

IN THE COURT OF APPEALS OF IOWA

No. 0-728 / 90-810

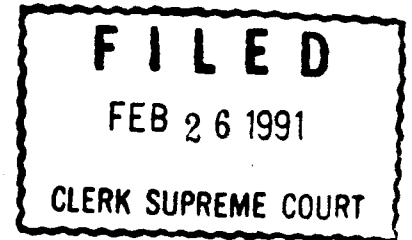
MARY D. SWINSCOE and DONALD R. SWINSCOE,

Plaintiffs-Appellants,

vs.

RICHARD ROSKI, M.D.,

Defendant-Appellee.



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Appeal from the Iowa District Court for Scott County,
James E. Kelley, Judge.

Plaintiffs appeal the judgment of the district court,
after a jury trial, in favor of defendant. **AFFIRMED IN
PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**

Arthur L. Buzzell, Davenport, and Michael J. Warner,
Rock Island, Illinois, for appellants.

Greg A. Egbers and Vicki L. Seeck of Betty, Neuman &
McMahon, Davenport, for appellee.

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

PER CURIAM

The central issue in this medical malpractice case is whether the trial court erred in refusing plaintiffs' request for an instruction on *res ipsa loquitur* when there was evidence, though disputed, plaintiff Mary D. Swinscoe's injury could have occurred even in the exercise of due care and the evidence showed the specific cause of the injury. We find, under the record here, it was error to refuse to give the instruction. We reverse and remand for new trial.

Defendant-appellee Richard Roski, M.D., a board certified neurosurgeon performed surgery on plaintiff-appellant Mary D. Swinscoe to correct a deficit, compatible with a herniated disc. During surgery defendant inserted a surgical instrument called the pituitary rongeur through the interior disc causing a laceration to the iliac vein and artery. The laceration was not a part of the surgery. Defendant introduced expert medical testimony that the cutting of the iliac vein and artery during surgery does not fall below the accepted standard of care.

Plaintiffs introduced expert testimony that defendant caused a ventral perforation and lacerated the vessels anterior to the anterior spinal ligament and that the laceration of the common iliac arteries and veins in a diskectomy is not part of the standard of care. Plaintiff requested an instruction on *res ipsa loquitur*. The trial court rejected the request on the basis there was no

disagreement in the evidence the insertion of a pituitary rongeur through the anterior disc wall caused the laceration of the right iliac artery and vein, and the uncontradicted evidence completely explained the occurrence. The trial court determined where the evidence furnishes a full and complete explanation of the occurrence, the inferences which are inconsistent with the evidence are destroyed.

The trial court gave the following instruction on the issue of negligence:

Instruction No. 8

Mary D. and Donald Swinscoe must prove all of the propositions:

1. The Defendant was negligent in one or more of the following particulars:
 - (a) In failing to provide a sufficient course of conservative treatment to Mary D. Swinscoe;
 - (b) In lacerating the iliac artery and vein of Mary D. Swinscoe during diskectomy surgery on November 6, 1986

* * *

Instruction No. 9

With regard to element 1(a) of Instruction Number 8, you are instructed that a physician 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 physician to be found negligent, it must be shown by a preponderance of the evidence that the physician, in making his diagnosis and treatment, failed to follow the customary practice and procedure of neurosurgeons under similar circumstances. This is the standard by which the neurosurgeon is to be judged under proposition 1(a) of Instruction Number 8.

* * *

Instruction No. 10

Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner.

A violation of this standard is negligence.

I.

Plaintiffs contend these instructions were not sufficient and they argue the trial court should have given an additional requested *res ipsa loquitur*. The issue is one where courts have experienced some difficulties and confusion. See generally 9 A.L.R.3d 1315 (1966); 33 A.L.R.2d 791, 793 (1954); Restatement (Second) of Torts 328 D at 156-157 (1965).

The factors here parallel closely the factors in Reilly v. Straub, 282 N.W.2d 688, (Iowa 1979). In Reilly, a medical malpractice action for damage for a birth injury resulting from traction applied to an infant's head, the supreme court determined the trial court did not err in permitting the jury to consider inferences of negligence under the doctrine of *res ipsa loquitur* in addition to submitting instructions on specific allegations of negligence. The instruction should have been given. Reilly, 282 N.W.2d at 695. We reverse and remand for new trial.

II.

Plaintiffs further contend it was error to allow a defense expert to testify about information he received from another doctor who had studied the vascular risks of disc surgery. One of defendant's experts was Henry Garretson, a neurosurgeon. The challenged testimony concerned Garretson's testimony about a letter he had received from Dr. DeSaussure, another neurosurgeon. The evidence would be admissible under Iowa Rule of Evidence 803(24).

The parties are in disagreement over whether plaintiffs had advance notice of the evidence as required by the rule. However, we need not address that issue, as plaintiffs now have notice of the testimony and cannot complain about lack of notice on retrial.

III.

Plaintiffs next contend the trial court erred in allowing a video tape to be used as demonstrative evidence. The trial court permitted defendant to show a video tape of a microdiscectomy operation. The tape was not of plaintiff's operation. The tape was admitted as demonstrative evidence. Before the tape was played, the trial court told the jury the only purpose of the video tape was to show the procedures and instruments generally used in this type of operation. The trial court also advised the jury the film did not show Mary Swinscoe's surgery, or surgery at the L4-5 level.

Demonstrative evidence is admissible if it tends to explain or prove an issue in a case. Davis v. Walter, 146 N.W.2d 247, 250 (Iowa 1966). Introduction of demonstrative evidence is discretionary with the trial court. Id. The trial court can best determine relevancy and whether the evidence has any value in assisting the jury in understanding the issues in this case. Id. We find no abuse of discretion.

IV.

We have considered plaintiffs' remaining assignments of error. They will not occur on retrial.

Costs on appeal are taxed to appellee.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

Schlegel, J., concurs; Oxberger, C.J., specially concurs; Sackett, J., dissents.

OXBERGER, C.J. (specially concurring)

I concur in the result only.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court in all respects.