DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

JOYCE DREW,
Appellant,

v.

TENET ST. MARY'S, INC. d/b/a St. Mary's Hospital,
Appellee.

No. 4D08-3499

[November 3, 2010]

LEVENSON, JEFFREY R., Associate Judge.

Joyce Drew appeals from a final judgment in a medical malpractice case in favor of St. Mary's Hospital. The court below denied Drew's motion for directed verdict on the issue of comparative negligence. The jury subsequently found Drew to be 70% comparatively negligent. Drew then filed a motion for new trial on the ground that the verdict was against the manifest weight of the evidence. The trial court denied the motion. We affirm, but write to discuss appellant's contention that the trial court erred in denying her motion for directed verdict.

After being diagnosed with breast cancer and treated with a lumpectomy, Drew sought radiation treatment at Kaplan Cancer Center. Before starting treatment, Drew and her surgeon had a phone conference with Dr. Ann Lewis, a radiation oncologist, to discuss the course of treatment and the role the radiation would play in the reduction of possible cancer recurrences. During the conference call, Drew inquired as to whether transportation needed to be arranged after radiation treatment. She was informed that radiation did not affect one's physical or mental functioning and that no arrangements were necessary at that time.

Upon arrival at Kaplan the following Monday, the doctors noted that Drew required an additional procedure to inflate a balloon previously inserted in her lumpectomy cavity. The radiation oncologist prescribed two milligrams of Ativan, an anti-anxiety drug, in order to help Drew relax. Ativan, a Class IV controlled substance, is typically used for

sedation because of its tranquilizing effect on the central nervous system. The drug produces various side-effects in the user that vary based on the individual.

Shortly after the Ativan was ordered, nurse Lisa Shoemaker entered Drew's room with it. Drew inquired as to whether she could drive home after taking the drug. During this time, Drew indicated her familiarity with medicine, noting she had a "background with meds" and that she had never seen an Ativan the size of the one presented to her. Further examination of Drew's history reveals that she had been prescribed Ativan after the passing of her husband and was familiar with similar anti-anxiety medications. In response to Drew's inquiry about her ability to drive, nurse Shoemaker replied that she could not tell Drew if she could drive and that she should, or could, ask Dr. Lewis.

Approximately an hour and twenty minutes after receiving Ativan, Drew found it necessary to leave the Kaplan facility. A nurse and radiation physicist consulted the treatment schedule and came to the conclusion that Drew would not begin radiation treatment until the next day and informed her that she could leave Kaplan and return the following day for the radiation treatment. The nurse, however, did not review Drew's chart and was unaware of the Ativan. While driving home, Drew crashed her car into a tree in her neighborhood and suffered serious injuries. The emergency room noted that her accident was a result of the Ativan.

On appeal, Drew contends that her lack of medical aptitude precludes her from any allocation of negligence. Accordingly, she argues that the trial court erred in denying her motion for a directed verdict on the issue of comparative negligence. We disagree and hold that the court below did not err in denying the motion.

We review the trial court's denial of Drew's motion *de novo*. *Dep't of Children & Family Servs. v. Amora*, 944 So. 2d 431, 435 (Fla. 4th DCA 2006). "A motion for directed verdict should be granted only when the evidence viewed in the light most favorable to the non-moving party, shows that a jury could not reasonably differ as to the existence of a material fact and that the movant is entitled to judgment as a matter of law." *Id.* Thus, "an appellate court must affirm the denial of a motion for directed verdict if any reasonable view of the evidence could sustain a verdict in favor of the non-moving party." *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 242, 250 (Fla. 4th DCA 2009) (citing *Amerifirst Fed. Sav. & Loan Ass'n v. Dutch Realty, Inc.*, 475 So. 2d 970, 971 (Fla. 4th DCA 1985)).

Drew specifically argues that there can be no comparative negligence on her part because the hospital had not presented her with the proper information about driving while on Ativan. Comparative negligence "is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection." *Restatement (Second) of Torts* § 463 (1965). In order to establish the defense of comparative negligence, a medical defendant must prove each of the following three elements of negligence: first, that the patient owed himself a duty of care; second, that the patient breached that duty; and, third, that the breach was the proximate cause of the damages the patient sustained. *See Borenstein v. Raskin,* 401 So. 2d 884, 886 (Fla. 3d DCA 1981).

Contrary to Drew's argument, courts have consistently recognized comparative negligence as a defense in cases where the plaintiff herself has knowledge of the danger that led to the injury, which requires the plaintiff to exercise adequate care for her own safety given the known danger. *See, e.g.*, *Langmead v. Admiral Cruises, Inc.*, 610 So. 2d 565 (Fla. 3d DCA 1992) (comparative fault of employee was properly submitted to the jury where the employee admitted having knowledge that the elastic band which injured her had broken in the past, so the employee "did not exercise adequate care for her own safety); *Gonzalez v. G.A. Braun, Inc.*, 608 So. 2d 125 (Fla. 3d DCA 1992) (evidence supported finding that products liability plaintiff was negligent where he had knowledge of the product's defects but continued to use it); *Kolosky v. Winn Dixie Stores, Inc.*, 472 So. 2d 891 (Fla. 4th DCA 1985) (issue of comparative negligence was presented where customer who was knocked down by children in the store had observed the children running in the store and, therefore, had knowledge of the dangerous condition).

The question of whether or not anyone definitively told Drew that she could not drive home after taking the Ativan is not dispositive of whether she bears an apportioned share of responsibility for her injuries. Rather, the critical question is whether, given the circumstances of this case, Drew exercised adequate care for her own safety when she took the medication and proceeded to drive home without awaiting clarification from Dr. Lewis as to the safety of driving on the drug. It is in this query that there is a reasonable question of Drew's comparative negligence. Drew's possible negligence was highlighted by her prior knowledge and experience regarding the effects of Ativan and her repeated outward suspicions that she might not be able to drive. Her experience with the drug, her judgment to drive without clarification from the doctor, and the information provided by nurse Shoemaker about the possible effects of anxiety medication certainly raise a comparative negligence question for the jury.

The type of negligence attributed to Drew in this case is that of ordinary negligence and not the type contributing to a worsened medical condition caused by medical staff with required expertise. Drew argues that a plaintiff in a medical malpractice case cannot be held comparatively negligent because patients are not held to the same standard of expertise as medical personnel. While this may be true, her negligence was the failure to use adequate care for her own safety; Drew, after taking the medicine, proceeded to drive home despite not obtaining an answer from Dr. Lewis as to whether it was safe or not.

Drew was aware of the possible dangers of taking an anti-anxiety medication and driving, and the comparative negligence question was properly submitted to the jury in order to determine her responsibility for the accident. On these facts, there was certainly a question whether her conduct was reasonable based on her knowledge and experience. The jury determined that it was not, and the evidence supports that finding.

Accordingly, we affirm the judgment entered below.

TAYLOR, J., concurs.
FARMER, J., dissents with opinion.

FARMER, J., dissenting.

Medicine is a learned art. A very learned art. Actually, a very, *very* learned art. Doctors begin with 4 years undergraduate college education, concentrating in the life sciences. Then they have 3 or 4 years of medical school dealing significantly with all manner of health care subjects. That is usually followed by internships, residencies and fellowships, often adding another 6 or 7 years of highly specialized education and training. So it is that when a Doctor becomes Board Certified in a medical specialty, the only person qualified to challenge that Doctor's judgment is another, equally qualified Doctor with comparable education, training and experience.[1] Surely no patient without medical training can do so.

On medical subjects, therefore, Doctors and their patients are usually on different levels. On very different levels. No, on very, *very* different levels. They are as far apart as it is possible to be. They are separated by a mammoth chasm in medical knowledge. As a matter of law we should acknowledge that the average patient cannot be deemed to know what a Doctor knows about a medical subject.

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[1] *See* § 766.012(5), Fla. Stat. (2009).

The major part of a Doctor's treatment tools today is neither technique nor implement. It is chemicals. Medicine. Substances introduced by the Doctor into the patient. Altering a patient's interior biochemistry. Many such chemicals — some *controlled substances* — can have adverse effects on patients. Doctors must know all possible side effects of these substances, as well as their specific indications and efficacy.[2] I mean, no competent patient would knowingly exchange a current medical problem for a worse one. Here again the level of inequality in knowledge is Grand Canyon vast.

Because of this disparity, Doctors are fiduciaries in medicine for their patients.[3] And the fiduciary duty imposed on Doctors who administer substances to their patients could not be more plain. Doctors must spontaneously and voluntarily make prior disclosure of all possible side effects from a substance they administer, whether or not a patient asks.[4] Because the Doctor is bound by fiduciary ties,[5] the patient is entitled to rely not only on what the Doctor tells the patient but equally on what the Doctor does not say.

In this case, before she even visited the Doctor she inquired about possible effects on driving caused by the planned treatment. She asked his office — hence, she asked him[6] — whether she should arrange for transportation home after the planned treatment. His office — hence, he personally — responded that such transportation was not indicated.

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[2] *See* § 766.103(3)(a)2, Fla. Stat. (2010) (Doctor must furnish sufficient information under the circumstances to give reasonable individual general understanding of the substantial risks and hazards inherent in the proposed treatment or procedures).

[3] *See Gracey v. Eaker*, 837 So.2d 348, 354 n.6 (Fla. 2002) ("This Court … has determined that a fiduciary relationship exists between physician and patient, whether the physician is a psychotherapist or not"); *Nardone v. Reynolds*, 333 So.2d 25, 39 (Fla. 1976) (recognizing the fiduciary relationship of physician and patient and imposing duty on the physician to disclose known facts, but not conjecture or speculation).

[4] *See* n.2 above.

[5] "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); *see also Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 485 n.10 (Cal. 1990) (term *fiduciary* signifies that physician must disclose all medical facts material to the patient's decision). *See also* n. 8 below.

[6] Because the nurse is his agent, the Doctor is deemed by law to know what his nurse knows.

At her treatment, the Doctor later decided he should administer a substance to assist the procedure. Yet when he gave the substance to her, he said nothing to indicate any adverse effect. The Doctor is deemed to know that the substance could cause side effects diminishing her ability to drive herself home. Did he ask her if she has a ride? Did he ask if she needed assistance? Did he warn her not to drive herself? The answer to all these questions is indisputably shown by the record as an unrefuted *NO*. He said nothing about the substance; he gave her no warnings. The gulf in knowledge between them about the substance remained undisturbed.

The law presumes she knew of her legal right to informed consent in medical treatment. That he has a duty to tell her of any adverse effects from any treatment he administered to her.[7] As the beneficiary in the fiduciary relationship, she was therefore entitled to understand that the response of his office to her inquiry represented his medical judgment about anything done to her during the treatment. Especially because his office had responded that she could do so when she had previously asked him about driving, she could reasonably rely on his apparent medical judgment there was no medical basis to instruct her to the contrary.

The trial judge and majority think there is evidence of her personal negligence to allow the jury to make a factual finding that she was negligent in driving herself home from the treatment. But the only evidence they cite is that she drove herself home after his office had told her she would be able to do so and later one of his nurses told her during the visit that only the Doctor could say whether the substance could affect driving.

Again, the Doctor had the duty to warn her of side effects but gave no such warning when she herself raised the issue. Because of his superior medical knowledge in this fiduciary relationship, she had every reason to take his earlier response when she had raised that very subject as a positive indication of no adverse effects on driving. No evidence in the record on appeal transformed *his* fiduciary duty to warn her correctly into a patient duty to worry about his judgment in advising her that she could drive herself — that is, instead to keep asking him until he finally relents and says don't drive.

According to the majority, she must magically divine what he knew about the drug in spite of his prior advice — which was left unchanged during the visit. They hold she must be deemed aware of adverse effects

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[7] *See* n. 2 above.

because she raised the subject rather than because he had responded by warning her about driving. They hold she had a duty to ignore his first answer and instead somehow deduce he had actually breached his fiduciary duty to give her some warning. Verily, they hold her to knowing what he knew!

Obviously, some patients do neglect instructions from their Doctors. But to impose comparative negligence on them, the cases require Doctors to specifically plead and prove that the patient failed to follow a specific instruction or warning actually made by the Doctor.[8] To repeat myself — perhaps overmuch — here the record is clear that this Doctor, in fact, never instructed or warned his patient, nor pleaded nor proved that he had. Rather, that record is clear that he breached his fiduciary duty of informed consent by failing to disclose adverse effects of the substance.

The fiduciary principle governing the comparative negligence defense may be succinctly stated thus: the *Doctor must protect his patient from his own treatment and ministrations.*[9] And so, physician-patient law does not require patients to assume they must protect themselves at all times from a Doctors' prescribed ministrations and treatment.[10] Such a view would contravene the expectations and goals of both sides in health care practice. For this reason, the cases hold that to trigger a duty of patient self-protection from his treatment the Doctor must first prove he gave a suitable warning/instruction indicating that his patient should protect herself from something he was doing or giving to her.[11] Because this patient asked for and received no warning to the contrary, she was entitled to rely on the safety of the substance and the absence of danger.

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[8] *See e.g. Vidal v. Macksoud*, 933 So.2d 659, 661 (Fla. 3d DCA 2008) (defendant in medical malpractice action has burden to plead and prove specific acts of patient negligence); *Riegel v. Beilan*, 788 So.2d 990, 991 (Fla. 2d DCA 2000) (if healthcare provider does not provide patient sufficient information patient cannot be charged with comparative negligence); *Swamy v. Hodges*, 583 So.2d 1095, 1096 (Fla. 1st DCA 1991) (to prove comparative negligence, Doctor had to show that patient had a duty, that the duty was breached, and that such breach was the cause of the damage about which plaintiff complains); *Borenstein v. Raskin*, 401 So.2d 884, 886 (Fla. 3d DCA 1981) (to establish defense of comparative negligence in medical malpractice action, Doctor had to prove that patient owed herself a duty of care, that patient breached that duty, and that such breach was proximate cause of damages patient sustained).

[9] *See* nn. 2 & 5 above.

[10] Few patients would use and trust Doctors whose judgment and treatment required self-protection.

[11] *See* n.8, above.

There is no evidence that she was anything but appropriately trusting with her Doctor.

Hence, this case does not involve any comparative negligence or duty of patient self-protection. The basis for this decision is a chimera. It was legal error to allow the Doctor's naked affirmative defense go to the jury when it so obviously lacked competent supporting evidence.

This case should be reversed for a new trial.

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Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502006CA007523 XXXXMBAA.

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Not final until disposition of timely filed motion for rehearing.