IN THE COURT OF APPEALS OF IOWA

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ERMA A. SAMMONS and MERLYN SAMMONS,

Plaintiffs-Appellants,

vs.

KOERT R. SMITH, WILFRIDO CALDERON, and BURLINGTON MEDICAL CENTER,

Defendants-Appellees.

Filed January 24, 1984

3-334
2-69345

Appeal from the Iowa District Court for Des Moines County - Harlan W. Bainter, Judge.

Plaintiffs appeal from the judgment entered for defendants in this medical malpractice action. REVERSED AND REMANDED.

Jay A. Nardini and William C. Ball of Ball, Kirk & Holm, P.C., Waterloo, for plaintiffs-appellants.

Robert V. P. Waterman of Lane & Waterman, Davenport, for defendant-appellee Smith.

Marsha K. Ternus and Michael H. Figenshaw of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for defendant-appellee Calderon.

Ralph D. Sauer of Betty, Neuman, McMahon, Hellstrom & Bittner, Davenport, for defendant-appellee Medical Center.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

Plaintiffs appeal from the judgment entered for defendants in this medical malpractice action. They claim that the trial court erred in giving certain instructions to the jury and in overruling their motion for new trial based on various grounds. We reverse and remand for a new trial.

Defendants are the surgeon (Koert Smith), anesthesiologist (Wilfrido Calderon), and hospital (Burlington Medical Center) involved in the performance of a knee operation on plaintiff Erma Sammons in 1977. During the surgery no unusual procedures or occurrences were observed but shortly afterwards it was discovered that Sammons had suffered nerve damage resulting in permanent damage to her previously-healthy right foot and lower leg. One of plaintiffs' expert witnesses testified that the chances were ninety-nine to one or better that the nerve damage was caused by excessive tourniquet pressure resulting from improper calibration of an automatic tourniquet machine used during anesthesis. He estimated at less than one percent the chances that the nerve damage could have resulted from a localized vascular anomaly or other pre-existing condition rendering Sammons peculiarly susceptible to pressure. Although the manufacturer of the machine in question recommended that calibration be checked every six months, the hospital had no preventive maintenance program and calibration was apparently not checked between 1968 and 1977. Defendant Smith expressed the opinion that Sammons' nerve injury resulted from unusual sensitivity to pressure but there was no direct evidence that she was in fact unduly sensitive or other direct evidence as to how the nerve injury occurred and no direct evidence as to whether the tourniquet machine was properly calibrated during the operation or afterwards.

The following Instruction 14B on duty of care was given over plaintiffs' objection that it was unsupported by record evidence and inapplicable in the absence of allegations of specific negligence directed against defendant doctors:

> You are instructed that a doctor cannot be found negligent merely because he makes a mistake in the treatment of a patient. Any error in 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 treating the patient, failed to follow the customary practice and procedures of doctors under similar circumstances and in similar localities. This is the standard by which the doctors are to be judged.

Instruction 14D on res ipsa loquitur was given over objection as follows:

> Defendants have alleged that they have no control over the physical frailties, allergies, reactions, anomalies, or idiosyncrasies of Plaintiff, Erma A. Sammons. They further contend that the alleged condition of her right leg and foot after her treatment by them does not demonstrate a lack of due care.
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> The Plaintiff's physical frailties, allergies, reactions, anomalies, or idiosyncrasies which were unknown to these Defendants, if any you find, is a circumstance for you to consider in determining whether or not Dr. Koert R. Smith or Dr. Wilfrido Calderon exercised due care in their treatment of Plaintiff in the operating room at Burlington Medical Center on the date in question.

Plaintiffs' record objection was that the instruction unduly emphasized "certain factual aspects of the case," that it did not represent a correct statement of the law, and that defendants "in this case would not be entitled to this particular instruction." On the previous day, when the instruction was first proposed, more detailed arguments were presented to the court.

The case was submitted to the jury only on res ipsa loquitur grounds with respect to the doctors; their motions for directed verdicts as to various allegations of specific negligence were sustained. The jury returned verdicts in favor of all defendants. Plaintiffs then filed a motion for new trial based on the individual and cumulative effect of various matters, one of which was juror bias allegedly demonstrated by both the brevity of deliberations (2-1/2 hours including a lunch break) and defendants' past or present treatment of some jurors and/or their relatives. Plaintiffs had not requested a change of venue or otherwise previously attempted to raise any issue of juror bias. The motion for new trial was overruled

in its entirety although the trial court indicated that a different verdict would have been reached had it been the finder of fact. This appeal followed.

I.

Plaintiffs first contend that the court erred in giving Instruction 14B, set out above. We agree. The jury had previously been instructed that plaintiffs were bringing their action under the general negligence theory of res ipsa loquitur. The jury was also correctly instructed on the elements of res ipsa loquitur; i.e. injury by an instrumentality under the exclusive control of one or more of the defendants and the occurrence was such as in the ordinary course of things would not happen if reasonable care had been used. See Fosselman v. Waterloo Community School District, 229 N.W.2d 280, 283 (Iowa 1975). The trial court had previously thrown out plaintiffs' claims of specific negligence against defendants Smith and Calderon since there was no evidence of any specific acts of negligence on their part. Instruction 14B, however, conflicts with the general theory of res ipsa loquitur and in fact appears to tell the jury that defendant doctors cannot be found negligent unless plaintiffs can point to something specific that defendants did wrong. The instruction refers to "a mistake in the treatment" and that plaintiffs must show that defendants "failed to follow the customary practice and procedures of doctors under similar circumstances and in similar localities." This language appears to us to go far beyond the general res ipsa theory that the injury would not have occurred had reasonable care been used and instead requires plaintiffs to show precisely what defendants did that caused the injury. The jury instructions were therefore in conflict; this is reversible error. Hartwig v. Olson, 261 Iowa 1265, 1278, 158 N.W.2d 81, 88 (1968). Since the case against the doctors was submitted on res ipsa loquitur, Instruction 14B should not have been given.

We add an additional reason for reversal and note that Instruction 14B is identical to Iowa Uniform Jury Instruction (Civil) 13.9 except that the latter talks about "diagnosis and treatment" whereas the former is limited to "treatment."

Uniform Instruction 13.9, in turn, is based on the case of Sinkey v. Surgical Associates, 186 N.W.2d 658 (Iowa 1971). That medical malpractice case involved a claim of wrongful and negligent diagnosis of a patient's illness as tonsillitis rather than appendicitis. In affirming a directed verdict for defendants, the court held in part as follows:

> Nevertheless, a physician or surgeon does not insure the correctness of his diagnosis. A patient is entitled to a thorough and careful examination such as his condition and attending circumstances will permit, with such diligence and methods of diagnosis as are usually approved and practiced by physicians of ordinary skill and learning under like circumstances and in like localities.

Id. at 660 (citations omitted). The Sinkey case is limited both by its facts and its rationale to cases involving a claim of negligent diagnosis. On the other hand, the present case has nothing to do with diagnosis; plaintiffs' sole claim relates to the allegedly excessive pressure applied by the tourniquet. Defendants' arguments notwithstanding, we believe there is a significant difference between diagnosis and treatment for purposes of applying the Sinkey holding. That court was careful to note that an incorrect diagnosis may readily be made since different diseases may yield the same symptoms and test results; for that reason, the mere fact that a doctor made an incorrect diagnosis does not in itself require a finding of negligence. Id. at 662. However, the same analysis cannot be used with regard to the treatment or surgery that takes place as a consequence of diagnosis since it is in such treatment or surgery that any injury will take place.

Therefore, we hold that the trial court erred in instructing the jury that a doctor cannot be found negligent due to a mistake made in the treatment of a patient; that instruction involved an unwarranted extension of the Sinkey holding. For the same reason and to the extent that Uniform Instruction 13.9 refers to treatment and diagnosis instead of diagnosis only, that instruction is disapproved.

II.

Although reversal and remand for a new trial is required for the reasons

stated in division I above, we also consider plaintiffs' contention with regard to Instruction 14D since that issue will likely be raised again on retrial. Instruction 14D, set forth above, told the jury in effect that it could consider any reactions, physical frailties, or other idiosyncrasies plaintiff might have which would render her peculiarly susceptible to nerve damage from tourniquet pressure even if defendants rendered due care in surgery. Plaintiffs contend the court erred in submitting this instruction to the jury because, among other reasons, there was insufficient evidence in the record of any such frailties or idiosyncrasies.[1] To uphold the submission of an issue to the jury, the record must contain substantial evidence to support it; a mere scintilla is not enough. Hamilton v. Luckey, 315 N.W.2d 823, 825, 826 (Iowa Ct. App. 1981).

We do not believe the record contains the requisite evidence to support this instruction. There is no evidence whatsoever that plaintiff had any physical anomaly rendering her unusually susceptible to tourniquet pressure. Plaintiffs' expert testified that the chances of plaintiff having such a predisposition to nerve damage from pressure were less than one percent. Defendant Smith was the only person who claimed that plaintiff's injuries arose from a physical anomaly beyond anyone's control; he testified in part as follows:

> I think what we mean by an idiosyncrasy or anomaly is that for an unknown undetectable reason Mrs. Sammons was just unduly sensitive to the tourniquet being placed in a normal position, a normal pressure, for a normal amount of time. Her nerves were just unusually very, very sensitive to that, and again, in my training and reading, it is a recognized thing that happens, and happens rarely, but it does happen.
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> You know, it's not anything we can detect, anything we can test. It's just an individual variation in people, and

[1] We reject defendants' claim that error was not preserved on this argument. We believe the record clearly shows that plaintiffs made the trial court aware of their position with respect to this instruction and the allegedly insufficient evidence in support thereof.

> their response to injuries and pressures in medicine. I think that unfortunately is why Mrs. Sammons has what she has.

Such speculative testimony, however, is entitled to little if any weight absent any other supporting evidence. Since the record did not contain sufficient evidence to warrant submission of Instruction 14D to the jury, it was reversible error to do so.

III.

We need not discuss plaintiffs' remaining issues; they are not likely to be raised during retrial. We wish to note, however, that plaintiffs' allegation of "probable jury bias and prejudice for Defendant" is not well taken. Plaintiffs did not move for a change of venue or challenge in any way the makeup of the jury until their motion for new trial after judgment was entered on the jury verdict in defendants' favor. Allegations of error raised for the first time in a motion for new trial and which could have been raised earlier are insufficient to preserve error. Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 555 (Iowa 1980).

Because of the error in submitting Instructions 14B and 14D to the jury, the judgment in this case in defendants' favor is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.