FILED
NOV 26 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

288

Filed November 26, 1985

5-276
84-1087

BELLE H. SMITH, as Executor for the Estate of Dale H. Smith, Deceased,

Plaintiff-Appellant,

vs.

ERNEST N. LERNER, M.D., and the HENRY COUNTY SOLDIERS AND SAILORS MEMORIAL HOSPITAL d/b/a HENRY COUNTY HEALTH CARE CENTER,

Defendants-Appellees.

Appeal from the Iowa District Court for Des Moines County - William S. Cahill, Judge.

Plaintiff appeals from a judgment entered on a jury verdict for defendants in plaintiff's medical malpractice case. **AFFIRMED.**

Thomas J. Vilsack of Bell & Vilsack, Mount Pleasant, Iowa, and Lex Hawkins of Hawkins & Norris, Des Moines, Iowa, for plaintiff-appellant.

Robert V. P. Waterman, Sr., and Robert V. P. Waterman, Jr., of Lane & Waterman, Davenport, Iowa, for defendant-appellee Lerner.

William M. Tucker and Richard M. Tucker of Phelan, Tucker, Boyle & Mullen, Iowa City, Iowa, for defendant-appellee hospital.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ., but considered en banc.

SACKETT, J.

Plaintiff appeals from a judgment entered on a jury verdict for defendants in plaintiff's medical malpractice case. Plaintiff raises two issues: (1) that the trial court erred in striking plaintiff's specification of negligence claiming defendant Lerner had abandoned defendant's decedent as a patient and in failing to instruct on the abandonment issue, and (2) the trial court erred in its instruction on standard of treatment.

During the day of September 5, 1980, plaintiff's decedent Dale Smith experienced some chest pain. He went to defendant, Ernest N. Lerner, M.D., to check on the possible cause. An examination by Lerner, including an electrocardiogram (EKG), revealed no cause for the episode. Dale was advised to rest for the remainder of the day and to stay away from work.

At approximately 11:30 p.m. that same evening, Dale experienced additional pain, and at Lerner's suggestion, he was driven to the defendant Henry County Soldiers and Sailors Memorial Hospital. There, pursuant to telephone orders from Lerner, a second EKG was performed. Lerner arrived at the hospital after the EKG was performed, examined the EKG, conducted a physical exam, ordered blood be drawn, and requested Dale remain in the coronary care unit overnight. Lerner gave the nursing staff several orders. One of the orders required a nurse to give Dale a drug called lidocaine. Lerner then left the hospital.

The lidocaine was administered. Within a short time Dale's speech became slurred and he became drowsy. Shortly thereafter, he suffered a convulsion or seizure. Dale subsequently suffered cardiac arrest.

Various procedures were employed to resuscitate Dale but all efforts were unsuccessful and he was pronounced dead at 1:30 a.m. on September 6.

I.

Plaintiff argues that she was entitled to have what she refers to as an issue of abandonment submitted to the jury.

Plaintiff claims the trial court erred in striking from her petition the following specification of negligence:

> Ernest N. Lerner, M.D., failed to use the reasonable care of an average specialist in internal medicine in diagnosing and treating the conditions of Dale H. Smith and was negligent as follow: In abandoning Dale H. Smith to the care of others under conditions then and there existing.

And in failing to give the following requested instruction:

> When a physician takes charge of a case, his employment continues until ended by mutual consent or his dismissal or until his services are no longer needed. A physician who leaves a patient in a critical stage of the disease or treatment without reason or sufficient notice to enable the patient to procure another physician or other competent care is guilty of negligence.
>
> As a part of the correct treatment of the patient, the physician must exercise reasonable and ordinary care and skill in determining when he may properly discontinue his treatment; and as long as anything remains to be done to effect a cure, it cannot be said that the treatment has ceased.
>
> A physician is under a duty to continue his attendance upon the patient until all the conditions for his rightful withdrawal are complied with. A physician cannot discharge himself from a case and relieve himself of responsibility for it by simply abandoning it or staying away without notice to the patient.

Plaintiff asks us to reject arguments that define abandonment as a narrow concept that includes only situations where a doctor decides to sever the physician-patient relationship despite the fact that a patient's condition requires additional medical attention.

Plaintiff claims abandonment should cover any situation where a doctor leaves a patient either momentarily or permanently when the patient's condition requires immediate treatment or continued attention.

Abandonment, in the context of medical malpractice cases, has been defined as a situation where a physician leaves a patient in a critical stage of the disease without reason or sufficient notice to procure another physician. McGulpin

v. Bessmer, 241 Iowa 1119, 1127, 43 N.W.2d 121, 125 (1950); Mucci v. Houghton, 89 Iowa 608, 611, 57 N.W. 305, 306 (1894); see also Annot., 57 A.L.R.2d 379, 385. Lerner did not discharge himself from this case nor terminate the doctor-patient relationship, nor does plaintiff claim he did. Plaintiff rather contends Lerner left Dale Smith in the care of persons who were not qualified to care for all of the needs that might arise due to the administration of lidocaine and in doing so Lerner abandoned Dale.

There is no evidence in the record to support plaintiff's proposed instruction. In fact, the evidence is to the contrary. Lerner may have left the hospital but only after directing the nurses in Dale's care, and despite Lerner's physical absence from the hospital he was available by phone. The hospital knew his whereabouts and the nurses talked to him twice by phone when problems occurred. There is no evidence Lerner discharged himself or withdrew from the case by simply abandoning it or staying away without notice to Dale.

Lerner contends that whether he should have stayed with his patient is an issue that falls within the area of "treatment." His treatment of Dale was included in plaintiff's allegation of negligent treatment and was submitted to the jury. Further, Lerner claims that the instructions given by the court covered the issue of abandonment as pleaded by plaintiff. That instruction, as given by the court, included the following specifications of negligence:

> The plaintiff alleges that the defendant Lerner was negligent in the following particulars:
>
> 2. In prescribing and causing to be administered the medication known as Lidocaine under conditions then and there existing.
>
> 3. In failing to instruct the hospital nurses in the proper treatment to be used to treat Dale H. Smith when his heart stopped and he was asystole.

> 4. In failing to properly treat Dale H. Smith under conditions then and there existing.

The issue struck from plaintiff's petition was whether Dr. Lerner was negligent in the treatment of Dale including a lack of diligence resulting from his leaving the patient with others when his presence was still required. The trial court's instructions were adequate on the issue of defendant's negligence. The language used was sufficient to convey plaintiff's theory that Lerner should have physically stayed with Dale in the hospital while lidocaine was administered. See Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978).

We find no error in the trial court's refusal to give the requested instruction and in striking the allegation of negligence from plaintiff's petition.

II.

Plaintiff next claims the trial court erred in including the third paragraph in Instruction 22. Instruction 22 as given in its entirety reads as follows:

> While the result of the treatment administered to the Plaintiff by the Defendants is not alone, and in itself, evidence of negligence, it is a circumstance which may be considered by you, together with all the other facts and circumstances disclosed by the evidence in determining whether or not such result is attributable to negligence or want of skill on the part of the Defendants.
>
> The mere fact that death resulted in this case does not, in itself, require you to find that the Defendants, or either of them, failed in any duty owed to Dale H. Smith, which duties have been defined for you. If the Defendants have exercised that degree of care and skill the law requires of them, they cannot be found to have failed in their duty simply on the basis of the death that followed.
>
> Nor can you find the Defendants failed in their duty if you find there are two or more recognized alternative courses of action which have been recognized by the medical profession or hospitals as proper methods of treatment, and the Defendants in the exercise of their best judgment elected one of these proper alternatives.

Plaintiff claims the third paragraph misstates the law of Iowa, confuses and misleads the jury, unduly emphasizes the concept of honest mistake, or is inapplicable to the facts in the record.

The first two paragraphs of Instruction 22 are embodied in Iowa Uniform Jury instruction No. 134.2.

As we understand plaintiff's argument she contends paragraph 3 of Instruction 22 when considered with the others confused the jury and invited the jury to turn its attention from the applicable standard of care to the issue of honest mistake and judgment.

Even correct statements of law if unduly emphasized may constitute reversible error. Eickelberg v. Deere & Co, 276 N.W.2d 442, 447 (Iowa 1979).

Defendants sought the addition of paragraph 3 because they contended throughout the trial the defendants had adhered in all respects to accepted standards of practice within their respective medical areas. There was contradictory expert testimony elicited at trial as to whether or not under the circumstances presented in Dale's case it was proper to prescribe lidocaine. According to the evidence at trial there was a difference of opinion within the medical profession as to this issue.

In considering instructions some well-recognized principles guide our consideration. A trial court may choose its own language in drafting instructions and is not bound to adopt wording preferred by counsel so long as instructions chosen cover all legal principles involved. Instructions are to be read and considered together and related to each other, not piecemeal or in artificial isolation. Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978). In considering the instructions as a whole, we fail to find error in the giving of paragraph 3 of Instruction 22.

AFFIRMED.

All judges concur except Schlegel, J., and Oxberger, C.J., who dissent.

SCHLEGEL, J. (dissenting)

I respectfully dissent. While I would not reverse this case on the court's failure to submit the issue of "abandonment" to the jury, I believe there was evidence which raised the issue of "lack of diligence" in Dale's treatment. That issue, however, is not before us. Consequently, I agree with the result reached by the majority upon the "abandonment" issue. On the issue concerning the addition of the third paragraph to Instruction 22, I vigorously disagree.

The majority opinion, in its discussion of the issue raised by the last paragraph of Instruction 22, states:

> As we understand plaintiff's argument she contends paragraph 3 of Instruction 22 when considered with the others confused the jury and invited the jury to turn its attention from the applicable standard of care to the issue of honest mistake and judgment.

I do not believe that is a fair representation of plaintiff's contention on this issue. It appears to me, and it is expressed in plaintiff's brief, plaintiff argues that the addition of the third paragraph to Instruction 22 misstates the law of Iowa, confuses the jury, unduly emphasizes the concept of honest mistake, or is inapplicable to the facts in the record. Plaintiff claims that the added paragraph creates a new test of the proper exercise of the duty of the physician, excusing him for the selection of an improper treatment procedure, or a procedure improperly carried out, so long as the procedure is found to be an accepted alternative procedure. The defendants characterize the legal proposition contained in the last paragraph of Instruction 22 as a "logical extension of well-established legal standards adopted by the Iowa Supreme Court."

A physician, in the defense of a medical malpractice case, should not be prevented from showing that there are alternative methods of treatment recognized in the medical profession which, when used with that degree of skill and care ordinarily used by similar specialists in like circumstances, will allow

a fact finder to determine that he has fulfilled his duty of care. On the other hand, if the alternative procedure chosen by the physician is inappropriate under the circumstances, or is carried out without the requisite skill, the mere selection of that alternative procedure should not excuse the doctor's negligence in the treatment of the patient in an inappropriate manner.

The paragraph complained of instructs the jury that it cannot find the defendants failed in their duty if they elected one of two or more recognized alternative courses of action. Read together with Instruction No. 14 (a specialist does not make any guaranty of results) and Instruction No. 16 (a doctor can't be found negligent merely because he makes a mistake in the diagnosis and treatment of a patient), the jury is encouraged to excuse the doctor if he selects an alternative procedure, even if it is obviously the wrong procedure to use.

In this case, the fighting issue, aside from the claim that Dr. Lerner should have stayed with the patient until he observed the effects of the lidocaine, was whether lidocaine should have been administered prophylactically or not. Witnesses testifying for plaintiff testified that such a procedure was wrong under these circumstances. Witnesses testifying for Dr. Lerner opined that the use of lidocaine was a correct procedure. The issue, therefore, was squarely one for determination of the jury. Was the use of lidocaine proper or was it wrong? In other words, did its use comport with the customary practice and give the patient the benefit of that degree of skill and care, knowledge and attention, ordinarily possessed by similar specialists of the medical profession under like circumstances?

The third paragraph of Instruction No. 22 took the issue of the propriety or impropriety of the use of prophylactic lidocaine away from the jury. It told them that they could not find the defendants had failed in their duty if the doctor chose the alternative method of treatment involving the use of prophyl-

actic lidocaine, even though the jury might also find that its use in this case was wrong. To that extent, it invited the jury to consider the selection to be an honest mistake of judgment, and therefore an excusable mistake. More importantly, however, the instruction directed that the jury couldn't find the defendants guilty of a violation of their duties, solely because the defendants selected an alternative method of treatment.

The addition of paragraph three to Instruction No. 22 misstated the Iowa law, tended to confuse the jury in its determination of the duty of the defendants, and denied plaintiff a fair determination of the central issue of the case. It was prejudicial, and constituted reversible error.

Oxberger, C.J., joins this dissent.