

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HARVEY BROSSOIT, JR., Personal Representative  
of the ESTATE OF HARVEY BROSSOIT,  
Deceased,

UNPUBLISHED  
June 16, 2000

Plaintiff-Appellee,

v

No. 210766  
Wayne Circuit Court  
LC No. 95-534819-NH

GARDEN CITY OSTEOPATHIC HOSPITAL and  
ROBERT H. AUTH, D.O.,

Defendants-Appellants.

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Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Plaintiff<sup>1</sup> commenced this action, alleging medical malpractice by defendant Robert H. Auth, D.O., and defendant Garden City Osteopathic Hospital, based on Auth's failure to diagnose a cancerous tumor on a chest x-ray of plaintiff's decedent on December 7, 1992. A jury found that defendant Auth was negligent, but that his negligence was not the proximate cause of plaintiff's damages. A judgment of no cause of action was therefore entered in favor of defendants. Plaintiff moved for a new trial, and the trial court granted the motion. Defendants subsequently filed a joint application for leave to appeal, which this Court granted. We now affirm the trial court's decision to grant plaintiff a new trial.

A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996). If the reasons assigned by the trial court for granting a new trial are legally recognized and supported by any reasonable interpretation of the record, the trial court has acted within its discretion. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 539; 506 NW2d 890 (1993).

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<sup>1</sup> The action was commenced by plaintiff Theresa Brossoit, as personal representative for the Estate of Harvey Brossoit, [Sr.,] Deceased. Harvey Brossoit Jr. later succeeded Theresa Brossoit as personal representative and was substituted for Theresa Brossoit as the plaintiff herein.

In this case, the trial court granted plaintiff's motion for a new trial on the basis of its determination that it had erred in failing to instruct the jury, as requested by plaintiff, that it was not to consider whether decedent was at fault in causing his lung cancer by smoking. The instruction would have foreclosed the jury from considering evidence and defense argument regarding the decedent's smoking in determining defendants' malpractice liability.

The evidence at trial showed that decedent had smoked for about eighteen years, but had quit about ten years before his death. There was also evidence that decedent had smoked about ten cigarettes on one occasion in early 1993, but, contrary to defendants' arguments, there was no evidence that decedent had smoked cigarettes at any other time since he quit ten years earlier.

A defense witness, Dr. Mark Campbell, testified that smoking is the principal cause of lung cancer and that the best way to avoid lung cancer is not to smoke. However, Dr. Campbell also testified that lung cancer is typically thought to be caused by regular smoking over an extended period of time, such as two packs a day for ten years, one pack a day for twenty years, or one-half pack a day for forty years.

At trial, the court instructed the jury on comparative negligence, over plaintiff's objection, and, in the instructions, in essence, linked the issue of comparative negligence to the issue of proximate cause. Further, in closing argument, defendants commented on decedent's smoking both before and after December 7, 1992, relating the decedent's smoking to causation, i.e., his death from cancer.

The trial court's instructions on comparative negligence and proximate cause were improper considering the facts and legal theories in this case. When the Standard Jury Instructions do not adequately address an area or issue, a trial court is obligated to give supplemental instructions when requested if those instructions properly inform the jury of the applicable law and are supported by the evidence. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). The determination whether special instructions are applicable and accurate is within the trial court's discretion. *Id.* A supplemental instruction must be concise, understandable, conversational, unslanted and nonargumentative. *Id.* at 163; *Bordeaux v Celotex Corp*, 203 Mich App 158, 169; 511 NW2d 899 (1993).

This Court reviews jury instructions in their entirety. *Stoddard, supra* at 163. A trial court does not commit error requiring reversal if, on balance, the parties' theories and the applicable law were adequately and fairly presented to the jury. *Id.* Before instructing a jury on comparative negligence, the trial court should determine, after viewing the evidence in the light most favorably to the defendant, if there is sufficient evidence for the jury to find negligence on the part of the plaintiff. *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 623; 563 NW2d 693 (1997).

The facts in *Sawka v Prokopowycz*, 104 Mich App 829, 834-838; 306 NW2d 354 (1981), are similar to those in this case. In *Sawka*, the decedent died of lung cancer, which the defendants failed to diagnose. *Id.* at 832, 835. The defendants argued that the decedent's failure to follow through with a recommended examination and his failure to stop smoking after being warned to stop was evidence of contributory negligence. *Id.* at 837. This Court held that the decedent's smoking could not

logically be termed a direct contributory cause of the alleged malpractice, but observed that a patient's conduct could constitute contributory negligence in a malpractice case in situations where the patient (1) failed to follow instructions, (2) refused treatment, or (3) provided the doctor with false, incomplete or misleading information concerning symptoms. *Id.* at 836. This Court concluded that the trial court erred in failing to instruct the jury that contributory negligence, i.e., the decedent's failure to return for a follow-up examination and the decedent's smoking, could not be considered in determining defendants' liability for malpractice. *Id.* at 837-838. There was a possibility that the jury erroneously considered these factors when deciding the issue of the defendants' liability. *Id.* at 838.

The panel in *Sawka* relied principally on *Podvin v Eickhorst*, 373 Mich 175, 181-182; 128 NW2d 523 (1964), a case in which our Supreme Court held that error occurred when in a medical malpractice case, defense counsel emphasized the plaintiff's alleged contributory negligence because he was at fault in the automobile accident that caused the underlying injuries necessitating medical treatment. The Court concluded that the trial court erred by not instructing the jury, as requested by the plaintiff, that contributory negligence of the plaintiff was not an issue in the case, and that the only issue for the jury to decide was whether the defendants met the standard of care in the medical treatment rendered. *Id.*

This Court has recognized that comparative negligence may be a defense in a medical malpractice case in situations where the plaintiff has failed to follow medical instructions or orders for medical treatment, thereby contributing to the resulting injuries. *Jalaba v Borovoy*, 206 Mich App 17, 22-23; 520 NW2d 349 (1994); *Pietrzyk v Detroit*, 123 Mich App 244, 248-249; 333 NW2d 236 (1983). The cases cited by defendants in support of their positions that such evidence is generally admissible are inapplicable to the facts and legal theories in this case, because those cases do not involve medical malpractice claims. See *Brisboy v Fibreboard Corp*, 429 Mich 540, 545-546; 418 NW2d 650 (1988); *Bordeaux*, *supra* at 170.

Here, defendants failed to present sufficient evidence to link the issue of decedent's smoking to any alleged comparative negligence on the part of decedent with regard to the alleged medical malpractice. Decedent's smoking before the date of the alleged malpractice was clearly not relevant to the issues in this case. *Sawka*, *supra*; *Podvin*, *supra*. The evidence of decedent's smoking ten cigarettes after December 7, 1992, was similarly insufficient to support a finding that the decedent's smoking caused his injury because defendants' experts failed to link this limited evidence of smoking to the spread of decedent's cancer. Rather, defendants' evidence showed only that regular smoking over an extended period of time may lead to lung cancer. In light of the evidence and argument concerning smoking, the court's instructions to the jury were improper. Compare *Wyatt v United States*, 939 F Supp 1402, 1411-1412 (ED Mo, 1996) (medical evidence produced by the defendant and un rebutted by the plaintiff supported finding that the plaintiff was comparatively negligent for smoking while in the hospital because smoking had a deleterious effect on the plaintiff's ability to heal from his injuries). In the context of this case, the instructions may have led the jury to conclude that defendant Auth, while negligent, was not a proximate cause of plaintiff's damages on account of decedent's smoking.

After reviewing the record, we do not believe that the error in this case was harmless. This Court will not reverse a jury's verdict on the basis of instructional error unless the failure to so do would

be inconsistent with substantial justice. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 101; 593 NW2d 595 (1999); MCR 2.613(A). See also *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) ("a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative.").

Here, we do not believe that the error was remedied by the court's instructions that the statements of counsel are not to be considered as evidence, given that the error also stemmed from the court's own erroneous instructions to the jury. The fact that the jury did not reach the question of decedent's comparative negligence also is not a sufficient reason for finding the error harmless, given that decedent's smoking was also linked to the question of proximate cause and it was on that precise question that the jury found in favor of defendants.

Finally, we are not convinced that the overwhelming weight of the evidence showed that decedent had no chance of survival even if his cancer had been detected in December 1992. Both sides presented varying opinions as to when the decedent's cancer had metastasized. This was a close question for the jury to decide, and we cannot say that the erroneous arguments and instructions with regard to decedent's smoking did not affect the outcome of this case.

Accordingly, we conclude that the trial court did not abuse its discretion in granting plaintiff's motion for a new trial.

Affirmed.

/s/ Janet T. Neff  
/s/ David H. Sawyer  
/s/ Henry William Saad