IN THE COURT OF APPEALS OF IOWA

No. 6-632 / 05-1992
Filed December 13, 2006

GARY VIVONE,
Plaintiff-Appellee,

vs.

BROADLAWNS MEDICAL CENTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

A hospital appeals a tort judgment against it based on a theory of vicarious liability arising from medical malpractice by a physician. **AFFIRMED.**

David L. Brown and Alexander E. Wonio of Hansen, McClintock & Riley, Des Moines, for appellant.

Jeffrey Carter, Des Moines, and Joseph A. Renzo and Kodi A. Petersen of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee.

Heard by Zimmer, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.

I. Background Facts & Proceedings

Gary Vivone sought treatment at Broadlawns Medical Center for gallbladder problems. Arrangements were made to have his gallbladder surgically removed on September 12, 2001. Vivone also agreed to have Dr. Hiep Phan remove a small cyst from his forehead while he was under anesthesia from the gallbladder surgery. Both of these procedures were performed on September 12. At the time of the surgery, Dr. Phan was a licensed physician in Iowa and a fifth-year medical resident who had been hired by Iowa Methodist Medical Center. As part of his residency training, Dr. Phan was serving a rotation at Broadlawns.

After the surgeries, Vivone noticed his forehead was swelling. Dr. Phan reopened the wound, restitched it, and placed a pressure bandage on Vivone's forehead. Vivone was then sent home with instructions to return in five days. On September 17, Dr. Phan removed the bandages, and replaced them with a new pressure bandage. Vivone returned again on September 24. At that time he learned he had tissue necrosis, or dead tissue, on his forehead. Vivone has a resulting permanent indentation in his forehead.

Vivone filed suit against Dr. Phan, Dr. Mansour Jadali, Dr. Robert Bannister, and Broadlawns, alleging medical malpractice.[1] Dr. Phan was not properly served notice, and he filed a motion to dismiss, which Vivone did not resist. Vivone later voluntarily dismissed the action against Drs. Jadali and Bannister, leaving only Broadlawns as a defendant. Vivone claimed Broadlawns

[1] Dr. Jadali and Dr. Bannister were Dr. Phan's supervisors when he was at Broadlawns.

was responsible under one or more of three theories: (1) the doctrine of respondeat superior; (2) the borrowed servant doctrine; or (3) vicarious liability under the case of *Wolbers v. Finley Hospital*, 673 N.W.2d 728, 734 (Iowa 2004).

The case proceeded to trial. Plaintiff presented the deposition of Dr. Ronald Bergman, a plastic and reconstructive surgeon. Dr. Bergman opined that Vivone did not receive adequate follow-up care. He testified the tissue necrosis on Vivone's forehead was caused by too much pressure, for too long a time, from the dressings that were applied, and that the wound should have been monitored more frequently. Dr. John Baeke, a plastic and reconstructive surgeon, testified that Dr. Phan had not met the applicable standard of care when tending to Vivone's forehead wound following surgery.

Vivone testified to his treatment and care. The deposition of Dr. Bannister was read into the record. Dr. Bannister, a surgeon at Broadlawns, testified he had been hired to direct residents while they were at Broadlawns, and he had supervised Dr. Phan while he was there. The deposition of Dr. Jadali was presented. Dr. Jadali stated he was a surgeon at Iowa Methodist Medical Center and Broadlawns. He stated he had been hired to be an ambassador and organizer between Methodist and Broadlawns. Dr. Jadali also supervised residents at Broadlawns.

Plaintiff then rested. Broadlawns filed a motion for directed verdict, claiming plaintiff had not presented sufficient evidence to show the hospital could be vicariously liable for Dr. Phan's actions. The district court reserved ruling on the motion.

Defendant presented the testimony of Dr. Douglas Dorner, the director of the surgical residency program at Iowa Methodist. Dr. Dorner stated Dr. Phan was an employee of Iowa Methodist. He stated that in order for residents to gain wider experience, Iowa Methodist arranged for its residents to spend rotations at other institutions, such as the VA Hospital, Blank Children's Hospital, and Broadlawns. Iowa Methodist had written agreements with these other institutions for that purpose. Iowa Methodist was responsible for hiring, firing, and discipline. The other institutions reimbursed Iowa Methodist for the residents' salary for the period of time they were there, but Iowa Methodist was responsible for the residents' fringe benefits. Iowa Methodist appointed a doctor, in this case Dr. Jadali, to supervise residents while they were at Broadlawns.

Defendant then rested and renewed its motion for directed verdict. Broadlawns readopted its earlier argument for directed verdict and raised an additional claim that Vivone had not sufficiently shown causation. The court reserved ruling on the motion. After extensive discussions about the jury instructions, the case was submitted to the jury. The jury found Dr. Phan was at fault, and an agency and/or employer-employee relationship existed between Dr. Phan and Broadlawns. The jury awarded damages of $160,000, and the district court entered judgment against Broadlawns.

Broadlawns filed a combined motion for judgment notwithstanding the verdict and motion for new trial. In the motion for judgment notwithstanding the verdict Broadlawns claimed: (1) it was not responsible for the actions of Dr. Phan; (2) the court should not have allowed the expert testimony of Dr. Bergman

or Dr. Baeke; (3) Vivone failed to prove any causal connection between defendant's conduct and his injuries; and (4) the special verdict form was improper. In the motion for new trial, Broadlawns claimed: (1) several jury instructions were improper; and (2) the special verdict form was improper. The district court denied Broadlawns' post-trial motions. Broadlawns now appeals.

II. Standard of Review

This case was tried at law, and our review is for the correction of errors at law. Iowa R. App. P. 6.4.

III. Judgment Notwithstanding the Verdict

In considering rulings on motions for judgment notwithstanding the verdict, we view the evidence in the light most favorable to the party opposing the motion. Iowa R. App. P. 6.14(6)(*b*); *Midwest Home Distrib. v. Domco Indus. Ltd.*, 585 N.W.2d 735, 738 (Iowa 1998). We consider whether substantial evidence exists to support the plaintiff's claim, justifying submission of the case to the jury. *Channon v. United Parcel Serv.*, 629 N.W.2d 835, 839 (Iowa 2001). Evidence is substantial if a jury could reasonably infer a fact from the evidence. *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 640 (Iowa 2000). An issue raised in a motion for judgment notwithstanding the verdict must first have been raised in a motion for directed verdict. *Field v. Palmer*, 592 N.W.2d 347, 351 (Iowa 1999).

A. Broadlawns contends it was entitled to judgment notwithstanding the verdict because it should not be held responsible for the actions of a surgical resident employed by Iowa Methodist. Plaintiff raised three theories as to why he believed Broadlawns should be vicariously liable for the actions of Dr. Phan.

1. Employer-Employee Relationship. Plaintiff's first theory was that Dr. Phan was an employee of Broadlawns, and Broadlawns should be liable under the doctrine of respondeat superior. Under the doctrine of respondeat superior, an employer is liable for the negligence of an employee committed while the employee is acting within the scope of employment. *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999).

Generally, a physician is considered an independent contractor, not an employee of the facility served. *Biddle v. Sartori Memorial Hosp.*, 518 N.W.2d 795, 797 (Iowa 1994). A determination of whether a physician is an employee, however, turns on the facts of the case. *Id*. In this case, Dr. Dorner testified Dr. Phan had been hired as a resident for Iowa Methodist, and so it is clear Dr. Phan was an employee. The question is whether he could have been an employee of Broadlawns at the time he treated Vivone.

In considering whether an employer-employee relationship exists, we look at: (1) the right of selection; (2) responsibility for payment of wages; (3) the right to discharge; (4) the right to control the work; and (5) the benefit of the work. *Caterpillar Tractor Co. v. Shook*, 313 N.W.2d 503, 505 (Iowa 1981). The primary focus is on the extent of control by the employer over the details of the alleged employee's work. *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 542 (Iowa 1997). The question of whether an act is within the scope of employment is ordinarily a jury question. *Riniker v. Wilson*, 623 N.W.2d 220, 231 (Iowa Ct. App. 2000).

Here, some factors favor Broadlawns, while others do not. Iowa Methodist had the right of selection and discharge, and it paid the residents' wages. On the other hand, Broadlawns reimbursed Iowa Methodist for the residents' wages while they were at Broadlawns. Broadlawns was in charge of the residents' day-to-day activities, and it received the benefit of their work while at Broadlawns. Where evidence is in conflict, as here, "we entrust the weighing of testimony and decisions about the credibility of witnesses to the jury." *Biddle*, 518 N.W.2d at 800. We conclude the issue was properly submitted to the jury.

2. Borrowed Servant Doctrine. When an employee is borrowed by another entity, an issue of fact may arise as to whether the employee becomes a "borrowed servant." *Bethards v. Shivvers, Inc.*, 355 N.W.2d 39, 45 (Iowa 1984). Absent evidence to the contrary, a court infers an employee remains in the original employment. *Burr v. Apex Concete Co.*, 242 N.W.2d 272, 276 (Iowa 1976). We look to which party has control of the employee. *Bride v. Heckart*, 556 N.W.2d 449, 453 (Iowa 1996). The control necessary to make the borrower the master must be something more than a right to point out the work to be done. *Bethards*, 355 N.W.2d at 45. Our primary consideration, however, is the intent of the parties. *Iowa Mut. Ins.*, 572 N.W.2d at 542. "The employer who temporarily borrows and exercises control over another's employee assumes liability in respondeat superior for the activities of the borrowed employee." *Bride*, 556 N.W.2d at 452-53.

We determine there is sufficient evidence in the record to submit the issue of whether Dr. Phan was a borrowed servant to the jury. The written agreement

between Iowa Methodist and Broadlawns shows the intent of those hospitals. The agreement provided "The residents, during their rotation will be considered house officers of Broadlawns Medical Center." The agreement also provided, "Surgery residents shall assume such clinical assignments and responsibilities as are developed by the director of surgery education at Broadlawns." There is evidence in the record to support a finding the hospitals intended the residents to be considered employees of Broadlawns for the time they were working at Broadlawns, and while they were under the direction and control of Broadlawns. We conclude the issue of whether Dr. Phan was a borrowed servant was properly submitted to the jury.

3. Vicarious Liability. In addition to the vicarious liability of an employer for the actions of an employee, a principal may be vicariously liable for the actions of an agent. *See Peppmeier v. Murphy*, 708 N.W.2d 57, 63 (Iowa 2005). An agency theory of vicarious liability was discussed in *Wolbers v. Finley Hospital*, 673 N.W.2d 728, 731 (Iowa 2003), where a plaintiff filed a medical malpractice suit against a hospital. In finding the hospital could be responsible for the acts of a physician under an agency theory of vicarious liability, the supreme court stated:

> We are convinced the hospital's relationship with Dr. Webb was such as to render it vicariously liable for his negligence in carrying out the hospital's emergency-response function. . . .
> . . . . Thus, a hospital may be vicariously liable for the negligence of its emergency-room caregivers, even if they are designated as independent contractors. This liability arises from an *ostensible agency*, in that an emergency-room patient looks to the hospital for care, and not to the individual physician—the patient goes

> to the emergency room for services, and accepts those services from whichever physician is assigned his or her case.

Wolbers, 673 N.W.2d at 734 (emphasis added) (citations omitted).

Vivone argues that although he did not seek emergency room care at Broadlawns, his situation was sufficiently similar and the vicarious liability provisions of *Wolbers* should apply. He asserted the physicians at Broadlawns were agents of the hospital. Vivone testified he looked to Broadlawns for care, and not to individual physicians. He pointed out that just as in *Wolbers*, he had no control over the physician treating him; he received services from whichever physician was assigned to his case. The district court determined, and we agree, that *Wolbers* is applicable in this case, and Broadlawns could be held responsible under ostensible/apparent agency principles.

We determine Vivone presented sufficient evidence to submit the case under the vicarious liability theory presented in *Wolbers*. The jury was presented evidence from which it could find Vivone sought treatment from Broadlawns, and that Dr. Phan was acting as the hospital's agent at the time he treated Vivone.

B. Broadlawns claims it is entitled to judgment notwithstanding the verdict because the district court improperly permitted Dr. Bergman and Dr. Baeke to testify. District courts have broad discretion in ruling on the admissibility of expert witness testimony. *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505 (Iowa 1993). We will not disturb the court's discretion unless it was exercised on clearly untenable grounds or to an extent clearly unreasonable. *Hill v. McCartney*, 590 N.W.2d 52, 54-55 (Iowa Ct. App. 1998).

Broadlawns asserts plaintiff had not timely disclosed its expert witnesses, as required by Iowa Code section 668.11 (2003). Section 668.11 provides a party intending to call an expert witnesses in a professional liability case "shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert" within 180 days of the defendant's answer. Our review of the record shows Vivone designated his expert witnesses in a timely manner. He indicated Dr. Bergman and Dr. Baeke would testify "regarding all aspects of Plaintiff's case including, but not limited to, diagnosis, and standard of care." We find the district court did not abuse its discretion on this issue.

Broadlawns also asserts plaintiff failed to follow the procedures for discovery of experts, found in Iowa Rule of Civil Procedure 1.508. An expert may be required to sign answers to written interrogatories, giving the expert's qualifications, mental impressions, opinions, and the facts known to the expert. Iowa R. Civ. P. 1.508(1). "An objection based on the failure of such answers to be signed by the designated expert shall be asserted within 30 days of service of such answers, otherwise the objection is waived." *Id*. Here, Broadlawns did not object within thirty days of receiving the answers to interrogatories, and their objections are waived. We conclude the district court did not err in permitting Dr. Bergman and Dr. Baeke to testify as expert witnesses at the trial.

C. Broadlawns claims it was entitled to a judgment notwithstanding the verdict because Vivone failed to show his injuries were caused by Broadlawns or its employees or agents. In order to prove causation, a plaintiff must show (1) the harm would not have occurred but for the negligence of the defendant, and

(2) the negligence of the defendant was a substantial factor in bringing about the harm. *Gerst v. Marshall*, 549 N.W.2d 810, 817 (Iowa 1996). Also, the policy of the law must require the defendant to be legally liable for the harm. *Id*. at 815.

Dr. Bergman testified Vivone's injuries were caused because the pressure dressing was left on too long and was not sufficiently monitored after it was applied. He testified the tissue necrosis could have been prevented if it had been discovered earlier. Dr. Baeke also testified that the pressure dressing was applied for too long a period of time. We conclude there is sufficient factual evidence of causation. As to whether Broadlawns should be legally liable under a theory of vicarious liability for Vivone's injuries, those theories were addressed above. We determine there was sufficient evidence of causation to submit the issue to the jury.

IV. Motion for New Trial

In ruling upon motions for new trial, the district court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.14(6)(*c*). We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 6.14(6)(*d*).

A. Broadlawns contends it is entitled to a new trial because the district court submitted improper instructions to the jury. Broadlawns objected to nine of the jury instructions. We review jury instructions to decide if they are a correct statement of the law and are supported by substantial evidence. *Bride*, 556 N.W.2d at 452. Evidence is substantial when a reasonable mind would accept it

as adequate to reach a conclusion. *Id*. A district court should not submit instructions which have no support in the record. *Field v. Palmer*, 592 N.W.2d 347, 352 (Iowa 1999). If a court errs in admitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa Ct. App. 1998).

When making an objection to a jury instruction, a party must specify the subject and grounds of the objection. *Lynch v. Saddler*, 656 N.W.2d 104, 110-11 (Iowa 2003). A general objection will not preserve error. *Field*, 592 N.W.2d at 352. A party may not amplify or change the grounds of objection on appeal. *Riniker v. Wilson*, 623 N.W.2d 220, 228 (Iowa Ct. App. 2000).

1. Marshalling Instruction. Broadlawns claims the district court erred by submitting Instruction No. 13, the marshalling instruction, to the jury. In particular, Broadlawns complains about the language which states, "The Plaintiff claims the Defendant, through the acts or omissions of its agent or employees, was at fault . . . ." Broadlawns again states there was insufficient evidence to show Dr. Phan was its agent or employee. In our discussion of the motion for judgment notwithstanding the verdict we have already concluded plaintiff presented sufficient evidence to create a jury issue as to whether Dr. Phan was an agent or employee of Broadlawns. We find no error in this jury instruction.

2. Informed Consent. Instructions No. 14 and 15 dealt with informed consent. Under the doctrine of informed consent, a doctor recommending a particular medical procedure generally has an obligation to

disclose all material risks involved in the procedure. *See Pauscher v. Iowa Methodist Med. Ctr.*, 408 N.W.2d 355, 358 (Iowa 1987); *Bray v. Hill*, 517 N.W.2d 223, 225 (Iowa Ct. App. 1994). One of the specifications of negligence was that Broadlawns, through its agents or employees, failed to obtain an informed consent from the plaintiff before performing and following up on an excision procedure performed on his forehead. Broadlawns claims there is insufficient evidence to show Vivone did not give an informed consent.

Vivone's medical records show he was advised the procedure on his forehead could result in bleeding, infection, and nerve injury. The evidence does not show he was advised necrosis was a possibility. Dr. Bergman testified he always advises surgery patients that necrosis is a risk. Dr. Baeke testified discharge instructions are a type of informed consent, because it confirms there has been an adequate transfer of information. Dr. Baeke testified Vivone did not receive adequate discharge instructions. We determine there was sufficient evidence in the record to submit the jury instructions regarding informed consent.

3. Hospital's Negligence. Jury Instruction No. 16 provided, "A hospital must use the degree of skill, care and learning ordinarily possessed and exercised by other hospitals in similar circumstances." This instruction is based on Iowa Civil Jury Instruction No. 1600.4. The transcript from the discussion of the jury instructions show no objection to this instruction, and in fact, it appears defendant recommended including it.[2] We conclude defendant failed to preserve error on this claim. *See* Iowa R. Civ. P. 1.924; *Riniker*, 623 N.W.2d at 228.

[2] The transcript provides:

THE COURT: Have you looked at that 1600.5 that he is recommending?

4. Vicarious Liability. Instructions No. 17 provided, "The claim against Broadlawns Medical Center is based on the alleged negligence of its agents or employees." The instruction then went on to state that Broadlawns could be liable for the actions of its employees or agents. Instruction No. 18 defined the principles of agency. Broadlawns argued the inclusion of these instructions was based on the court's interpretation of *Wolbers*, 673 N.W.2d at 733-34, and it disagreed with that interpretation.

Jury Instruction No. 17 relates both to a theory of vicarious liability based on an employer-employee relationship and agency. We have determined there was sufficient evidence to present the jury with the theory of vicarious liability based on an employment relationship and under the agency theory discussed in *Wolbers.* Plaintiff presented evidence from which the jury could have found Dr. Phan was an employee of Broadlawns. Plaintiff also presented evidence to show there could have been an agency relationship between Dr. Phan and Broadlawns based on the language of *Wolbers*, 673 N.W.2d at 734. We find no error in the submission of these instructions to the jury.

5. Borrowed Servant. Broadlawns claims plaintiff did not present sufficient evidence that Dr. Phan was a borrowed servant, and the district court should not have submitted jury instruction No. 20, on borrowed servants. As noted above, when an employee of a corporation is borrowed by another business, an issue of fact may arise as to whether the employee becomes a

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MR. RENZO: No, I have not.
MR. BROWN: 1600.4. It's 1600.4.
The parties then discussed the language of Iowa Civil Jury Instruction 1600.4, and counsel for plaintiff ultimately agreed to include it in the jury instructions.

borrowed servant. *Bethards*, 355 N.W.2d at 45. We find sufficient evidence was presented for a factual issue to arise as to whether Dr. Phan was a borrowed servant at the time he treated Vivone. We find no error in the submission of this instruction to the jury.

6. Duty of Specialist. In Instruction No. 22, the jury was instructed, "A physician who holds himself out as a specialist must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner." At the hearing on jury instructions, Broadlawns claimed plaintiff did not present sufficient evidence to show Dr. Phan was a specialist. Plaintiff requested the instruction concerning the duty of a specialist because Dr. Phan was performing the work of a surgeon when he treated Vivone. Plaintiff pointed out that Dr. Phan was in the fifth year of a five-year residency program to become a surgeon.

On appeal, Broadlawns claims plaintiff did not present expert testimony of the standard of care a specialist should exercise under similar circumstances. Defendant failed to raise this issue before the district court, and we conclude it has not been preserved for our review. *See Field*, 592 N.W.2d at 352 (noting grounds or objections to jury instructions that were not raised before the district court may not be considered on appeal).

7. Damages. Broadlawns objected to instruction No. 23, which listed the types of damages that could be awarded, stating it believed there was not sufficient evidence to support submitting any damage claim because liability

had not been established. Broadlawns argued Dr. Bergman and Dr. Baeke should not have been permitted to give evidence concerning possible future medical costs. In addition, Broadlawns stated there was no evidence of past loss of function.

The vicarious liability issues have already been extensively discussed, and will not be discussed further. Dr. Bergman testified to possible courses of treatment for Vivone, and the associated costs. Dr. Baeke created a list of possible treatment options, and the estimated cost of each. We determine there was sufficient evidence to support a jury instruction on future medical costs. We note the jury did not award Vivone any damages for past loss of function.

We conclude Broadlawns is not entitled to a new trial based on the instructions given to the jury in this case.

B. Broadlawns asserts it is entitled to a new trial based on the questions in the special verdict form relating to Dr. Phan. During the trial, Broadlawns objected to the special verdict form due to its arguments regarding vicarious liability. Broadlawns agreed to the questions regarding Dr. Phan, as follows:

> I do think there needs to be something with respect to Hiep Phan. There is no doubt about it, he was the treating doctor. He did the surgery. He did the follow-up. He was with him. I think that was the focus of the case, was Hiep Phan. That was the focus of the case, so we probably need something in the special verdict form to actually identify him. Was he negligent? Was he a proximate cause? I think we should do something for him.

Plaintiff was the party who objected to questions solely about Dr. Phan. Based on the discussions concerning the special verdict form before the district court,

we conclude defendant failed to preserve error on this issue. *See Field*, 592 N.W.2d at 352 (noting the court may not set aside the jury's verdict based on a perceived error that was not pointed out by any party prior to the submission of the case).

Even if this issue had been preserved, however, we would find no error in the special verdict forms. In *Dickens v. Associated Anesthesiologists, P.C.,* 709 N.W.2d 122, 125 (Iowa 2006), the supreme court held that under the doctrine of respondeat superior, a plaintiff has "the right to sue the employer with or without joining the employee as a party to the action." Similar to the present case, a physician and nurse were dismissed from the suit for failure to serve adequate notice. *Dickens*, 709 N.W.2d at 124. The court determined the plaintiff was not precluded from going forward with his vicarious liability claims against the employer. *Id.* at 127.

Where an action is brought under a theory of vicarious liability, the action against the principal is based on the alleged negligent acts of the agent or employee. *Peppmeier*, 708 N.W.2d at 64; *see also Kulish v. Ellsworth*, 566 N.W.2d 885, 892 (Iowa 1997) (noting a judgment in favor of agents necessarily justifies dismissal of claims against principal); *Biddle v. Sartori Memorial Hosp.*, 518 N.W.2d 795, 798 (Iowa 1994) (finding a settlement with a tortfeasor employee removes the basis for any additional recovery from the principal for the same acts of negligence). Because the liability of the principal is based on the negligent acts of the agent or employee, the special verdict forms properly asked

whether the agent or employee was negligent, even if the agent or employee was not party to the suit.

We conclude Broadlawns is not entitled to a new trial based on the special verdict forms. We affirm the decision of the district court.

AFFIRMED.