IN THE COURT OF APPEALS OF IOWA

FILED
DEC 23 1986
CLERK SUPREME COURT

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SHIRLEY PERKINS and GEORGE PERKINS,

Plaintiffs-Appellants,

vs.

JOHN R. WALKER,

Defendant-Appellee.

6-384
85-1863

Appeal from the Iowa District Court for Black Hawk County (62055) - Peter Van Metre, Judge.

Plaintiffs appeal the judgment upon a jury verdict for the defendant doctor in this medical malpractice case. **REVERSED AND REMANDED.**

Steven K. Warbasse of White & Warbasse, Cedar Rapids, Iowa, for plaintiffs-appellants.

Gail D. Fokken and James E. Walsh, Jr., of Clark, Butler, Walsh & McGivern, Waterloo, Iowa, for defendant-appellee.

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

SCHLEGEL, J.

The plaintiffs appeal the judgment upon a jury verdict for the defendant doctor in this medical malpractice case. We reverse and remand for a new trial.

For several years prior to 1979, Shirley Perkins had been treated for psoriasis by the application of topical steroid ointments.

In 1979 Shirley Perkins underwent unrelated back surgery. Within a few hours of the surgery she suffered a drastic drop in blood pressure, followed by a stroke. Her theory is that her prior use of topical steroid ointments had caused a suppression of the functioning of the adrenal gland, which prevented the adrenal gland from responding normally to regulate her blood pressure and circulation during the trauma and blood loss of major surgery.

Shirley Perkins and her husband sued Dr. John Walker, the doctor who performed the back surgery. They alleged that Dr. Walker had been negligent in failing to properly prepare Shirley Perkins for surgery in light of her prior use of topical steroids. At trial they presented expert testimony that cortisol injections before surgery would have compensated for the adrenal gland's inability to function properly. A jury returned a verdict for Dr. Walker. The plaintiff's have appealed from the resulting judgment. The plaintiffs contend a "negligent diagnosis" jury instruction was not supported by the evidence or warranted by their specifications of negligence. They assert the evidence tends to show improper preparation for surgery, not a mistake in diagnosis. The defendant responds that the instruction was warranted because the plaintiffs' petition and evidence did allege a mistaken diagnosis, namely failure to diagnose an adrenal insufficiency.

Our scope of review is for correction of errors at law. Iowa R. App. P. 4.

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Plaintiffs contend that it was inappropriate for the trial court to give an instruction on negligent diagnosis. Plaintiffs claim there was no factual basis or contention by the plaintiffs to support this instruction. The trial court's instruction 6B stated:

> You are instructed that a doctor cannot be found negligent merely because he makes a mistake in the diagnosis and treatment of a patient. Any error in diagnosis and treatment, if you find any, does not in and of itself constitute negligence. For a doctor to be found negligent, it must be shown by a preponderance of the evidence that the doctor, in making his diagnosis and treatment, failed to follow the customary practice and procedure of doctors in his specialty. This is the standard by which the doctor is to be judged.

The plaintiffs submitted the following specification of negligence contained in Jury Instruction No. 8:

> There is no controversy in this case but that the defendant and the plaintiff, Shirley Perkins, were in a physician-patient relationship at all material times involved in this case. Consequently, to entitle the plaintiffs to recover, the burden of proof is upon them to establish by a preponderance of the evidence each and all of the additional following propositions:
>
> 1. That the defendant was negligent in failing to properly prepare the plaintiff, Shirley Perkins, for surgery to prevent harm to her as a result of her prior usage of topical steroids.
>
> 2. That such negligence, if any, was a proximate cause of plaintiff Shirley Perkins' stroke and any resulting damage to the plaintiffs.
>
> 3. That the plaintiffs have suffered damage and the extent thereof.
>
> If the plaintiffs have established each and all of the foregoing propositions by a preponderance of the evidence, then plaintiffs are entitled to recover the full amount of their damages, if any you find. If the plaintiffs have failed to establish by a preponderance of the evidence any one or more of the foregoing propositions, then plaintiff cannot recover and your verdict will be for the defendant.

This instruction goes to the negligent treatment of plaintiff relating to the doctor's failure to prepare the plaintiff for surgery. The trial court did not at the time of trial have the benefit of Jensen v. Crabb, 380 N.W.2d 736 (Iowa Ct. App. 1985), which was filed eight days after this case was submitted to the jury. We believe that Jensen controls the disposition of this case on appeal.

In Jensen, this court held that when there is no basis in the record for an instruction on misdiagnosis, it is prejudicial error to instruct the jury as to diagnosis. Jensen v. Crabb, 380 N.W.2d at 738-39. In the present case, our review of the record shows that in the course of the trial, plaintiffs did not attempt to show that the defendant doctor misdiagnosed the patient as to adrenal insufficiency; plaintiffs only sought to show that the doctor improperly treated the patient in not properly taking into account her history of use of topical steroid creams. The jury instruction No. 8, submitted by plaintiffs, clearly reflects that the issue was treatment and not diagnosis. Therefore, in this case, as in Jensen, the doctor's treatment was called into question, not the doctor's diagnosis. The doctor knew of the plaintiff's use of the topical steroids before surgery. The question raised was whether or not the doctor properly prepared plaintiff for surgery, not if he misdiagnosed an adrenal insufficiency plaintiff may have had.

It is reversible error to submit an issue not raised by the proof. Id. Furthermore, the giving of instructions which are confusing is reversible error. Sammons v. Smith, 353 N.W.2d 380, 385 (Iowa 1984). We therefore conclude that the trial court erred in instructing the jury on misdiagnosis and the plaintiffs are entitled to a new trial.

REVERSED AND REMANDED.

All judges concur except Sackett, J., and Donielson, J., who dissent.

SACKETT, J. (dissenting)

I dissent.

Our holding in Jensen v. Crabb, 380 N.W.2d 73 (Iowa App. 1985) is not applicable. The alleged negligence in Jensen was the doctor's use of high forceps. The alleged negligence here is the doctor's failure to diagnose an adrenal insufficiency.

I would affirm the trial court.

Donielson, J., joins this dissent.