IN THE COURT OF APPEALS OF IOWA

No. 9-334 / 08-1269
Filed July 22, 2009

ELLEN GRAMS,
Plaintiff-Appellant,

vs.

LORI RENNER, R.N. and
GENESIS MEDICAL CENTER,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Plaintiff appeals the jury verdict for defendants in this medical negligence case. **AFFIRMED.**

William J. Bribriesco of William J. Bribriesco & Associates, Bettendorf, for appellant.

Charles E. Miller and Diane M. Reinsch of Lane & Waterman, L.L.P., Rock Island, Illinois, for appellees.

Heard by Eisenhauer, P.J., and Doyle and Mansfield, JJ.

EISENHAUER, J.

Ellen Grams brought suit against Lori Renner and Genesis Medical Center alleging medical negligence. Trial resulted in verdicts in favor of the defendants. Grams appeals claiming error in instructing the jury and in denying her motion to exclude expert testimony. We affirm.

I. Background Facts & Proceedings

Grams was scheduled to have surgery for a hernia with Dr. Gregory Bohn on July 11, 2002, at Genesis Medical Center in Davenport. Prior to arriving at the hospital, Grams signed a consent to surgery designating the right upper quadrant of the abdomen as the site of the operation. The history and physical authenticated by Dr. Bohn, however, stated Grams had a mass in the right lower quadrant of the abdomen.

Renner was assigned as the circulating nurse for Grams's surgery.[1] Before the surgery, Grams told Renner she was having surgery in the right upper quadrant. Renner noticed the discrepancy with Dr. Bohn's history and physical. Renner obtained a signed consent to surgery in the right lower quadrant from Grams. Grams was prepared for surgery in either location and placed under anesthesia.

When Dr. Bohn arrived, Renner and the anesthesiologist, Dr. Ricky Sedgwick, informed Dr. Bohn there was a question concerning the location of the surgery. Dr. Bohn did not answer, but proceeded with surgery in the right lower quadrant. Renner then ripped up the first written consent to surgery for the right

[1] A circulating nurse takes a patient to the operating room, prepares paperwork, and transports patients to the recovery room after surgery.

upper quadrant. She also crossed off the word "upper" in the phrase "right upper quadrant" in a pre-operative order and wrote in "lower," and initialed the change.

After the surgery, Renner told her supervisor, Vari Nelson, she believed Dr. Bohn had performed surgery in the wrong location. The matter was also discussed with Grams's aunt, Marsha Damushes. Dr. Bohn told Grams she could come back in a few days and have surgery on the right upper quadrant, or she could have the procedure that same afternoon. Grams agreed to the second surgery that day. Renner had Grams sign a new consent to surgery in the right upper quadrant. This form was also signed by Damushes because Grams was still partially sedated with pain medication from the first surgery.

On July 10, 2006, Grams filed suit against Renner and Genesis Medical Center.[2] Grams claimed Renner was negligent in destroying the first consent to surgery in the right upper quadrant, changing the pre-operative order, and failing to take steps to stop the surgery. Grams claimed the action was not barred by the statute of limitations due to fraudulent concealment by Renner based on her actions of ripping up the first consent to surgery and changing the pre-operative order.

The defendants designated Dr. Daniel Congreve, the former Director of Surgery at Genesis Medical Center, to testify concerning the appropriate nursing standard of care. Grams filed a motion to exclude Dr. Congreve's testimony, claiming as a surgeon he did not have sufficient knowledge to testify to the proper standard of care for a nurse. The district court found Dr. Congreve as the Director of Surgery qualified to testify to the standard of care for a nurse.

[2] A separate suit was filed against Dr. Bohn in 2004.

Grams objected to proposed jury instruction No. 22, setting forth the elements of fraudulent concealment. Grams claimed the instruction did not adequately follow the Iowa Supreme Court's ruling in *Christy v. Miulli*, 692 N.W.2d 694, 702 (Iowa 2005). The court did not amend the proposed instruction as requested by Grams.

The issue of fraudulent concealment was submitted to the jury, along with the issue of negligence. The jury found for defendants. Grams filed a motion for a new trial, raising the issue of Dr. Congreve's testimony and the jury instruction on fraudulent concealment. The district court denied the motion for new trial. Grams now appeals.

II. Jury Instructions

Grams contends the district court erred in giving Instruction No. 22 because it did not accurately reflect the law regarding fraudulent concealment. Instruction No. 22 provided:

> Plaintiff's claim of fraudulent concealment prevents Defendants from raising the statute of limitations defense. In order to prove fraudulent concealment Ellen Grams must prove each of the following elements by clear, convincing and satisfactory evidence:
>
> 1. By some act of fraud, Lori Renner did some affirmative act to conceal the Plaintiff's claims;
> 2. Ellen Grams lacked knowledge of the true facts necessary to file her claims;
> 3. The acts of concealment took place after the acts of negligence;
> 4. Lori Renner intended that Ellen Grams act or fail to act based upon the concealment; and
> 5. Ellen Grams acted in reliance of Lori Renner's concealment to her prejudice in not timely filing her claims.
>
> The circumstances justifying fraudulent concealment end when Ellen Grams became aware of the fraud or concealment, or

> by the use of ordinary care and diligence should have discovered the fraud or concealment.
>
> If you find that Ellen Grams has proven each of the elements of fraudulent concealment, then Defendants cannot raise the statute of limitations as a defense and Ellen Grams may seek to recover damages that you find she suffered, if any, on her claims of negligence as explained to you in Instruction No. 12. If you find that Ellen Grams has failed to prove any one of the elements of fraudulent concealment, then her claims for negligence are time barred and you need not consider damages.

Our standard of review concerning alleged errors in respect to jury instructions is for the correction of errors at law. *Banks v. Beckwith*, 762 N.W.2d 149, 151 (Iowa 2009). We review to determine whether prejudicial error has occurred. *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 20 (Iowa 2000). Jury instructions must be considered as a whole, and if the jury has not been misled, there is no reversible error. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999).

A. Grams claims the district court improperly included five elements in a claim of fraudulent concealment, instead of only four. Before the district court Grams stated, "We would ask the Court to give the four articulated elements of the *Christy* case in its instruction, and not add a fifth." She asked that the third element in the court's instruction be eliminated.

In *Christy*, 692 N.W.2d at 702, the Iowa Supreme Court lists four elements to establish a claim of equitable estoppel, which creates the foundation for a claim of fraudulent concealment. The elements of equitable estoppel are: (1) the defendant has made a false representation or concealed material facts; (2) plaintiff lacks knowledge of the true facts; (3) defendant intended for plaintiff to act on the representations; and (4) plaintiff relied on the representations to his or

her prejudice. *Christy*, 692 N.W.2d at 702. The supreme court also stated, "With respect to the first element, a party relying on the doctrine of fraudulent concealment must prove the defendant did some affirmative act to conceal the plaintiff's cause of action independent of and subsequent to the liability-producing conduct." *Id.*

The element in Instruction No. 22 not found in the list of four factors in *Christy*, 692 N.W.2d at 702, is the third element, "The acts of concealment took place after the acts of negligence." We find no error in the addition of this element. For a claim of fraudulent concealment, "there must be a 'temporal separation of the acts of negligence and the acts of alleged concealment; the concealment must take place after the alleged acts of negligence occurred.'" *Schlote v. Dawson*, 676 N.W.2d 187, 195 (Iowa 2004) (quoting *Van Overbeke v. Youberg*, 540 N.W.2d 273, 276 (Iowa 1995)). The defendant must engage in an affirmative act to conceal the cause of action, independent of and subsequent to the alleged negligent conduct. *Hallet Constr. Co. v. Meister*, 713 N.W.2d 225, 231 (Iowa 2006). We conclude the added element is supported by the law, and was properly included in the jury instruction.

B. Grams also claims the district court erred by giving Instruction No. 22 because it incorporated the concept of inquiry notice. Grams did not specifically object on this ground to Instruction No. 22.[3] A party challenging a jury instruction must "specify[ ] the matter objected to and on what grounds." Iowa R. Civ. P. 1.924. Objections to instructions must be sufficiently specific to

[3] The transcript shows the defendants attempted to add an instruction on inquiry notice, but the court denied their request.

alert the district court to the basis for the complaint. *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007). "No other grounds or objections shall be asserted thereafter, or considered on appeal." Iowa R. Civ. P. 1.924. We conclude Grams failed to preserve error on her claim Instruction No. 22 improperly included the concept of inquiry notice.

C. Grams further claims Instruction No. 22 unduly emphasized the defendants' theory of the case. Defendants requested the last paragraph of Instruction No. 22, and Grams objected. She contended the paragraph placed undue emphasis on defendants' assertion the statute of limitations applied in the absence of fraudulent concealment. On appeal, however, Grams is claiming the addition of the element, "The acts of concealment took place after the acts of negligence," unduly emphasized defendants' assertion that the act of negligence and the act of fraudulent concealment must be separate.

To the extent Grams's argument on appeal is different than the objection raised at trial, we determine she had not preserved error. *See* Iowa R. Civ. P. 1.924. Additionally, we have already concluded the district court properly included a statement that the act of fraudulent concealment must be separate and subsequent from the act of negligence. *See Hallet Constr. Co.*, 713 N.W.2d at 231.

A jury instruction should not give undue prominence to any particular aspect of a case. *Peters by Peters v. Vander Kooi*, 494 N.W.2d 708, 713 (Iowa 1993). An instruction may constitute reversible error if it unduly emphasizes a particular theory or otherwise distracts the jury in performing its responsibility to

decide the issues in a case. *Smith v. Koslow*, 757 N.W.2d 677, 681 (Iowa 2008). Grams does not claim the concept found in element three in Instruction No. 22 was covered elsewhere in the instructions. We conclude the jury instructions do not unduly emphasize this point of law. We find no error in the submission of Instruction No. 22.

III. Expert Testimony

Grams contends the district court abused its discretion by permitting Dr. Congreve to testify to the standard of care for nurses. The admission of expert testimony is largely within the discretion of the district court. *Johnson v. Am. Family Mut. Ins. Co.*, 674 N.W.2d 88, 91 (Iowa 2004). Expert testimony should be admissible if it will assist the trier of fact to understand the evidence or determine a fact at issue. *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 13 (Iowa 1999). "We are committed to a liberal rule on admissibility of opinion testimony." *Wick v. Henderson*, 485 N.W.2d 645, 648 (Iowa 1992). Only when the district court has clearly abused its discretion would the admissibility of such evidence be found to be prejudicial. *Heinz v. Heinz*, 653 N.W.2d 334, 341 (Iowa 2002).

Iowa Rule of Evidence 5.702 provides, "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The Iowa Supreme Court has rejected licensure as a requirement for admission of expert testimony. *Carolan v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996). The court has held the criteria of rule 5.702 must be employed, instead of merely examining whether a proposed expert belongs to a particular

profession or has a particular degree. *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 885 (Iowa 1994). Thus, it is possible for a physician to testify to the standard of care for nurses. *See Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 799 (Iowa 1994).

The district court found Dr. Congreve had the knowledge, background, and experience to testify to the standard of care for nurses. He had knowledge of the general development of the standards of care for a nurse to take a patient to the operating room. The court also noted Dr. Congreve, as the Director of Surgery at Genesis Medical Center, participated in the creation of standards of care for surgical nurses.

We conclude the district court did not abuse its discretion in permitting Dr. Congreve to testify to the standard of care for a nurse in this case. The court properly applied the law by not looking merely to determine whether Dr. Congreve was licensed as a nurse. *See Carolan*, 553 N.W.2d at 888. The court looked to the criteria in rule 5.702, the knowledge, skill, experience, training, or education of the witness. We find no abuse of discretion in the court's conclusion Dr. Congreve had sufficient expertise to testify to the standard of care for a surgical nurse.

We affirm the decision of the district court.

AFFIRMED.