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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1197**

Jean Kingsley,
Appellant,

vs.

Manuel R. Pinto, M.D.,
Respondent.

**Filed May 9, 2011
Affirmed
Wright, Judge**

Hennepin County District Court
File No. 27-CV-09-286

Mark Hallberg, Hallberg & McClain, P.A., St. Paul, Minnesota (for appellant)

William M. Hart, J. Richard Bland, Melissa Dosick Riethof, Meagher & Geer, P.L.L.P.,
Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this medical-malpractice action, appellant challenges the district court's denial of a new trial following a jury verdict finding that respondent was not negligent in his care and treatment of appellant. Appellant argues that the district court erred by

declining to instruct the jury on negligent nondisclosure and declining to include special-verdict interrogatories on this negligence theory. We affirm.

FACTS

In 2004, respondent Dr. Manuel R. Pinto, an orthopedic spine surgeon, diagnosed appellant Jean Kingsley with degenerative disc disease at multiple levels of the spine. As a result of the diagnosis, Dr. Pinto offered spinal-fusion surgery as an option to alleviate Kingsley's back pain. Dr. Pinto explained to Kingsley the potential complications and risks of this course of treatment, including the risk of paralysis, other injury, or death. Kingsley elected to undergo the surgery, which Dr. Pinto performed on September 13, 2004. When Kingsley awoke after the surgery, she was unable to move her legs, although she retained sensation in them. Dr. Pinto determined that the motor paralysis was caused by a vascular compromise to Kingsley's spinal cord. Kingsley later was diagnosed with paraplegia.

Kingsley sued Dr. Pinto, alleging negligent nondisclosure by failing to obtain Kingsley's informed consent for the surgery and negligent treatment by failing to employ intraoperative neuromonitoring (IONM) during surgery to test spinal-cord function and detect harm to the spinal cord arising during surgery. Specifically, Kingsley alleged that Dr. Pinto negligently failed to disclose to her the availability of IONM for her surgery and the increased risks of surgery without IONM. Prior to trial, Dr. Pinto moved the district court to exclude expert testimony concerning Kingsley's negligent-nondisclosure claim. Dr. Pinto also sought to exclude jury instructions and special-verdict interrogatories addressing negligent nondisclosure. The district court granted the motion,

concluding that Kingsley's evidence and theory of liability did not comport with the negligent-nondisclosure doctrine.

Kingsley proceeded to trial on the negligent-treatment claim, presenting evidence to support her allegation that Dr. Pinto breached the standard of care when he failed to use IONM during surgery to monitor changes in spinal-cord function. The district court instructed the jury on the negligent-treatment claim. The special-verdict form included questions on negligent care and treatment, causation, and damages. The jury found that Dr. Pinto was not negligent. The district court denied Kingsley's motion for a new trial. And this appeal followed.

D E C I S I O N

Kingsley challenges the district court's decision denying a new trial, arguing that the district court erred when it declined to instruct the jury on negligent nondisclosure and when it excluded special-verdict interrogatories on this theory of negligence. The decision to grant a new trial generally rests within the sound discretion of the district court and will remain undisturbed absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). A district court has considerable latitude in instructing the jury and in posing special-verdict questions. *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000), *review denied* (Minn. June 27, 2000). A party is entitled to an instruction on that party's theory of the case when evidence supports the instruction and the instruction comports with the governing law. *Kalsbeck v. Westview Clinic*, 375 N.W.2d 861, 867 (Minn. App. 1985), *review denied*

(Minn. Dec. 30, 1985). We will not reverse the denial of a new trial when the jury instructions, viewed in their entirety, state the law fairly and correctly. *Id.*

The Minnesota Supreme Court recognized a cause of action for negligent nondisclosure in *Cornfeldt v. Tongen*, holding that, when there is a particular risk inherent in a treatment, a doctor may have a duty to disclose the risk. 262 N.W.2d 684, 699 (Minn. 1977). This doctrine is founded on the patient's right to be informed of the potential consequences of treatment in order to preserve the patient's free choice. *Pratt by Pratt v. Univ. of Minn. Affiliated Hosps. & Clinics*, 414 N.W.2d 399, 401 (Minn. 1987) (citing *Cornfeldt*, 262 N.W.2d at 699). Liability for negligent nondisclosure arises when a physician fails to secure the patient's informed consent to treatment that results in harm that the patient would have avoided by declining the treatment or choosing an alternative treatment. *Madsen v. Park Nicollet Med. Ctr.*, 431 N.W.2d 855, 861 (Minn. 1988). The negligent-nondisclosure doctrine applies when the patient must choose between distinct, alternative methods of treatment. *Kalsbeck*, 375 N.W.2d at 869. Thus, when alternative methods of treatment are available, a physician has a duty to inform the patient of the alternative treatments. *Id.*

Negligent nondisclosure, however, "does not involve negligence in the administration of treatment, in failure to treat, or in failure to properly diagnose." *Madsen*, 431 N.W.2d at 861. In *Madsen*, for example, the Minnesota Supreme Court concluded that a physician's decision to manage a patient's pregnancy in a home setting with restrictions and self-monitoring, rather than at a hospital with identical restrictions and monitoring by hospital personnel, did not involve a choice between alternative

methods of treatment because the treatment would have been the same and carried the same risks in either location. *Id.* at 860-61. “Treatment” is broadly construed and includes measures such as surgery, medication, and activity restrictions. *See id.* at 860 (holding that bed rest and activity restrictions are methods of treatment); *Cornfeldt*, 262 N.W.2d at 699 (recognizing physician duty to disclose risks of proposed surgical treatment); *Russell*, 608 N.W.2d at 899 (holding that claim that physician failed to advise patient to refrain from strenuous activity was negligent-treatment claim); *Kalsbeck*, 375 N.W.2d at 869 (observing that methods of treatment include taking cultures, blood-sugar tests, and administration of antibiotics).

Here, Kingsley argues that the negligent-nondisclosure doctrine applies because surgery without IONM is an alternative method of treatment that Dr. Pinto failed to disclose. We disagree. The treatment that Dr. Pinto recommended for Kingsley’s back pain was surgery to fuse portions of Kingsley’s spine. The use or nonuse of IONM, a monitoring protocol available for use during surgery, is not an alternative treatment to surgery. Rather, it is a process used during surgery to monitor the nervous system and detect potential complications arising during surgery. The question here is not whether surgical spinal fusion or another remedy should have been used. At issue is how the surgical spinal-fusion procedure was administered, including the surgeon’s decision not to employ the monitoring system used to detect vascular compromise. Even Kingsley’s experts testified that a physician’s decision whether to use IONM depends on the patient’s condition, the type of surgery, and the objective of the surgery. These are factors that implicate Dr. Pinto’s administration of treatment. This testimony does not

establish a physician's duty to disclose alternative treatments to surgery. *See Madsen*, 431 N.W.2d at 861 (concluding that negligent nondisclosure does not involve negligent administration of treatment).

The district court correctly concluded that Dr. Pinto's decision not to use IONM presents a question of the method or administration of treatment that does not support a negligent-nondisclosure claim. Accordingly, the district court properly rejected Kingsley's proposed jury instruction and special-verdict interrogatories addressing a negligent-nondisclosure claim.

Affirmed.