

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA SCOTT, Personal Representative of
the Estate of MINNISE J. HOLT,

Plaintiff-Appellee,

v

BRUCE ADELMAN, M.D.,

Defendant-Appellant.

UNPUBLISHED
February 21, 2008

No. 273859
Ingham Circuit Court
LC No. 03-002131-NH

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

In this medical malpractice action, defendant appeals by leave granted from the trial court's order granting plaintiff's motion for a new trial. We reverse and remand for reinstatement of the jury verdict.

Plaintiff's decedent Minnise Holt underwent surgery to remove a mole from his face. At the time, Holt was a 79-year-old resident of a nursing home suffering from "dementia with a lot of psychiatric problems" as a result of advanced Alzheimer's disease. Because of his condition, Holt was sedated during the surgery.

Defendant was the anesthesiologist involved in Holt's procedure. Defendant testified that he was present for the initial induction of the anesthetic and then left the operating room. Sandra Robe, a certified registered nurse anesthetist (CRNA) remained in the room throughout the procedure and, among other things, monitored the oxygen delivery to Holt. Dr. Edward Lanigan, the plastic surgeon who operated on Holt, testified by deposition that during the procedure a fire erupted, which was sparked by the close use of a Bovie cauterizing device to the oxygen from the nasal cannula attached to Holt's face. Evidence at trial suggested that oxygen had accumulated under the surgical drape Robe placed over Holt's face, which increased the risk of such a fire. The fire was quickly extinguished, and defendant returned to the operating room "almost immediately" and intubated Holt within minutes.

The fire resulted in first- and second-degree burns to Holt's face and airway. Holt died approximately two and a half months later of aspiration pneumonia, a complication of the injuries that he sustained in the fire.

Plaintiff, Holt's daughter, brought a medical malpractice action against, among others, Lanigan, Robe, and defendant. As a result of pre-trial settlement agreements, the sole defendant in the instant trial was Adelman, the anesthesiologist.

After the close of plaintiff's proofs at trial, both parties unsuccessfully moved for directed verdicts. The jury ultimately found in favor of defendant. Plaintiff then moved for judgment notwithstanding the verdict (JNOV) and a new trial. The trial court granted plaintiff's motion for a new trial, and this appeal followed.

Defendant's sole argument on appeal concerns the lower court's grant of plaintiff's motion for a new trial. We review this decision for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the result is outside of "the principled range of outcomes." *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). In contrast, we review questions of law and claims of instructional error de novo. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002).

At the close of proofs, plaintiff's attorney asked that a special instruction be given to the jury. The proposed instruction reads as follows:

In the operating room, while a patient is undergoing surgery, the anesthesiologist is ordinarily regarded, in law, as having exclusive responsibility and control of the anesthesia. The anesthesiologist can thus be held responsible for any acts of negligence committed during the operation by any member of the anesthesia care team who is under the anesthesiologist's direction, no matter whether or not such assistant is an employee of another. For the purposes of the surgery, such a person is often called a "borrowed servant" for whose acts the anesthesiologist must respond as an employer for the acts of a servant performed in the course of that employment.

If you find from the evidence in this case that the injury which is the subject of this action was due to the act of a person other than the defendant anesthesiologist, but who was under the anesthesiologist's direct supervision and control, you may find the defendant liable.

If, on the other hand, you find that whether or not the act took place while the anesthesiologist was present, the person so acting was not acting under the anesthesiologist's direct supervision and control, your verdict should be for the defendant.

Plaintiff's attorney argued that the instruction was warranted by the American Society of Anesthesiologists (ASA) "guidelines" and by defendant's concession at trial that he maintains ultimate responsibility for the anesthesia care team. In contrast, defense counsel argued that there was conflicting testimony as to the effect of the ASA guidelines and that the requested instruction would simply reiterate plaintiff's trial arguments and present them as law, virtually requiring the jury to find for plaintiff.

Ultimately, the trial court agreed with defense counsel and refused to give the requested instruction, reasoning that plaintiff's attorney could still make the argument to the jury. The standard jury instructions were given. After three hours of deliberating, the jury returned a verdict of no cause of action in favor of defendant.

In granting plaintiff's motion for a new trial, the trial court stated:

Okay. The Court has read your motion and your brief and the Defendant's response. And I have to say I was shocked by the verdict in this case, and I also went and talked to the jury, as you indicated, and at least one said, well, if there was an instruction saying that . . . [defendant] was responsible for the nurse anesthetist, they would have found differently. I know Mr. Boss [a juror] said there was some comment about the, um, Plaintiff's expert didn't work with nurse anesthetists, but I believe it was . . . [Juror] Boss who also said if he had that instruction, he would have probably – they would have found differently.

I've been thinking about this for several months and I think that the Court was incorrect in not giving some type of special jury instruction, perhaps not exactly like . . . [plaintiff's counsel] proposed but something to the effect that based on the ASA guidelines, that the anesthesiologist remains responsible for the acts of the CRNA even though he may, you know, delegate some tasks and the responsibilities to the CRNA. And that's also what . . . the Defendant, testified to; that he remained responsible. And without that instruction, I think the jury was allowed to speculate as to other people's negligence.

And at the time of the . . . trial, I ruled that the Plaintiff's attorney could argue, make that argument to the jury, but I have to agree with the Plaintiffs that . . . the jury is also instructed to disregard arguments as not being the evidence.

So I think that . . . the verdict was against the great weight of the evidence. And for that reason, the Court is granting the motion for judgment notwithstanding the verdict. Actually, I'm not granting a JNOV. I'm granting a motion for a new trial.

Generally, a new trial may be granted where the verdict is against the great weight of the evidence or contrary to law, or where there was an error in the proceedings. MCR 2.611(A)(1)(e) and (g).

In this case, the trial court stated that it based its decision to grant plaintiff's request for a new trial on the fact that the verdict was against the great weight of the evidence; however, the court did not support its conclusion with further explanation. An examination of the court's rationale in granting plaintiff's motion reveals that it was actually basing its decision on the fact that it erroneously failed to give plaintiff's requested special instruction at trial. It is this ground on which we base our review.

Generally, a trial court may give a nonstandard jury instruction "if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence."

Bouverette v Westinghouse Electric Corp, 245 Mich App 391, 402; 628 NW2d 86 (2001). Plaintiff argues that the requested jury instruction, in which defendant is asserted to have a nondelegable duty, accurately reflects (1) defendant's admission at trial that he was responsible for CRNA Robe's negligence and (2) the ASA "guidelines" with respect to the standard of care of an anesthesiologist. We find neither argument persuasive or supported by existing caselaw.

First, plaintiff appears to mischaracterize defendant's testimony at trial. The record reveals that the testimony on which plaintiff relies in her brief, in which defendant stated that "I am responsible for the anesthesia care delivered to the patient," was in response to questioning regarding what the ASA guidelines suggest. In contrast to plaintiff's argument on appeal, defendant's testimony contains neither an admission that the ASA guidelines provide the applicable standard of care nor that he was legally liable for Robe's asserted negligence.

Also, although plaintiff relies largely on a portion of a document published by the ASA entitled "The Anesthesia Care Team" (to which plaintiff refers as "guidelines") in support of her argument that defendant had a nondelegable duty to Holt, the document itself was never entered into evidence at trial. Rather, it appears that the document was introduced to the jury on two occasions at trial: during the cross-examination of defense witness Khrovsky (when plaintiff's attorney put up a chart with part of the document on it) and during defendant's testimony, when plaintiff's counsel instructed defendant to read selected portions of it. Further, plaintiff cites no authority in support of the proposition either that Michigan law has accepted the ASA "guidelines" as authoritative in this state or that the law supports a finding of an anesthesiologist's nondelegable duty to a patient. Similarly, this Court can find no such authority.

Thus, to the extent that the trial court based its decision to grant plaintiff's motion for a new trial on the fact that it had previously denied plaintiff's proffered special jury instruction, we also find that its decision was constituted an abuse of discretion because applicable law did not support the instruction.

We reverse the trial court's granting of a new trial and remand this case for reinstatement of the jury's verdict of no cause of action. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray