STATE OF MICHIGAN

COURT OF APPEALS

TONIA CIAVERELLA,

Plaintiff-Appellant,

v

NED Z. WINKELMAN, M.D., NED Z. WINKELMAN, M.D. F.A.C.S., P.C., a Michigan professional corporation,

Defendants-Appellees.

UNPUBLISHED
February 1, 2002

No. 224685
Oakland Circuit Court
LC No. 97-545198-NH

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the jury verdict of no cause of action. We reverse and remand for a new trial.

This case arises as a result of breast reduction surgery performed on plaintiff by defendant on December 29, 1994. Plaintiff alleged that defendant negligently replaced her nipples too high on her breasts during surgery; defendant asserted that the high nipple placement was the inevitable result of a naturally occurring post-surgical phenomenon called "bottoming out" and not the result of negligence.

First, plaintiff argues that the verdict was against the great weight of the evidence. We disagree.

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). Reversal of a jury verdict is warranted only when the verdict is manifestly against the clear weight of the evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court may not substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *Id.*

Our review of the record indicates that both sides presented ample evidence in support of their positions. The test for determining whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a

miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

In this case, there was conflicting evidence regarding what caused defendant's breasts to appear the way they do. Plaintiff argues that she was the only one who saw where her nipples were located immediately following surgery and that they were located in the abnormally high position where they are now all along; thus, plaintiff contends, only defendant's malpractice could have caused her deformity—not the phenomenon of "bottoming out." In fact, the record indicates that defendant also saw plaintiff's nipples shortly after surgery. Furthermore, it was not necessary that anyone else see the position of plaintiff's nipples immediately after surgery in order to rebut plaintiff's position that defendant's negligence, rather than "bottoming out" caused her condition. Plaintiff's argument is flawed in two respects.

First, causation may be proven by circumstantial evidence. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Defendant's experts opined that the location of the nipple could have been, and probably was, caused by the "bottoming out" phenomenon, as opposed to defendant's alleged negligence. Although defendant's experts did not see plaintiff's nipples immediately after surgery, their theories of causation constituted circumstantial evidence that the "bottoming out" phenomenon, rather than negligence, caused plaintiff's condition; this circumstantial evidence was sufficient and it did not matter that defendant's experts did not observe plaintiff's nipples immediately following surgery. Moreover, although plaintiff testified that her nipples were, at the time of trial, in the same position as they were immediately after surgery, the jury may have reasonably concluded that plaintiff's credibility was damaged during cross-examination.

Second, if the jury concluded that plaintiff's credibility was damaged, then it had to look to plaintiff's experts for support of her theory of causation. If, as plaintiff contends, defendant's experts' testimony should be disregarded because they only testified to the effect that "bottoming out" could have caused plaintiff's deformity, and not that it did, and if this was because they did not actually see where plaintiff's nipples were located immediately following surgery, then the testimony of plaintiff's experts must also be disregarded for the same reason. None of plaintiff's experts saw plaintiff's nipples immediately following surgery either.

The question of whether a verdict is against the great weight of the evidence generally involves issues of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), but if there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder, *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). In this case, there was no lack of evidence presented by either party. The issue of negligence boiled down to a question of whose theory of causation the jury believed. The evidence was conflicting in this case, and therefore, the facts were properly left to the jury to decide.

We again note the difficult standard of review applicable to this issue. In deciding a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). This Court must determine whether the trial court abused its discretion in ruling with regard to a motion for a new trial. *Id*. Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id*. Given

the testimony provided by defendant's expert witnesses, and given plaintiff's damaged credibility, we conclude that the court did not abuse its discretion in denying plaintiff's motion.

Next, plaintiff argues that the court abused its discretion by refusing to give the res ipsa loquitur instruction to the jury. We agree.

On appeal, claims of instructional error are generally reviewed de novo. *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000). However, "[a] trial court may be entitled to some level of deference under the abuse of discretion standard of review if the decision to give or withhold a certain jury instruction depends on a factual determination, i.e., whether the evidence will support the instruction." *Hilgendorf v St John Hosp & Medical Center,* 245 Mich App 670, 694-695; 630 NW2d 356 (2001). We believe that the issue of whether to give the instruction in this case depended on a factual determination, therefore, the court's decision is entitled to some deference and should be reviewed under the abuse of discretion standard.

MCR 2.516(D)(2) provides:

> (2) Pertinent portions of the Michigan Standard Jury Instructions (SJI) must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party.

The crux of the issue in this case is whether SJI2d 30.05 was "applicable" given the facts of the case. SJI2d 30.05 provides:

> **Medical Malpractice: Permissible Inference of Malpractice from Circumstantial Evidence (Res Ipsa Loquitur)**
>
> If you find that the defendant had control over the [*body of the plaintiff/instrumentality which caused the plaintiff's injury*], and that the plaintiff's injury is of a kind which does not ordinarily occur without someone's negligence, then you may infer that the defendant was negligent.
>
> However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of plaintiff's injury.
>
> Additionally, the Note on Use provides, in pertinent part:
>
> This instruction should be given only if there is expert testimony that the injury does not ordinarily occur without negligence, **or** if the court finds that such a determination could be made by the jury as a matter of common knowledge. [Emphasis added.]

The parties do not dispute that defendant had control over plaintiff. Without a doubt, plaintiff's theory at trial was that plaintiff's injury was of the kind that did not ordinarily occur in the absence of malpractice. Moreover, plaintiff did present expert testimony to this effect. The appropriate question is, therefore, whether the res ipsa loquitur instruction must be given where a plaintiff presents some expert testimony indicating that the injury is of the kind which ordinarily does not occur in the absence of someone's negligence, even when that testimony is disputed by other expert testimony, and even when the negligence is not so blatant as to be within the common knowledge of the jurors.

Defendant's practical argument is worth considering: defendant argues that "it would make a mockery of the Res Ipsa Loquitur Doctrine if it would be triggered simply based upon the say-so of Plaintiff's expert witness." Defendant contends that there must be some showing that the factual matter at issue is within the common knowledge of the average layman, and also contends that "[I]f expert testimony is required, the case does not properly fall within the Res Ipsa Loquitur Doctrine."

At first glance, defendant's contention that the instruction should not be given every time a plaintiff's expert "says so" makes sense. However, defendant's position breaks down under further examination.

It cannot be the case that "if expert testimony is given" the doctrine does not apply. First, the Note on Use for SJI2d 30.05 specifically says that the instruction should be given if there is expert testimony that the injury does not ordinarily occur without negligence **or** if the court finds that such a determination could be made by the jury as a matter of common knowledge. SJI2d 30.05. Second, in *Jones v Porretta*, 428 Mich 132, 157; 405 NW2d 863 (1987) (in the context of the companion case to *Jones*, *Dziurlikowski v Morley*), our Supreme Court dealt specifically with a situation where the plaintiffs presented expert testimony, which was disputed by defendant's expert's testimony, to the effect that "but for" negligence, the injury would not have occurred. Therein, plaintiff alleged that the defendant doctor had breached the standard of care in administering anesthetic, thereby causing him injury; defendant disagreed, arguing and presenting expert testimony to the effect that plaintiff's injury was the result of a rare and unavoidable side effect of surgery and not the result of the doctor's negligence. *Id*. at 140-141. The Court in *Jones* found that the res ipsa loquitur instruction should have been given. Therefore, the instruction is not, as defendant contends, only appropriate when expert testimony is unnecessary or undisputed; nor is it only applicable when the negligence determination could be made as a matter of common knowledge.

"The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Jones*, *supra*, 428 Mich at 150. In this case, plaintiff was unable to prove the actual occurrence of a negligent act because, like many patients undergoing surgery, she did not have direct proof of the procedure defendant used during surgery nor of her allegation that defendant placed her nipple too high during surgery.

Furthermore, it is well established that "a prima facie res ipsa medical malpractice case requires more than a showing of bad result." *Id*. at 152. If a court gives an instruction to this effect, however, the court must "balance" such an instruction with instructions regarding permissible inferences which the jury is allowed to make. *Id*. at 155. In this case, the court did

give the adverse result instruction, and also instructed the jurors that there are inherent risks in surgery over which the defendant lacks control. We conclude that by failing to give the res ipsa loquitur instruction under SJI2d 30.05 as well, the court gave unbalanced instructions like those given in *Jones, supra*, 156. Our Supreme Court explained this issue thoroughly therein, and its reasoning is applicable to the facts of this case:

> We agree with plaintiffs' observation in *Dziurlikowski* that, when coupled with the instruction that an adverse result is not evidence of negligence, the instruction had the potential to mislead the jury as to a permissible inference which the jury might draw from the plaintiffs' proofs. While it is correct to state that a bad result alone does not raise an inference of negligence, it is also an accurate statement that the bad result did permit the jury to infer negligence if it credited the testimony of plaintiff's expert witness that such a result did not ordinarily occur in the absence of someone's negligence. The testimony of that witness was such that the trier of fact could have concluded that the defendant was negligent and the jury should have been instructed in some form to enable it to infer negligence if it found that the proofs supported the conclusion that the injury would not have occurred otherwise, see *Miller v Kennedy*, 11 Wash App 272; 522 P2d 852 (1974). Moreover, such language would be an incorrect statement of law in those classes of medical malpractice cases where common experience indicates that injury does not occur if there is proper skill and care. Where such an instruction is granted, plaintiffs also have a right to have the jury instructed on all of the aspects of a res ipsa case, not just those favorable to the defendant. See, e.g., *Kennedy v Gaskell*, 274 Cal App 2d 244; 78 Cal Rptr 753 (1969). [*Jones, supra*, 156. Emphasis added.]

We conclude that it was up to the jury to decide whether plaintiff's alleged injury was of the type that does not occur in the absence of negligence, based on its assessment of the testimony presented.

Defendant relies on *Locke v Pachtman*, 446 Mich 216, 230-231; 521 NW2d 786 (1994), wherein our Supreme Court reiterated the following four factors as necessary to a res ipsa loquitur claim:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; . . .
>
> (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

The issue in *Locke*, however, was whether plaintiffs had presented enough evidence to withstand defendant's motion for directed verdict, and not whether a particular instruction was applicable.

Id. at 223. There our Supreme Court explained that "the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury" and found that neither standard had been met, because even plaintiff's own expert suggested that faulty equipment, rather than negligence, could have caused the injury. *Id*. at 231. By contrast, in this case, plaintiff's expert, Dr. Lipkin, specifically testified that plaintiff's nipple and areolar complex would not have ended up located where they were located if they had been placed in the correct position during surgery, and also that such an injury was of the kind that ordinarily would not occur in the absence of negligence. Thus, there was expert testimony that plaintiff's injury was of the kind that could only occur as a result of negligence.

Further, we note that the language of SJI2d 30.05 is permissive rather than directive. The instruction provides that "if" you find that defendant had control over plaintiff's body, *and* that her injury was of a kind which does not ordinarily occur in the absence of negligence, then you *may* infer that defendant was negligent. Furthermore, the second paragraph of the instruction reminds the jury to weigh all of the evidence in order to determine whether defendant was negligent, and to determine also whether that negligence was a proximate cause of plaintiff's injury. SJI2d 30.05. Therefore, all the instruction does is permit the jury to rely on circumstantial evidence *if* it believes the expert testimony to the effect that "but for" negligence, this type of injury does not normally occur. In light of plaintiff's expert testimony, and in light of the instructions indicating that a bad result is insufficient to establish negligence and indicating that there are inherent risks in surgery, we conclude that the instruction was applicable and that the court abused its discretion in failing to give it.

The failure to give a properly requested, applicable and accurate instruction does not require reversal unless the failure to vacate the jury verdict would be inconsistent with substantial justice. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997). As in *Jones, supra*, 157, the jury in this case was given a circumstantial evidence instruction, but was not given SJI2d 30.05, and was in effect told that it could not find that the injury alone was evidence of negligence. Moreover, the jury in this case was instructed that there are inherent risks in surgery. Therefore, given the unbalanced nature of the instructions, we conclude that, as in *Jones*, affirmance of the jury's verdict would be "inconsistent with substantial justice" and that plaintiff is entitled to a new trial.

Reversed and remanded in accordance with this opinion. This Court does not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell