IN THE COURT OF APPEALS OF IOWA

No. 6-425 / 05-1123
Filed September 7, 2006

CAROL TRIPP and LANNY TRIPP,
Petitioners-Appellants,

vs.

CEDAR VALLEY MEDICAL SPECIALISTS, P.C.,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Plaintiffs appeal following a verdict and judgment entry in favor of defendant, asserting instructional error by the district court. **AFFIRMED**.

Timothy Semelroth of Riccolo & Semelroth, Cedar Rapids, for appellants.

Timothy Boller of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Plaintiffs Carol and Lanny Tripp appeal following a jury verdict and district court judgment entry in favor of defendant Cedar Valley Medical Specialists, P.C. (Cedar Valley). The Tripps assert the district court erred when it submitted two instructions to the jury over their objections. We affirm.

I. Background Facts and Proceedings.

On August 9, 2000, Carol Tripp fractured and displaced bones in her left wrist. After examining x-rays of Tripp's wrist, Dr. Jitu D. Kothari, an employee of Cedar Valley, performed a procedure known as a closed reduction. In this procedure, the physician manipulates the fractures back into alignment without an incision. Dr. Kothari then applied a sugar tong splint which immobilized Tripp's wrist at an approximately forty-five degree angle. He informed Tripp that, if her wrist did not stay in place, the alternate treatment of surgery would be necessary. He prescribed pain medication and directed Tripp to move her fingers as much as possible.

Tripp remained under Dr. Kothari's care through August 29, 2000. During this time Dr. Kothari ordered and reviewed additional x-rays of Tripp's wrist. Although he twice changed Tripp's cast, he continued to immobilize Tripp's wrist in the same flexed position. While under Dr. Kothari's care Tripp complained that the pain in her wrist was increasing, and that her fingers were swelling and she was unable to move them. Dr. Kothari prescribed pain killers and recommended that Tripp continue to try to move her fingers.

Tripp decided to transfer her care from Dr. Kothari to another Cedar Valley employee, Dr. Thomas Gorsche. She was first seen by Dr. Gorsche for care of

her wrist on September 6, 2000.[1] Dr. Gorsche reviewed Tripp's prior x-rays and decided to continue Tripp's current treatment. On a September 18 follow-up visit, Dr. Gorsche removed Tripp's cast, ordered and reviewed x-rays, and referred Tripp to physical therapy. When Tripp returned to see Dr. Gorsche on September 25, he directed Tripp to continue with physical therapy and schedule a visit in two weeks.

Tripp did not return to Dr. Gorsche, but sought care and treatment from a number of other physicians. She was eventually diagnosed with complex regional pain syndrome with significant flexion contracture of the left hand and stiffness of all fingers, post-traumatic degenerative arthritis, and carpal tunnel syndrome. She underwent numerous pain treatments, as well as carpal tunnel release surgery. She has lost partial use of her left arm, and has sought treatment for depression and anxiety.

In August 2002 Tripp and her husband Lanny filed suit against Cedar Valley, asserting Dr. Kothari, in his role as an employee or agent of Cedar Valley, was negligent in his care and treatment of Tripp. The petition sought damages for Tripp's alleged injuries and Lanny's alleged loss of spousal consortium.[2]

The matter proceeded to trial in June 2005. Following the close of evidence the jury was instructed that Cedar Valley was liable for the negligent acts of its employees, and that Dr. Kothari and Dr. Gorsche were employees of

---

[1] Dr. Gorsche examined Tripp on August 28 for a back injury. He did not treat Tripp's wrist injury, but did note that Tripp's wrist was cast in a flexed position.

[2] The petition also contained a loss of parental consortium claim made on behalf of Tripp's children, and asserted the negligence and consortium claims against both Dr. Kothari individually and Cedar Valley as Dr. Kothari's employer. Dr. Kothari subsequently died, and his estate was substituted as defendant. Prior to trial the plaintiffs voluntarily dismissed without prejudice the loss of parental consortium claim and all claims against Dr. Kothari's estate.

Cedar Valley at the time they provided medical treatment to Tripp. The jury was further instructed to ascertain whether Cedar Valley "was negligent in failing to meet the standard of care in at least one of the following ways":

> a. To appropriately cast Carol Tripp; or
> b. Allowing Carol Tripp to be cast at 45 degrees flexion for too long; or
> c. Failing to appropriately recognize and treat instability in Carol Tripp's wrist; or
> d. Failing to recognize x-ray evidence of misaligned bones; or
> e. Failing to appropriately respond to x-ray evidence of misaligned bones.

The jury also received a result-of-treatment and an alternate-methods-of-treatment instruction over the Tripps' objections.

The jury returned a verdict that found no employee of Cedar Valley was negligent. The district court accordingly entered a verdict in Cedar Valley's favor. The Tripps appeal. They contend the court erred in submitting the result-of-treatment and alternate-methods-of-treatment instructions to the jury.

II. Scope and Standards of Review.

We review the court's decision to give the challenged jury instructions for correction of errors of law. *Anderson v. Webster City Cmty. Sch. Dist*., 620 N.W.2d 263, 265 (Iowa 2000). However, error in giving an instruction will not warrant reversal unless the objecting party has been prejudiced. *Kurth v. Iowa Dep't of Transp*., 628 N.W.2d 1, 5 (Iowa 2001). Prejudicial error occurs when an instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized. *Anderson v. Webster City Cmty. Sch. Dist*., 620 N.W.2d 263, 268 (Iowa 2000).

III. Result-of-Treatment Instruction.

Instruction No. 18 informed the jury, "The mere fact that full recovery does not result or that medical treatment is not entirely successful does not mean that the defendant was negligent or at fault." The instruction is consistent with the proposition that, except in cases involving res ipsa loquitur, "[i]t is evident, and it has often been held in this state, that the mere unsuccessful result of a treatment by a physician cannot, of itself, produce a liability on the part of the practitioner." *Gebhardt v. McQuillen*, 230 Iowa 181, 185, 297 N.W. 301, 303 (1941).[3]

Instruction No. 18 is also a modified version of Iowa Civil Jury Instruction 700.8, which states: "The mere fact an accident occurred or a party was injured does not mean a party was [negligent] [at fault]." It is well settled that, again with the exception of res ipsa loquitur claims, this uniform instruction is a correct statement of the law. *See Novak Heating & Air Conditioning v. Carrier Corp*., 622 N.W.2d 495, 497 (Iowa 2001); *Fanelli v. Illinois Cent. R. Co*., 246 Iowa 661, 664, 69 N.W.2d 13, 15 (1955). It is also well established that "[t]rial courts have discretion to modify or rephrase the uniform jury instructions to meet the precise demands of each case as long as the instructions fully and fairly embody the issues and applicable law." *Sumpter v. City of Moulton*, 519 N.W.2d 427, 434 (Iowa Ct. App. 1994).

---

[3] We note our agreement with a number of jurisdictions that have routinely held an inference of ordinary or specific negligence does not flow from unsuccessful treatment alone. *See e.g., Boone v. William W. Backus Hosp*., 864 A.2d 1, 19 (Conn. 2005); *Kenyon v. Miller*, 756 So.2d 133, 136 (Fla. Dist. Ct. App. 2000); *Narducci v. Tedrow*, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000); *Cunningham v. Riverside Health Sys., Inc*., 99 P.3d 133, 138 (Kan. Ct. App. 2004); *Galloway v. Baton Rouge Gen. Hosp.*, 602 So.2d 1003 (La.1992); *Wlosinski v. Cohn*, 713 N.W.2d 16, 21 (Mich. Ct. App. 2005); *Kilpatrick v. Mississippi Baptist Med. Ctr.*, 461 So.2d 765, 768 (Miss. 1984); *Seippel-Cress v. Lackamp*, 23 S.W.3d 660, 667 (Mo. Ct. App. 2000).

Upon a review of the record, we cannot conclude the district court erred in submitting Instruction No. 18 to the jury. The plaintiffs alleged the negligence of Drs. Kothari and Gorsche in recognizing and treating Tripp's wrist fracture proximately caused the pain and impairment she experienced after terminating her care at Cedar Valley. Because this matter does not involve res ipsa loquitur, the plaintiffs were required to present specific proof of Cedar Valley's negligence. *See Welte v. Bello*, 482 N.W.2d 437, 439-40 (Iowa 1992). They attempted to do so through expert testimony that, if Tripp's wrist fracture had been properly treated, she would have had a greater range of motion, been relatively pain free, had an "extremely slim" chance of experiencing carpal tunnel syndrome, and experienced a lesser degree of traumatic arthritis. Cedar Valley, in turn, presented evidence that even with proper treatment a fracture such as Tripp's could cause ongoing problems, including complex regional pain syndrome and carpal tunnel syndrome.

In light of the foregoing, the record substantially supported a jury instruction stating the mere fact Tripp did not fully recover from her wrist fracture, or that Drs. Korthari and Gorsche's treatments were not entirely successful, did not mean that Cedar Valley was negligent or at fault for Tripp's subsequent pain and impairment. *See Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994) ("[C]ourts must give requested jury instructions when they correctly state the law applicable to the facts of the case and if the legal concept is not embodied in other instructions."). "However, even instructions correctly stating the law should not give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence." *Id*. The plaintiffs assert that such is the case here.

The plaintiffs first contend Instruction No. 18 unduly emphasized the defense theory that Tripp's pain and disability was not proximately caused by Drs. Kothari and Gorsche's treatment of her wrist fracture. They assert the instruction emphasized Cedar Valley's evidence that, even with proper treatment, Tripp's subsequent pain and impairment were potential consequences of her initial injury, while deemphasizing the plaintiffs' evidence that if Tripp's wrist fracture had been properly treated she would have had a greater range of motion, been relatively pain free, had an "extremely slim" chance of experiencing carpal tunnel syndrome, and experienced a lesser degree of traumatic arthritis.

We cannot agree with the plaintiffs' contention. The result-of-treatment instruction does not unduly emphasize the theory of the defense. Rather, it points to evidence favorable to the plaintiffs, and cautions the jury on the limited use to which such evidence may be properly put.

Nor can we agree with the plaintiffs' contention that the instruction was an improper comment on the evidence, similar to that found in *Peters v. Vander Kooi*, 494 N.W.2d 708 (Iowa 1993). There, our supreme court restated its conclusion that mistake-in-treatment and mistake-in-diagnosis instructions

> are not statements of the law that determine a physician's duty of care [but] . . . are comments on potential factual scenarios in which a standard of care may or may not have been adhered to. As such, they amount to comments on the evidence, which . . . [are] unnecessary for the jury's determination of the issues.

Vander Kooi, 494 N.W.2d at 712-13.

Like the result-in-treatment instruction given in this case, a mistake-in-treatment or mistake-in-diagnosis instruction limits the use to which a jury may put certain evidence: they instruct the jury that a physician cannot be found

negligent merely because he or she made a mistake in the treatment or diagnosis of a patient. However, the mistake instructions do not simply limit the jury's use of evidence, but address a factual situation which may or may not be found to exist by the jury—that the physician in fact made a mistake in treatment or diagnosis. Here, in contrast, there is no dispute that Tripp failed to make a full recovery following the disputed treatment. The district court did not err in submitting this instruction to the jury.[4]

IV. Alternate-Methods-of-Treatment Instruction.

Instruction No. 20 informed the jury as follows:

> Physicians may disagree in good faith upon 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 the defendant, in the exercise of their best judgment, elected one of these proper alternatives, then the defendant was not negligent.

The plaintiffs assert the court erred in submitting Instruction No. 20 to the jury because record does not contain a factual basis for giving the instruction.

An alternate-methods-of-treatment instruction may be given if the following two elements are shown by substantial evidence:

---

[4] We decline to address the plaintiffs' contention that Instruction No. 18 was inaccurate or incomplete because it did not further state the result of the medical treatment could nevertheless be considered in assessing whether negligence in fact occurred. Without deciding whether it would have been appropriate to submit such language to the jury in this case, we note the plaintiffs' objections to Instruction No. 18 were limited to assertions the instruction commented on the evidence and overemphasized the defendant's theory of the case, and we see no evidence the plaintiffs requested that such language be either added to Instruction No. 18 or separately submitted to the jury. We will not review a claim of instructional error that was not first raised before the district court. *Sievers v. Iowa Mut. Ins. Co*., 581 N.W.2d 633, 638 (Iowa 1998).

> (1) that, with respect to a particular act or omission upon which the claim of negligence is predicated, there was more than one method of treatment acceptable to a physician exercising the degree of skill, care, and learning ordinarily possessed and exercised by other physicians in similar circumstances; and (2) that the physician considered these alternatives and exercised his or her best professional judgment in choosing the method of treatment that was utilized.

Vander Kooi, 494 N.W.2d at 713.

The plaintiffs contend the only specifications of negligence that could possibly provide a basis for giving an alternate-methods-of-treatment instruction are "a. To appropriately cast Carol Tripp," and "b. Allowing Carol Tripp to be cast at 45 degrees flexion for too long," and that there is not substantial evidence to support giving the instruction for either alternative. Without deciding whether the instruction was warranted by either of the above specifications, we conclude the court did not err in submitting Instruction No. 20 given that specification "c. Failing to appropriately recognize and treat instability in Carol Tripp's wrist," did interject the alternative treatment doctrine into this case.

The record reveals that a closed reduction and a surgical repair are recognized treatment methods for the type of wrist injury suffered by Tripp. The dispute in the evidence pertained to whether opting for a continued closed reduction and extended casted flexion of the wrist breached the standard of care under the particular facts of this case. The record reveals that both Dr. Kothari and Dr. Gorsche relied on Tripp's August 29 x-rays, at least in part, when making their decisions to continue Tripp's current course of treatment. The plaintiffs presented evidence that Tripp's fracture was unstable, and that based on the August 29 x-rays Tripp should have been offered an alternative form of treatment. Cedar Valley responded with evidence indicating that Dr. Kothari's

and Dr. Gorsche's decisions to continue Tripp's current treatment did not breach the standard of care. Thus, the record contained substantial evidence that there was more than one method of treatment available to Dr. Kothari and Dr. Gorsche that complied with the standard of care.

The record also contains substantial evidence that alternative methods of treatment were considered and, in the exercise of best professional judgment, rejected by both physicians. Although the defendant was unable to present testimony from Dr. Kothari, as he died prior to trial, the plaintiffs themselves testified that during the August 29 visit they asked Dr. Kothari about the possibility of performing surgery. According to the Tripps Dr. Kothari responded by showing them the x-ray, pointing out that "it" (presumably a reference to nonunion of the fracture site) was only three or four millimeters long, and explained that was the reason he did not do surgery. This evidence raises at least a reasonable inference that Dr. Kothari considered surgery, but decided to continue the current course of treatment because he concluded the nonunion of the site was not significant enough to warrant surgery.

However, even if the foregoing were not enough to satisfy the second element of the alternative methods test as to Dr. Kothari, Dr. Gorsche testified that he considered, and rejected, surgery as an alternate treatment of Tripp's healing wrist fracture. Dr. Gorsche stated that he believed there was no indication to change Tripp's current treatment on September 6, specifically that surgery was not indicated at that time, because Tripp had an acceptable reduction of her fracture, and further that the cast should not be removed

because "you run the risk of further loss of reduction of the fracture . . . [a]nd, secondly, her finger motion was improving . . . ."

The foregoing evidence, in light of specification "c," provides substantial support for submitting an alternate-methods-of-treatment instruction to the jury. The Tripps' allegations of prejudice, which appear to stem from the premise that Instruction No. 20 was without sufficient evidential support, are accordingly rejected. The district court did not err in submitting this instruction to the jury.

V. Conclusion.

No prejudicial error resulted from the district court's decisions to submit Instruction No. 18 and Instruction No. 20 to the jury over the Tripps' objections. The jury verdict and judgment in favor of Cedar Valley are accordingly affirmed.

AFFIRMED.