was tried to a jury in July 2006.

At trial, Brandt called an expert witness, Dr. Michael Hickey, who testified that both Dr. Clayton and Dr. McGonigal were negligent in their care of Tschida. With respect to Dr. Clayton, Dr. Hickey testified that there is a "very low threshold" for investigating the possibility of a leak following gastric bypass surgery. He testified that, in light of Tschida's rapid heart and breathing rates and elevated temperature, Dr.

Clayton deviated from the standard of care by failing to perform a CT scan or exploratory surgery to rule out a leak. Dr. Hickey further testified that Dr. Clayton's negligence was a substantial contributing factor to Tschida's death. In support of the latter point, Dr. Hickey explained that, had the leak been diagnosed and treated earlier, Tschida would have had less bleeding. Dr. Hickey also testified that Dr. McGonigal was causally negligent in failing to perform emergency surgery on Tschida sooner than he did.

Dr. Clayton called his own expert, Dr. David Lewis, who testified that Dr. Clayton met the standard of care for post-operative gastric bypass patients and that Tschida's death was caused solely by Dr. McGonigal's failure to perform surgery earlier. Dr. Clayton testified on his own behalf. On cross examination, he testified that Tschida displayed symptoms that may be associated with an anastomotic leak but at varying times and "not in a pattern which would lead one to conclude that there was a leak."

The district court used a special verdict form. The jury was asked to determine, in series, whether Dr. Clayton was negligent; if so, whether his negligence was a cause of Tschida's death; whether Dr. McGonigal was negligent; and if so, whether his negligence was a cause of Tschida's death. The jury then was asked to attribute percentages of negligence to the two physicians. After six hours of deliberation, the jury returned a verdict finding both physicians causally negligent and assigning 50 percent of the negligence to each of them. The jury found damages of approximately $704,000 for loss of society and companionship, loss of financial support, medical expenses, pain and suffering, and funeral expenses.

After trial, Dr. Clayton moved for judgment as a matter of law or, in the alternative, for a new trial. The district court denied the motions. The district court entered judgment against Dr. Clayton in the amount of approximately $352,000. Dr. Clayton appeals.

D E C I S I O N

I. Motion for Judgment as a Matter of Law

Dr. Clayton argues that the district court erred by denying his post-trial motion for judgment as a matter of law. His argument for reversal is based entirely on the contention that Dr. Hickey was not qualified to give expert testimony in this case. At oral argument, Dr. Clayton's counsel conceded that if Dr. Hickey's testimony is deemed admissible, the evidence would be sufficient to sustain the verdict.

A. Standard of Review

Initially, we must determine the manner in which we should review the district court's rulings. On appeal from a motion for judgment as a matter of law, this court ordinarily applies a de novo standard of review. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003); *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). Dr. Clayton's post-trial motion focuses on the district court's admission of expert testimony during trial. A district court's determination that an expert is qualified is reviewed for abuse of discretion. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

Dr. Clayton, however, did not challenge Dr. Hickey's qualifications in a pre-trial motion *in limine* or by objecting at trial before Dr. Hickey gave expert testimony. Rather, Dr. Clayton first raised the issue in a motion for judgment as a matter of law after Brandt

rested his case. Dr. Clayton asserts that he was unable to challenge Dr. Hickey's qualifications at an earlier stage because he did not depose Dr. Hickey. Depositions of expert witnesses require leave of court. Minn. R. Civ. P. 26.02(d)(1)(A)-(B). There is no indication in the record that Dr. Clayton ever brought a motion for leave to depose Dr. Hickey. In addition, Dr. Clayton did not ask to conduct a voir dire examination of Dr. Hickey to assess his qualifications. Rather, Dr. Clayton first raised the issue of Dr. Hickey's qualifications after he had completed his testimony, when Brandt was unable to respond to the objection by providing additional foundation for Dr. Hickey's testimony.

In another medical malpractice case, the supreme court stated that post-trial motions are "an inappropriate time at which to effectuate a determination regarding the admissibility of evidence." *Reinhardt v. Colton*, 337 N.W.2d 88, 92 n.1 (Minn. 1983). The *Reinhardt* court further noted, "Determinations regarding the admissibility of evidence should be made at the time the evidence is offered and not through the use of a JNOV after the jury's verdict has been returned, because the latter approach substantially usurps the role of the jury." *Id.* The defendant in *Reinhardt* had objected to the plaintiff's expert's qualifications before the expert gave testimony, but the district court reserved ruling until the post-trial stage. Despite its admonition, the supreme court considered the merits of the expert's qualifications, *id.* at 92-93, perhaps because the appellant was not responsible for the timing of the district court's ruling.

In this case, Brandt has not asserted that Dr. Clayton waived the objection and has not otherwise made an issue of the timeliness of Dr. Clayton's objection. In light of *Reinhardt* and the lack of any waiver argument by Brandt, we will consider the issue of

Dr. Hickey's qualifications by applying an abuse-of-discretion standard of review. *See Reinhardt*, 337 N.W.2d at 92 & n.1; *Goeb*, 615 N.W.2d at 815.

B. Dr. Hickey's Qualifications

A witness qualified as an expert by "knowledge, skill, experience, training or education" may testify to assist the jury. Minn. R. Evid. 702. An expert witness in a medical malpractice action must have both "sufficient scientific knowledge" and "some practical experience" with the subject matter of the proposed testimony. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977). "But a medical expert need not have a specialty, experience, or a position identical to a medical defendant." *Koch v. Mork Clinic, P.A.*, 540 N.W.2d 526, 529 (Minn. App. 1995). "Consultations with treating physicians may constitute practical experience." *Id.* at 530 (citing *Cornfeldt*, 262 N.W.2d at 693 (holding that expert's consultations with surgeons enabled him to testify about suitability of patient for surgery), and *Fiedler v. Spoelhof*, 483 N.W.2d 486, 489 (Minn. App. 1992), *review denied* (Minn. June 10, 1992) (holding that cardiologist who handled referrals from, and discussed treatment with, family practitioners may testify about standard of care for family practitioner)).

Dr. Clayton relies on several Minnesota cases in which medical experts were held to be not qualified to testify outside their areas of expertise or experience. In *Swanson v. Chatterton*, 281 Minn. 129, 160 N.W.2d 662 (1968), the expert was a board-certified internist who had spent much of his career in administration and "had never in any way participated" in the surgery at issue in the case. 281 Minn. at 135, 160 N.W.2d at 666. In *Reinhardt*, the expert was a pathologist and not a clinician, had never prescribed the drug

at issue in the case, and admitted that he did not diagnose patients. 337 N.W.2d at 93. And in *Teffeteller v. University of Minnesota*, 645 N.W.2d 420, 426 (Minn. 2002), the expert was a pediatrician with no experience treating cancer patients or patients who had undergone bone marrow transplants, as had the child in that case. Notably, in *Teffeteller*, where the district court's exclusion of expert testimony was upheld, the supreme court emphasized the deferential standard of review to be applied to a district court's determination of admissibility of expert medical testimony. *Id.* at 427-28.

The facts of this case should be distinguished from the cases cited by Dr. Clayton. Dr. Hickey is a board-certified general surgeon, the type of practitioner who performs both gastric bypass surgery and surgeries necessitated by post-operative complications. He completed a surgical residency and was part of the surgical staff at the University of California at San Francisco for 13 years. He performed gastric bypass surgeries during his residency. While on staff at the University of California, he ran a general surgery clinic and taught medical students general surgery techniques, including techniques for responding to complications arising from gastric bypass surgery. Since 1999, Dr. Hickey has been on staff at Harris Methodist Hospital in Fort Worth, Texas, where he works as a trauma surgeon. In this position, he has assisted less-experienced surgeons in treating gastric bypass complications.

Dr. Clayton focuses on the fact that Dr. Hickey has not performed gastric bypass surgery since his residency. The negligence at issue in this case, however, did not occur during the surgery itself but, rather, arose from the post-operative care given to Tschida. Dr. Clayton does not contend that a physician must perform gastric bypass surgeries in

order to provide post-operative care to patients recovering from gastric bypass surgery. Dr. Clayton also points out that Dr. Hickey's testimony is unclear as to whether he currently cares for post-operative gastric bypass patients himself or merely works in a hospital where other physicians provide that type of care. Dr. Clayton's counsel did not clarify or otherwise explore the issue on cross-examination of Dr. Hickey. The record is ambiguous but is sufficient to support a conclusion that Dr. Hickey personally cares for patients in addition to giving advice and direction to medical students and less-experienced surgeons on post-operative care.

Thus, the district court did not abuse its discretion in admitting Dr. Hickey's expert testimony and, consequently, in denying Dr. Clayton's post-trial motion for judgment as a matter of law.

II. Motion for New Trial

Dr. Clayton argues that the district court erred by denying his alternative motion for a new trial. The motion is based on two grounds. First, Dr. Clayton contends that the district court erroneously allowed Brandt's counsel to cross-examine him concerning the capabilities of the River Falls hospital and improperly commented on that evidence. Second, he contends that the district court erred by giving a jury instruction on aggravation and damages. This court reviews the district court's denial of a motion for a new trial for clear abuse of discretion. *See Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 476-77 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

A. Evidence Concerning River Falls Hospital

Dr. Clayton argues that a new trial is required because Brandt's counsel cross-examined him concerning his decision to perform gastric bypass surgery at the River Falls hospital. Dr. Clayton further argues that the prejudicial effect of the cross-examination was compounded by a comment made by the district court in overruling his objection to the examination. "An improper evidentiary ruling resulting in the erroneous admission of evidence will only compel a new trial if it results in prejudicial error to the complaining party." The error is prejudicial "if it might reasonably have influenced the jury and changed the result of the trial." *W.G.O. ex rel. A.W.O. v. Crandall*, 640 N.W.2d 344, 349 (Minn. 2002).

During his direct examination, Dr. Clayton testified about his decision to not perform an additional CT scan at the River Falls hospital because of "manpower" issues there. On cross-examination, Brandt's counsel explored these issues further. Dr. Clayton's counsel objected when Brandt's counsel asked Dr. Clayton why he performed the surgery at the River Falls hospital "if you [didn't] have the support equipment and staff to handle consequences that might arise after that surgery." Dr. Clayton's counsel objected on grounds of relevance, elaborating that the "testimony is beyond the scope of issues in the case." The court overruled the objection, adding, "I think it is very much a part of the issues in the case."

The cross-examination conducted by Brandt's counsel was related to, and a reasonable response to, Dr. Clayton's prior testimony, which concerned not only the post-operative care he gave to Tschida but also the closely related subject of his pre-operation

planning for post-operative care. The line of questioning generally was relevant to the jury's determination whether Dr. Clayton was negligent in his post-operative care. The district court's ruling on the objection was not an abuse of discretion. *Weiby v. Wente*, 264 N.W.2d 624, 627 (Minn. 1978) (stating that rulings on "relevance of proffered testimony" are not "grounds for reversal or a new trial unless abuse is clearly demonstrated").

Furthermore, the district court's comment when overruling the objection was not improper. A review of the transcript reveals that the district court did not "unduly criticize counsel" or "show[] bias in favor of one of the parties [that would] tend to incite hostility or prejudice in the minds of the jury toward one party and sympathy for another." *Hansen v. St. Paul City Ry. Co.*, 231 Minn. 354, 360-61, 43 N.W.2d 260, 264 (1950). Rather, the district court's comment was a proportional response to counsel's extended objection and, thus, was well "within the province of the trial judge to admonish and rebuke counsel." *Id.* at 360, 43 N.W.2d at 264.

Furthermore, the admission of the evidence does not appear to have been prejudicial. The district court gave the standard instruction that neither its own comments nor those of counsel should be construed as evidence, stating, "It's not evidence if I've made a comment, that's not evidence of the case." Although Dr. Clayton argues that the evidence raised an alternative theory of negligence, Brandt's counsel did not argue it to the jury in that manner. It does not appear that the admission of evidence concerning the River Falls hospital "might reasonably have influenced the jury and changed the result of the trial." *W.G.O.*, 640 N.W.2d at 349.

Thus, the district court did not err in admitting evidence concerning the River Falls hospital, in commenting on the evidence, or in denying Dr. Clayton's motion for new trial on this ground.

B. Jury Instruction Concerning Aggravation

Dr. Clayton also argues that a new trial is necessary because the district court erred in instructing the jury on the effect of Dr. McGonigal's negligence on the determination of damages. A district court "has broad discretion in determining jury instructions, and this court will not reverse in the absence of abuse of discretion." *Bolander v. Bolander*, 703 N.W.2d 529, 539 (Minn. App. 2005), *review dismissed* (Minn. Nov. 15, 2005). This discretion extends to both the propriety of an instruction and the language used. *Id.* An error in a jury instruction warrants a new trial only if the errors "destroy[s] the substantial correctness of the charge, cause a miscarriage of justice, or result in substantial prejudice." *Kirsebom v. Connelly*, 486 N.W.2d 172, 174 (Minn. App. 1992) (citing *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974)).

In the portion of jury instructions that addressed damages, the district court instructed the jury as follows:

> If Dr. Michael McGonigal was negligent and his negligence aggravated Michelle Tschida's condition or failed to prevent her death, damages for Michelle Tschida's death should be for the entire amount of damages sustained and should not be decreased because of Dr. McGonigal's negligence, if any.

This instruction is loosely based on Wisconsin pattern jury instruction number 1710, which is entitled "aggravation of injury because of medical negligence."[1] The pattern instruction reflects the common-law rule in Wisconsin that "a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has exercised good faith and due care in selecting his or her treating physicians." *Lievrouw v. Roth*, 459 N.W.2d 850, 859 (Wis. Ct. App. 1990) (quotation omitted).

It appears that Dr. Clayton did not preserve an objection to the aggravation instruction. The instruction given was a verbatim recitation of an instruction submitted to the district court in the parties' jointly proposed set of instructions. The proposed instructions state, somewhat cryptically, "Stipulated by the parties – except for WISC. JI-CIVIL 1710." No objection by Dr. Clayton can be found in the transcript of the instructions conference. Thus, Dr. Clayton has not properly preserved an objection to the instruction. Minn. R. Civ. P. 51.03(a). Accordingly, we will review for "plain error . . . affecting substantial rights." Minn. R. Civ. P. 51.04(b).

Dr. Clayton makes three specific arguments for reversal based on the aggravation instruction. His primary argument is that the instruction was inappropriate because the

[1] The pattern instruction is as follows: "If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)'s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)'s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence." II Wisc. Civil Jury Instructions Comm., *Wisconsin Jury Instructions -- Civil* 1710 (2007). All parties have applied Wisconsin law to the issue in part II.B. of this opinion and have applied Minnesota law to the issues in parts I. and II.A. Because the parties do not dispute choice-of-law issues, we have not analyzed them.

district court also gave a comparative-fault instruction, which, Dr. Clayton contends, is inconsistent with the concept of aggravation. Regardless whether Wisconsin maintains that doctrinal distinction, the district court's use of a modified form of the pattern instruction on aggravation was not plain error. The district court used the pattern instruction for a slightly different purpose than that for which it was intended; the district court used it to instruct the jury to consider all of plaintiff's injuries when finding damages. The district court wished to prevent the jury from making its own reduction to the damages to be assessed against Dr. Clayton because the district court intended to make, and did make, that reduction after the verdict based on the jury's allocation of negligence between the two physicians. The jury's allocation of negligence, in combination with the district court's subsequent reduction in damages, ensured that Dr. Clayton was not held liable for aggravation of injuries caused by Dr. McGonigal. In other instructions, the district court more thoroughly explained to the jury the standard of care and the concept of comparative negligence, and the court did so in the same manner with respect to Dr. Clayton and Dr. McGonigal.

Dr. Clayton also argues that the pattern instruction was inappropriate because it is intended for cases arising from automobile accidents in which a negligent driver caused injuries that may have been aggravated during subsequent medical treatment, not for cases in which both the first tortfeasor and the second tortfeasor are physicians. It is true that the comments to the pattern instructions cite *Lievrouw* and other cases concerning automobile accidents. But there is no comment in the pattern instructions stating that the instruction is inappropriate if the first tortfeasor is a physician, and there is no Wisconsin

case law precluding the use of the instruction in a medical malpractice case against two physicians.

Finally, Dr. Clayton argues that the aggravation instruction confused the jury. Dr. Clayton points to the jury's two questions to the district court, which concerned whether they would answer special interrogatory number five, which allocated negligence between Dr. McGonigal and Dr. Clayton, if they were to answer special interrogatory number one by indicating that Dr. Clayton was not negligent. We do not perceive the instruction at issue to have been a source of confusion. The instruction challenged by Dr. Clayton concerned the jury's finding of damages in special interrogatories number six and number seven. Although a different instruction on damages may have better served the district court's purposes, the instruction was not plain error, and it does not appear that the instruction "destroy[ed] the substantial correctness of the charge, cause[d] a miscarriage of justice, or result[ed] in substantial prejudice." *Kirsebom*, 486 N.W.2d at 174.

Thus, the district court did not commit plain error in instructing the jury and, accordingly, did not abuse its discretion in denying Dr. Clayton's motion for new trial on this ground.

Affirmed.