IN THE COURT OF APPEALS OF IOWA

No. 7-578 / 06-0655
Filed October 12, 2007

SHIRLEY A. SMITH, as Executor of the Estate of DONALD E. SMITH, and SHIRLEY A. SMITH, Individually,
Plaintiff-Appellant,

vs.

ALAN R. KOSLOW, M.D., and IOWA HEART CENTER, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, John D. Lloyd, Judge.

Plaintiff appeals following a verdict and judgment entry in favor of defendants, asserting instructional error by the district court. **AFFIRMED.**

Timothy Semelroth of Riccolo & Semelroth, P.C., Cedar Rapids, for appellants.

Robert D. Houghton, Nancy J. Penner, and Jennifer Rinden of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Shirley Smith, individually and as executor of the estate of Donald Smith, appeals following a jury verdict and district court judgment entry in favor of Dr. Alan Koslow and Iowa Heart Center, P.C. She asserts the district court erred in submitting an instruction to the jury despite her objections. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Donald Smith was referred to Dr. Koslow, a vascular surgeon, for treatment of an abdominal aortic aneurysm in October 2002. An aneurysm is a weak place in the wall of an artery that can rupture and cause death. Dr. Koslow informed Smith the risk of the aneurysm rupturing within that year "was about 15 percent" and the risk "over the next five years was essentially 100 percent. In other words, I told him that if [he] did not have [the aneurysm] repaired . . . [he] would die from a rupture . . . within five years." Smith also suffered from emphysema, which increased the chances his aneurysm would rupture.

Dr. Koslow recommended that Smith undergo a stent graft procedure to repair the aneurysm. This procedure involves the placing of a stent graft in the artery, which allows blood to flow through the area of the aneurysm without putting pressure on the aortic wall. Dr. Koslow informed Smith there was a risk the aneurysm could rupture during the surgery and result in his death. Smith decided to proceed with the procedure.

The surgery was performed on November 26, 2002. During the surgery, Dr. Koslow chose to use dilators to widen or dilate narrowed portions of the arteries to allow passage of the stent graft. After dilating the arteries, Dr. Koslow attempted to pass the stent graft up Smith's right iliac artery but was unable to do

so. Once he removed the stent graft, he noticed there was an absence of blood in the artery. Dr. Koslow noted Smith's blood pressure was stable, and he asked the anesthesiologist if there were any problems. Approximately fifteen seconds later, the anesthesiologist reported a sudden fall of the blood pressure, indicating internal bleeding. Dr. Koslow attempted to control the bleeding but was unsuccessful. Smith died during the surgery.

Shirley Smith filed a medical malpractice action against Dr. Koslow and his employer, Iowa Heart Center. Following the close of evidence, the jury was instructed, "The mere fact that a party was injured does not mean that a party was negligent." The jury returned a verdict finding Dr. Koslow was not negligent. The district court accordingly entered judgment in defendants' favor. The defendants appeal, claiming the district court erred in submitting the above-quoted instruction to the jury.

II. SCOPE AND STANDARDS OF REVIEW.

Our standard of review for claims that the trial court erred in submitting a jury instruction is for correction of legal errors. *Greenwood v. Mitchell*, 621 N.W.2d 200, 204 (Iowa 2001). We review the disputed jury instruction to determine if it is a correct statement of the law based on the evidence presented. *Le v. Vaknin*, 722 N.W.2d 412, 414 (Iowa 2006).[1] Error in giving or refusing jury

[1] We reject the defendants' contention that we should review the plaintiff's argument that the district court erred in denying her request for additional language to be included in the instruction for abuse of discretion. *See Summy v. City of Des Moines*, 708 N.W.2d 333, 340 ("We review the related claim that the trial court should have given the defendant's requested instructions for abuse of discretion."). The plaintiff's argument in this regard is based on her claim that the instruction as submitted to the jury was an incorrect statement of the law. Therefore, our review is for correction of errors at law. *See Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 748 (Iowa 2006) ("We review alleged errors in jury instructions for correction of errors at law.").

instructions does not merit reversal unless the error results in prejudice to the party. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994).

III. MERITS.

Over the objection of defendants, the district court instructed the jury, "The mere fact that a party was injured does not mean that a party was negligent." The plaintiff claims the district court erred in submitting this instruction to the jury because it unduly emphasized the defendants' theory of the case. She further claims the instruction is an incorrect statement of the law.

Courts must give requested jury instructions when the instructions correctly state the law applicable to the facts of the case and if the legal concept is not embodied in other instructions. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994). However, even instructions correctly stating the law should not give undue emphasis to any particular theory, defense, or piece of evidence. *Id.*

The instruction given is consistent with the proposition that, except in cases involving res ipsa loquitur, "[i]t is evident, and it has often been held in this state, that the mere unsuccessful result of a treatment by a physician cannot, of itself, produce a liability on the part of the practitioner." *Gebhardt v. McQuillen*, 230 Iowa 181, 185, 297 N.W. 301, 303 (1941). The instruction is a near-verbatim recitation of Iowa Civil Jury Instruction 700.8, which states: "The mere fact an accident occurred or a party was injured does not mean a party was [negligent] [at fault]." This uniform instruction is a correct statement of the law in cases not involving the res ipsa loquitur doctrine. *See Fanelli v. Illinois Cent. R.R. Co.*, 246 Iowa 661, 664, 69 N.W.2d 13, 15 (1955).

The plaintiff did not assert the res ipsa loquitur doctrine applied in this case. Instead, she claimed Dr. Koslow was negligent and deviated from the accepted standard of care by using an allegedly outdated dilator technique, rather than a balloon catheter technique, to widen the narrowed portions of the arteries. She was therefore required to present specific proof of Dr. Koslow's negligence. *See Bigalk v. Bigalk*, 540 N.W.2d 247, 249 (Iowa 1995). At trial, the plaintiff attempted to establish negligence through expert testimony opining that Dr. Koslow perforated Smith's artery by using an allegedly outdated dilator technique with inappropriate dilators. The defendants, however, presented evidence and testimony to support their theory that Smith's aneurysm could have ruptured even in the absence of negligence on the part of Dr. Koslow. We believe the evidence contained in the record substantially supported a jury instruction stating the mere fact that Smith was injured and died during surgery did not mean that Dr. Koslow was negligent in performing that surgery.

We reject the plaintiff's argument that the instruction was an incomplete statement of the law because it did not further state the result of the medical treatment could nevertheless be considered in assessing whether negligence in fact occurred. *See Daiker v. Martin*, 250 Iowa 75, 81, 91 N.W.2d 747, 750 (1958) ("[W]hile the result alone is not, in itself, evidence of negligence, yet same may nevertheless be considered, together with other facts and circumstances . . . in determining whether . . . such result is attributable to negligence."). The additional language requested by the plaintiff is applicable in cases where the injuries involved would not have occurred if the physician or physicians had

exercised ordinary care.[2] Here, the rupturing of the artery and Smith's consequent death were known risks of the surgical procedure that could occur even if the procedure was performed in a skillful and competent manner. Thus, the instruction as given correctly stated the law applicable to the facts of the case.

Furthermore, we do not agree with the plaintiff's contention that the instruction unduly emphasized the defendants' theory of the case by "underscoring Defendants' expert testimony that Dr. Koslow's use of renal dilators did not constitute negligence." Rather, the instruction points to evidence favorable to the plaintiff, Smith's hemorrhage and death, and cautions the jury as to the limited use of such evidence in determining negligence. The legal concept embodied in the instruction was not set forth in other instructions that advised the jury as to the elements and definition of negligence, the applicable standard of care for physicians, and the definition of proximate cause. *See Hutchinson v. Broadlawns Med. Ctr.*, 459 N.W.2d 273, 275 (Iowa 1990) ("Parties are not . . . entitled to any particular instruction if the issue is adequately covered in other instructions.").[3] We therefore conclude the district court did not err in submitting the instruction to the jury.

---

[2] *See, e.g., Daiker*, 250 Iowa at 75-76, 91 N.W.2d at 747 (determining result of procedure could be considered in assessing whether negligence occurred where physician placed cast so tightly on patient's leg that circulation was impeded and amputation resulted); *Kirchner v. Dorsey & Dorsey*, 226 Iowa 283, 285, 284 N.W. 171, 173 (1939) (accord where physicians failed to take steps, following surgery, to prevent closure of patient's cervical canal); *Berg v. Willett*, 212 Iowa 1109, 1110, 232 N.W. 821, 822 (1930) (accord where patient's hand severely burned after series of x-ray treatments).

[3] In support of her argument that the instruction in this case was unnecessary, the plaintiff cites *Hutchinson, Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820 (Iowa 1992), and *Peters v. Vander Kooi*, 494 N.W.2d 708 (Iowa 1993). She argues those cases stand for the proposition that instructions similar to the one at issue in this case

IV. CONCLUSION.

We conclude the district court did not err in instructing the jury, "The mere fact that a party was injured does not mean that a party was negligent." The instruction correctly stated the law applicable to the facts of the case. We therefore affirm the judgment of the district court.

AFFIRMED.

---

should not be given in medical malpractice cases. The plaintiff mischaracterizes the holdings of these cases. Instead, they declare that "mistake-in-treatment" or "mistake-in-diagnosis" instructions should not be given in medical malpractice cases. *See Hutchinson*, 459 N.W.2d at 276-77; *Vachon*, 490 N.W.2d at 824; *Peters*, 494 N.W.2d at 712-13. None of the cases express an opinion on the instruction at issue in this case.