STATE OF MICHIGAN

COURT OF APPEALS

JACK N. JOHNS and HOPE JOHNS,

Plaintiffs-Appellants,

v

DAVID A. DETRISAC, M.D., DAVID A. DETRISAC, M.D., P.C., and EAST LANSING ORTHOPEDIC ASSOCIATION, INC.,

Defendants-Appellees.

UNPUBLISHED
October 1, 1999

No. 208694
Ingham Circuit Court
LC No. 95-080963 NM

Before: Talbot, P.J., and Fitzgerald and O'Connell, JJ

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right from a judgment in favor of defendants following a jury trial. We affirm.

Plaintiffs contend that the issue of plaintiff Jack Johns' ("Johns") failure to mitigate his damages by undergoing corrective wrist surgery should have been excluded from trial because the surgery was risky and involved no "virtual guarantee of success." Plaintiffs therefore argue that the trial court erred by denying their pretrial motion[1] to exclude evidence that they failed to mitigate their damages, by denying their motion for a directed verdict on the mitigation issue, and by instructing the jury on the duty to mitigate damages.

We review a trial court's decision to admit evidence for an abuse of discretion. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 517; 592 NW2d 786 (1999). We review a trial court's denial of a motion for a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). We must consider the evidence in the light most favorable to the nonmoving party to determine whether a factual question exists upon which reasonable minds may differ. *Nabozny v Pioneer State Mut Ins Co*, 233 Mich App 206, 209; 591 NW2d 685 (1998); *Meagher, supra* at 708. Finally, we review a trial court's decision to give a jury instruction for an abuse of discretion. *Lagalo, supra* at 519. "Jury instructions must accurately state the law and must be warranted by the evidence presented." *Id*.

In tort actions, "[i]t is well-settled that an injured party has a duty to exercise reasonable care to minimize damages, including obtaining proper medical or surgical treatment." *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 91; 393 NW2d 356 (1986); *Smith v Jones*, 382 Mich 176, 186; 169 NW2d 308 (1969). In determining whether such a duty exists, this Court has recognized that the "authority seems to employ a balancing test . . . based on an assessment of whether the medical procedure stands a high probability of being successful in light of the pain, expense, and effort involved in the corrective surgery." *Robins v Katz*, 151 Mich App 802, 808; 391 NW2d 495 (1986), citing *Klanseck v Anderson Sales & Service, Inc*, 136 Mich App 75, 85; 356 NW2d 275 (1984), aff'd 426 Mich 78; 393 NW2d 356 (1986) and *Earls v Herrick*, 107 Mich App 657, 667-668; 309 NW2d 694 (1981). It is the burden of the defendant to show that the plaintiff "failed to employ every reasonable effort to mitigate damages." *Dep't of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633, 637; 385 NW2d 685 (1986).

In this case, plaintiffs' theory was that defendant, Dr. David Detrisac, was negligent in failing to recommend or perform surgery on Johns' wrist within six weeks of the injury and that surgery at a later date would have entailed risk, possible complications, and a reduced chance of success. However, plaintiffs did not allege that later corrective surgery would have been more painful or expensive than surgery performed within six weeks of the injury. Moreover, although some witnesses testified that later surgery would be both more complicated and less successful, other witnesses testified that later surgery would have been essentially the same as earlier surgery and would have produced highly satisfactory results. Indeed, there was testimony that some doctors prefer to wait several months before surgically treating a problem such as Johns'. In light of the pretrial arguments supporting and the trial testimony verifying the viability of later corrective surgery, the trial court did not err by denying plaintiffs' pretrial motion to exclude the mitigation evidence, by denying plaintiffs' motion for a directed verdict, or by instructing the jury on the duty to mitigate damages.

Plaintiffs argue that reversal is required under *Robins*, *supra*, where a panel of this Court held that "the victim of medical malpractice involving surgery should not ordinarily be required to suffer the undoubted physical and psychological pain and suffering of further surgery in the absence of a virtual guarantee of success." *Id*. at 808-809. Plaintiffs contend that they should not have been penalized for Johns' failure to undergo surgery because the potential corrective surgery did not "virtually guarantee" that his hand would return to normal.

We disagree and hold that the "virtual guarantee of success" language from *Robins* does not apply in the instant case. The *Robins* Court specifically limited its holding to "victim[s] of medical malpractice involving surgery" and concluded that those victims should not be required to undergo "*further* surgery" absent a virtual guarantee of success. *Id*. at 808-809 (emphasis added). Here, Johns was not a victim of medical malpractice "involving surgery." Rather, he was the alleged victim of medical malpractice involving the failure to provide surgery early enough. Indeed, Johns' injury would have required initial corrective surgery with its inherent risks even absent defendants' allegedly negligent conduct. Moreover, even assuming that the *Robins'* Court's mandate that further surgery "virtual[ly] guarantee . . . success" is applicable, the trial court did not err in treating the mitigation issue as it did given the evidence and arguments that corrective surgery would very likely improve the condition of

Johns' wrist. See *Domako v Rowe*, 184 Mich App 137, 150; 457 NW2d 107 (1990), aff'd 438 Mich 347 (1991).

Given our resolution of this case, we need not address the issue whether plaintiffs' arguments on appeal are moot in light of the jury's finding of no negligence.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

[1] Plaintiffs argue that even though their attorney mislabeled this motion as a motion in limine, it was actually a motion for partial summary disposition and should be reviewed as such on appeal. However, because there is no record support for plaintiffs' assertion, we will review the motion as a motion in limine.