IN THE COURT OF APPEALS OF IOWA

No. 7-212 / 06-1346
Filed May 23, 2007

CHRISTY CROSON, Individually and as Injured Parent of NATHAN CROSON, CHELSEA CROSON, and CASEY CROSON, and SCOTT CROSON, Husband of Christy Croson,
Plaintiffs-Appellants,

vs.

THOMAS A. CARLSTROM, M.D., and THE IOWA CLINIC, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Plaintiffs appeal the jury verdict for defendants in this medical malpractice action. **AFFIRMED.**

James H. Cook of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellants.

Richard C. Garberson and Tricia Hoffman-Simanek of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees.

Considered by Sackett, C.J., and Huitink, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

I. Background Facts & Proceedings

Dr. Thomas Carlstrom performed back surgery on Christy Croson on December 26, 2001, to excise a herniated disc. A surgical report indicated the surgery had been performed at the L4-5 level. Later tests, however, showed the surgery had been performed at the L3-4 level. Croson subsequently had back surgery performed by Dr. Carlstrom at the L4-5 level on February 25, 2002.

Croson filed a medical malpractice action against Dr. Carlstrom, alleging he acted negligently by failing to order an x-ray during surgery in December 2001 to verify the level of her spine in which he intended to operate. During the trial Croson presented the expert testimony of Dr. Leonard Rutberg, a neurologist, who testified Dr. Carlstrom breached the applicable standard of care by failing to obtain an intra-operative x-ray to determine where he was operating.

Dr. Carlstrom testified he manually counted vertebrae, and when he came to what he thought was the L4-5 level, he found Croson had a herniated disc, which he removed. He stated in some situations he would order an intra-operative x-ray, but he did not in this situation because he found a herniated disc where he expected one to be. Dr. Carlstrom testified there were two acceptable methods to locate the surgical level in the back, and in this case he used the manual method. He stated that when he performed the second surgery in February 2002, Croson also had a herniated disc at the L4-5 level.

Dr. Carlstrom presented the expert testimony of Dr. Patrick Hitchon, a professor of neurosurgery at the University of Iowa. Dr. Hitchon testified there

were two different ways to determine where to operate on a patient's back, and both complied with the standard of care. He testified Dr. Carlstrom was not required to obtain an intra-operative x-ray in order to meet the standard of care.

Among the instructions submitted to the jury in this case, the district court submitted the following:

> Physicians may disagree in good faith upon what would be the proper treatment of a medical condition in a given situation. It is for the physician, in this case Dr. Carlstrom, to use his professional judgment to select which recognized method of treatment or procedure to use in a given situation. If you determine that there were two or more recognized alternative courses of action or procedures which have been recognized by the medical profession as proper methods of treatment, and if Dr. Carlstrom, in the exercise of his best judgment, elected one of these proper alternatives, then Dr. Carlstrom was not negligent.

Croson objected to the instruction, claiming it was not supported by the evidence in the case. The district court found there was substantial evidence in the record to support giving the instruction.

The jury found Dr. Carlstrom was not negligent, and returned a verdict for defendant. Croson appealed the verdict.

II. Standard of Review

This case was tried at law, and our review is for the correction of errors at law. Iowa R. App. P. 6.4.

III. Merits

Croson claims the district court erred by instructing the jury on alternative medical procedures. She claimed there was insufficient evidence to show Dr. Carlstrom would ever use an x-ray if he were operating at the L4-5 level, and that therefore he did not exercise professional judgment, or make a choice, not to

order an x-ray in this case. Croson contends that under these circumstances, submission of an alternative medical procedure instruction was improper.

An instruction on alternative medical treatment should be given only if supported by the factual record. *Peters v. Vander Kooi*, 494 N.W.2d 708, 714 (Iowa 1993). An instruction on alternative methods of treatment recognizes, "where there are several methods of approved diagnosis or treatment, which could be made available to a patient, it is for the doctor to use his best judgment to pick the proper one." *Estate of Smith v. Lerner*, 387 N.W.2d 576, 582 (Iowa 1986) (citation omitted).

For the instruction to be submitted, there must be substantial evidence of alternative proper treatments for a given condition. *Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820, 823 (Iowa 1992). There must be substantial evidence in the record of the following two elements:

> (1) that, with respect to a particular act or omission upon which the claim of negligence is predicated, there was more than one method of treatment acceptable to a physician exercising the degree of skill, care, and learning ordinarily possessed and exercised by other physicians in similar circumstances; and (2) that the physician considered these alternatives and exercised his or her best professional judgment in choosing the method of treatment that was utilized.

Peters, 494 N.W.2d at 713. If these two elements have not been met, the instruction should not be given. *Id*. at 714.

Dr. Carlstrom testified there were two accepted methods to locate the surgical level. Dr. Hitchon also testified there were two completely different ways to do the same surgery and both complied with the standard of care. It is clear there was substantial evidence in the record to support the first element – that

"there was more than one method of treatment acceptable to a physician" exercising an appropriate degree of care. *Id.* at 713.

On the second element, Dr. Carlstrom testified:

> Q. Are there circumstances in which you will order an intra-operative x-ray for L4-L5 laminectomy? A. Sure.
> Q. What are they? A. Well, when I do the operation, like I just described, I go and I feel and I've made the laminotomy and look at the disc, and if it's funny, it's abnormal, I will get an x-ray to see where I am, what's going on.
> Q. Are there any other examples in which you would routinely order intra-operative x-ray, physical characteristics? A. There are a lot of reasons. To operate on obese patients, it's hard to find a level. . . . Older people, they've got arthritis, nerves in their back, you get an x-ray on them or you'll never know where you are. . . . Then anytime I'm operating on L3-4 and above, I will get an x-ray because I don't want to make a huge incision. I always get x-rays of the neck because there are palpable – no things that I can feel to tell me where I am, so we always get them then.
> Q. Were any of those medical necessity situations present on December 26, 2001, during Ms. Croson's surgery. A. No.

Dr. Carlstrom had formulated certain criteria as to when and in what situations he would utilize one method or the other. The judgment he made in this case as to which method to use was based on these criteria. We find no error in the district court's conclusion there was substantial evidence in the record to show "the physician considered these alternatives and exercised his or her best professional judgment in choosing the method of treatment that was utilized." *Id.* Contrary to Croson's assertion, there was substantial evidence to show Dr. Carlstrom would consider an intra-operative x-ray at the L4-5 level in some circumstances.

We affirm the decision of the district court.

AFFIRMED.