

**IN THE COURT OF APPEALS OF IOWA**

No. 6-1024 / 06-0243  
Filed January 31, 2007

**BETTY D. SCHROEDER, as Executor  
Of the Estate of HOMER SCHROEDER,  
And BETTY D. SCHROEDER, Individually,**  
Plaintiffs-Appellants,

**vs.**

**SAADI ALBAGHDADI, M.D.,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,  
Judge.

Plaintiff appeals following a jury verdict and district court judgement in  
favor of defendant, asserting instructional errors by the district court.

**REVERSED AND REMANDED.**

William J. Bribiesco and Daniel D. Bernstein of William J. Bribiesco &  
Associates, Bettendorf, for appellants.

Jack L. Brooks and Will R. Ripley of Brooks & Trinrud, P.C., Rock Island,  
Illinois, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

**BAKER, J.**

Plaintiff Betty D. Schroeder appeals following a defense verdict. Schroeder asserts the district court committed reversible error in submitting jury instructions and verdict forms that improperly interfered with the jury's fact-finding duties. We agree, and accordingly reverse and remand for a new trial.

**I. Background and Facts and Proceedings**

On July 17, 2001, Homer Schroeder was taken by ambulance to the Mercy Medical Center Emergency Room in Clinton, Iowa. He complained of shortness of breath, nausea, and anxiety. Mr. Schroeder had undergone open-heart surgery for blockage of three coronary arteries on July 3, 2001.

Homer Schroeder was examined by Randall Hinrichs, M.D., who ordered numerous laboratory tests, a chest x-ray, and two electrocardiograms (EKGs). The laboratory results showed several abnormalities, including high potassium levels. The chest x-ray was abnormal. Mr. Schroeder's EKG showed a heart attack had occurred at some time and that possibly his heart was not getting adequate blood flow.

Dr. Hinrichs, who did not have admitting privileges, felt that Schroeder should be admitted to the hospital and called Dr. Saadi Albaghdadi, M.D., who was the cardiologist on call. There is a dispute regarding the nature of Dr. Hinrichs's conversation with Dr. Albaghdadi. Dr. Hinrichs testified at trial that he told Dr. Albaghdadi about the abnormalities in the laboratory test results, including Mr. Schroeder's high potassium levels, the changed EKG (the July 17, 2001 EKG compared with Schroeder's June 2001 EKG), and his recommendation that Mr. Schroeder be admitted. Per Dr. Hinrichs's testimony,

Dr. Albaghdadi said that he wanted to look at the EKG himself. Dr. Hinrichs had the EKG faxed to Dr. Albaghdadi's home; Dr. Albaghdadi called back and told Dr. Hinrichs that Mr. Schroeder could be seen in the office in the next day or two and should be sent home. Dr. Hinrichs documented his conversations with Dr. Albaghdadi on Mercy's Physical Exam form.

According to Dr. Albaghdadi's testimony, he only spoke with Dr. Hinrichs one time on July 17, 2001, after a June 2001 and July 17, 2001 EKG had been faxed to his home. Dr. Albaghdadi testified that Dr. Hinrichs told him that he believed the EKG looked abnormal and that Mr. Schroeder had undergone recent heart bypass surgery, but did not tell him about the abnormal laboratory results or his recommendation that Mr. Schroeder be admitted.

At trial, plaintiff's expert testified that Dr. Albaghdadi's July 17, 2001 conversations with Dr. Hinrichs were not a "curbside consult," but rather a full, formal consultation. Plaintiff's expert described a "curbside consult" as "a very informal kind of consultation where one doctor wants to pick the brain of another doctor without getting that doctor involved in any way in the medical care," for example, where a cardiologist is asked to just look at an EKG and give an interpretation. Plaintiff's expert testified that Dr. Albaghdadi had a duty to respond as an "on-call" physician. He further testified that Mr. Schroeder should have been hospitalized.

Dr. Hinrichs discharged Mr. Schroeder, who continued to have difficulty breathing throughout the night. The next morning, Mr. Schroeder was transported by ambulance back to the Mercy Emergency Room, where he went into cardiorespiratory arrest. Later that day, July 18, 2001, Mr. Schroeder died.

Plaintiff Betty D. Schroeder, as Executor of the Estate of Homer Schroeder, and individually, brought a medical malpractice action against Drs. Hinrichs and Albaghdadi for failure to diagnose and treat Mr. Schroeder's cardiac condition, leading to his death. The plaintiff settled her claim against Dr. Hinrichs and proceeded to a jury trial against Dr. Albaghdadi.

The trial court provided the jury with Instruction No. 15, which directed the jury to one of two verdict forms: Verdict Form 1, which asked the jury to determine whether Dr. Albaghdadi was negligent by failing properly to interpret the electrocardiogram, was to be used if the jury found "that the defendant, as the on-call cardiologist on July 17, 2001, only was requested by Dr. Hinrichs to give an interpretation of an electrocardiogram of Homer Schroeder, and was not told of the elevated potassium level." Verdict Form 2 asked the jury to determine whether Dr. Albaghdadi was negligent on July 17, 2001, in one or more of the following ways: (a) by failing to properly interpret the electrocardiogram, (b) by failing to examine Mr. Schroeder in the emergency room, (c) by failing properly to diagnose Mr. Schroeder in the emergency room, (d) by failing to direct that Mr. Schroeder be admitted to the hospital as an inpatient, or (e) by failing properly to treat Mr. Schroeder. Per Instruction No. 15, the jury was to use Verdict Form 2 if they found that "Dr. Hinrichs sought the admission of Homer Schroeder to the hospital by the defendant or told the defendant of the elevated potassium level."

Although the plaintiff's brief indicates the jury completed Verdict Form 2, the trial record indicates the jury completed Verdict Form 1 and answered "no," that Dr. Albaghdadi was not negligent "by failing properly to interpret the electrocardiogram of Homer Schroeder on July 17, 2001."

Following a defense verdict, the plaintiff appeals, alleging several errors by the district court. The plaintiff contends that (1) the jury instructions and verdict forms improperly interfered with the jury's fact-finding duties, and (2) all of the specifications of negligence should have been submitted to the jury, including a specification of negligence that the defendant Dr. Albaghdadi breached his duty of care to Homer Schroeder by failing to ask Dr. Hinrichs's questions.

## **II. Standard of Review**

The standard of review for alleged errors in jury instructions, and for the district court's evidentiary and trial objection rulings, is for correction of errors at law. Iowa R. App. P. 4; *Sleeth v. Louvar*, 659 N.W.2d 210, 213 (Iowa 2003); *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa 2001); *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). An error in giving a particular instruction may result in reversal where the error is prejudicial to the party. *Kurth*, 628 N.W.2d at 5.

## **III. Preservation of Error**

Issues must be raised and passed upon by the district court before they can be decided on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997). The plaintiff contends the jury instructions and verdict forms improperly interfered with the jury's fact-finding duties and that she preserved the issue by objecting to Instruction No. 15 and the use of the two verdict forms.

The defendant claims the plaintiff did not properly preserve the argument for appeal because (1) the only objection made by the plaintiff was that Instruction No. 15 did not allow the jury to conclude that Dr. Albaghdadi owed Mr. Schroeder

a full-fledged duty as a physician, regardless of what Dr. Albaghdadi was told by Dr. Hinrichs, and (2) plaintiff did not object to the inclusion of the specification of negligence in the verdict forms as being duplicative, as The plaintiff has claimed on appeal.

In applying error-preservation rules, it is important to keep their underlying purpose in mind. *State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999). The underlying rationale for error-preservation rules is that

[t]he orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.

*State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983).

At trial, the plaintiff objected to the use of Instruction No. 15 and the use of two verdict forms. The trial court overruled the plaintiff's objection because the court had concluded that using the instruction and the two forms was the best approach to structure the case so that the jury could determine the factual dispute regarding the nature and extent of the duty owed by Dr. Albaghdadi to Mr. Schroeder. The plaintiff's objection to the use of the procedure is based on her contention that it improperly interfered with the jury's fact-finding duties. Therefore, the plaintiff's objection to Instruction No. 15 and the use of two verdict forms did preserve the issue. Additionally, the plaintiff's objection at trial gave defendant notice and an opportunity to be heard on the issue of whether the use

of the instruction and two verdict forms interfered with the jury's fact-finding duties. *See id.*

#### **IV. Jury Instructions and Verdict Forms**

The plaintiff contends the jury instructions and verdict forms improperly interfered with the jury's fact-finding duties because, by directing the jury to use one verdict form or the other, the trial court limited the jury's fact-finding options. By limiting the negligence specifications on Verdict Form 1 only to Dr. Albaghdadi's interpretation of the EKG, even though the scope Dr. Albaghdadi's duty as a specialist was already defined in Instruction No. 7, the plaintiff contends the trial court effectively and drastically reduced the scope of Dr. Albaghdadi's duty to Mr. Schroeder; the verdict forms became, in effect, jury instructions, that embodied the specifications of negligence. Additionally, the plaintiff contends the jury was constrained in its fact-finding to one of two factual scenarios presented by the physicians' testimony, and the trial court in effect told the jury they must pick one set of facts over the other: either find Dr. Albaghdadi's version of the July 17, 2001 conversation(s) completely true, or find Dr. Hinrichs's version completely true.

The defendant asserts that the district court's instructions to the jury were proper and did not limit or reduce any duty owed by Dr. Albaghdadi. The court simply asked the jury to resolve the factual issue of whether Dr. Hinrichs only asked Dr. Albaghdadi to read and interpret an EKG, or whether Dr. Hinrichs asked for an EKG reading *and* informed Dr. Albaghdadi of the elevated levels of potassium *or* sought to admit Mr. Schroeder. Using Instruction No. 15 and the two verdict forms, defendant contends, the question of fact was properly

determined by the jury, and the questions of law were properly determined by the trial court.

Thus, the question presented is whether it was reversible error for the trial court to give Instruction No. 15 and use the two verdict forms because they improperly interfered with the jury's fact-finding responsibilities.

#### A. Jury's Fact-finding Responsibilities

In order to establish a claim of negligence, a legal duty must exist. *Shaw v. Soo Line R. Co.*, 463 N.W.2d 51, 53 (Iowa 1990). Whether an actionable duty<sup>1</sup> exists under a given set of facts is a question of law for the court. *Leonard v. State*, 491 N.W. 2d 508, 509 (Iowa 1992). The jury's task is "to determine the reasonableness of the care exercised by the defendant in light of the foreseeability of harm." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 267 (Iowa 2000).

The trial court has a responsibility to instruct a jury with reasonable fullness on all legal issues presented; the jury instructions provide the jury's only guide for the correct application of the law to the case facts. *Id.* at 265-66; *Kuehn v. Jenkins*, 251 Iowa 718, 731, 100 N.W.2d 610, 617-18 (1960). In a negligence action, the trial "court is required to define all legal standards, including the applicable standard of care." *Anderson*, 620 N.W.2d at 266.

The duty of care jury instructions may not, however, "amount to a comment on the evidence." *Id.* at 267. "The submission of instructions which clearly

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<sup>1</sup> "An actionable duty is defined by the relationship between individuals; it is a legal obligation imposed upon one individual for the benefit of another person or particularized class of persons." *Sankey v. Richenberger*, 456 N.W.2d 206, 209 (Iowa 1990).



overemphasize one parties' theory of the case is error." *Sunrise Developing Co. v. Iowa Dep't of Transp.*, 511 N.W.2d 641, 644 (Iowa Ct. App. 1993).<sup>2</sup>

#### B. Interference with Jury's Responsibilities

The jury's task was to determine the reasonableness of the care exercised by Dr. Albaghdadi in light of the foreseeability of harm and whether or not Dr. Albaghdadi breached his duty of care under the circumstances. See *Anderson*, 620 N.W.2d at 267 ("It is the task of the jury to determine the reasonableness of the care exercised by defendant in light of the foreseeability of harm.").

##### 1. Reasonableness of Care

The defendant contends the trial court essentially determined that different duties exist for a "curbside consult" than for a formal consultation. At trial, the plaintiff's expert characterized Dr. Albaghdadi's July 17, 2001 communication with Dr. Hinrichs as other than a "curbside consult," more that of an "on-call" physician.

While there are valid policy reasons for not imposing a duty in a true "curbside consult," this is not the situation presented here. A "curbside consult" is a situation where doctors informally discuss a situation such as a chance meeting in a hallway or in a social setting.<sup>3</sup> In this case, however, Dr. Albaghdadi was on

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<sup>2</sup> The Iowa Supreme Court has summarized guidelines for jury instructions:

1. Instructions should not marshal the evidence or give undue prominence to any particular aspect of a case;
2. Courts, when instructing the jury, should not attempt to warn against every mistake or misapprehension a jury may make;
3. Jurors must be left to their intelligent apprehension and application of the rules put forth in the instructions.

*Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989).

<sup>3</sup> In a similar case, the Arizona Court of Appeals held that, when the defendant physician undertook to give advice to an emergency room physician, the defendant

call and responsible for all of the group's cardiac patients. In the current health care system, in which patients routinely are seen by one physician who then consults with other consulting physicians who might not ever see the patient face-to-face, it is unrealistic to apply a narrow definition of the physician-patient relationship in determining whether such a relationship exists for purpose of a medical malpractice case. A physician-patient relationship may be implied when a physician affirmatively undertakes to diagnose and/or treat a person, or affirmatively participates in such diagnosis and/or treatment. As Dr. Albaghdadi was "on call" and *was consulted in that capacity*, he had a duty to the plaintiff's decedent.

Once an on-call physician who has a duty to the hospital, its staff, or patients is contacted for the benefit of an emergency room patient, and a discussion takes place between the patient's physician and the on-call physician regarding the patient's symptoms, a possible diagnosis and course of treatment, a physician-patient relationship exists between the patient and the on-call physician.

*McKinney v. Schlatter*, 692 N.E.2d 1045, 1050 (Ohio Ct. App. 1997).

The issue in this case, however, is the nature and extent of that duty under these circumstances and whether the court or the jury determines that duty.

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owed a reasonable duty of care. *Diggs v. Ariz. Cardiologists, Ltd.*, 8 P.3d 386, 391 (2000). In response to the defendant's argument that finding a duty would chill the informal exchange of information between medical professionals, the court was not persuaded:

We are not dealing with the informal exchange of medical information between two physicians, one of whom merely serves as a resource such as a treatise or textbook. In that case, where the treating physician exercises independent judgment in determining whether to accept or reject such advice, few policy considerations favor imposing a duty on the advising physician.

*Id.*

Because the trial court has a responsibility to instruct a jury with reasonable fullness on all legal issues presented and is required to define all legal standards, including the applicable standard of care, it was within the trial court's purview to provide guidance regarding the applicable standard of care. See *Anderson*, 620 N.W.2d at 265-66 ("The trial court has a duty to instruct a jury on all legal issues presented in a case."). In this case, however, the trial court committed error in usurping the jury's function in determining the nature of that duty.

## 2. *Breach of Duty of Care*

In addition to determining what constituted reasonable care, the jury was responsible for determining whether or not Dr. Albaghdadi breached his duty of care under the circumstances. Because the trial court's giving Instruction No. 15 and use of two verdict forms improperly interfered with the jury's fact-finding responsibility of determining whether Dr. Albaghdadi breached his duty of care, the use of the instruction and verdict forms constitute reversible error.

The plaintiff contends that Instruction No. 15 and the use of the two verdict forms amounted to an implicit comment that one set of facts was completely true and the other completely false. Thus, the jury's ability to make findings of facts was limited to the two choices it was presented, i.e., the jury was not allowed to believe part of Dr. Albaghdadi's version and part of Dr. Heinrichs's version on the events of July 17, 2001, or to disbelieve both physicians. "When evidence is in conflict, such as it was here, we entrust the weighing of testimony and decisions about the credibility of witnesses to the jury." *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 800 (Iowa 1994).

“Parties are entitled to have their legal theories submitted to the jury so long as the instructions embodying those theories correctly state the law, have application to the case and are not otherwise covered in the court’s instructions.” *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). The trial court, in Verdict Form 1, limited the jury’s ability to determine the *scope* of Dr. Albaghadadi’s duty to plaintiff’s decedent, essentially creating a limited “curbside” duty. The testimony of plaintiff’s expert would have allowed the jury to find fault beyond merely misreading the EKG. The jury was not allowed under the trial court’s instruction to determine whether Dr. Albaghadadi had a duty to respond as an “on-call” physician or whether Mr. Schroeder should have been hospitalized.

Facts other than those made available to the jury, via Instruction No. 15 and the two verdict forms, were supported by substantial evidence in the record. Once a physician undertakes to assist in the treatment of a patient, a physician-patient relationship exists and it becomes an evidentiary issue as to the nature and extent of that duty and the jury’s function to define that duty and determine its breach, if any. *See Bovara v. St. Francis Hosp.*, 700 N.E.2d 143, 146 (Ill. App. Ct. 1998) (“A consensual relationship can be found to exist where a physician contacts another physician on behalf of the patient.”); *Kelley v. Middle Tenn. Emergency Physicians, P.C.*, 133 S.W.3d 587, 593 (Tenn. 2004) (a physician-patient “relationship is implied *if* the physician affirmatively undertakes to diagnose and/or to treat the plaintiff”);

The district court erred in submitting Instruction No. 15 and the two verdict forms to the jury because this procedure improperly interfered with the jury’s responsibility of determining the scope of Dr. Ablaghdadi’s duty and whether

there was a breach of duty. Because the plaintiff was entitled to an instruction which would have allowed the jury to find fault beyond merely misreading the EKG, the use of the instruction and forms improperly limited the jury, to plaintiff's prejudice. See *Anderson*, 620 N.W.2d at 268 ("Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized.").

#### **V. Specifications of Negligence**

The plaintiff also asserts that it was error to fail to submit to the jury whether Dr. Ablaghdadi committed malpractice by failing to ask Dr. Hinrichs questions.

While parties are entitled to have their legal theories submitted to the jury, proposed jury instructions must be supported by substantial evidence.

*Vasconez*, 651 N.W.2d at 52. "Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion." *Id.* The Iowa Supreme Court has recognized three means to establish a physician's specific negligence:

One is through expert testimony, the second through evidence showing the physician's lack of care so obvious as to be within comprehension of a layman, and the third, (actually an extension of the second) through evidence that the physician injured a part of the body not involved in the treatment. The first means is the rule and the others are exceptions.

*Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992).

It is undisputed that there was no expert testimony on this issue. The plaintiff asserts that this is an issue so obvious as to be within the comprehension of laymen. The plaintiff contends that Dr. Albaghdadi should have asked questions, but does not specify what questions should have been asked. There were many laboratory tests performed on decedent, including blood gases, blood

counts, enzyme levels, and others. To assert that a jury without expert testimony could determine which questions would have been pertinent and which were not simply is not realistic. The nature and extent of the questions that should have been asked and that would meet the standard of care go to the core of the failure of diagnosis by Dr. Albaghdadi. What Dr. Albaghdadi should have done or what questions would have met the standard of care require testimony on protocols and proper means of diagnosis. This is not a situation where the lack of care was so obvious as to be within comprehension of a layman. *See Johnson v. Van Werden*, 255 Iowa 1285, 1289, 125 N.W.2d 782, 784 (1964) (finding, where blisters appeared after removal of a bandage, expert testimony was necessary to present a jury question because the result was not so obvious a layman could conclude it was the result of negligence); *Meirick by Meirick v. Weinmeister*, 461 N.W.2d 348, 350 (Iowa Ct. App. 1990) (proving physician's alleged negligence during pregnancy, labor, and delivery caused oxygen deprivation to child "must be done by expert medical testimony showing the applicable standard of care and its breach"); The trial court correctly determined that this was an issue that required expert testimony. The failure to elicit expert testimony on this issue precluded the court from submitting this issue to the jury.

## **VI. Conclusion**

The district court erred in submitting Instruction No. 15 and the two verdict forms to the jury. Because plaintiff was entitled to an instruction which would have allowed the jury to find fault beyond merely misreading the EKG, the use of the instruction and forms improperly limited the jury, to plaintiff's prejudice. *See*

*Anderson*, 620 N.W.2d at 268. We accordingly reverse the judgment in this matter and remand for a new trial.

**REVERSED AND REMANDED.**