IN THE COURT OF APPEALS OF IOWA

No. 1999-548 (9-809) / 98-2266
Filed April 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ENRIQUE ABOLTES GARCIA,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Defendant appeals from his conviction for first-degree murder. **REVERSED AND REMANDED FOR NEW TRIAL.**

William L. Kutmus of Kutmus & Pennington, P.C., Des Moines, and Catherine K. Levine, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano and Frank Severino, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Hecht, J., and Habhab, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

HECHT, J.

Defendant Enrique Garcia appeals from a conviction of murder in the first degree. He contends the district court erred in excluding a defense expert's testimony bearing upon his defense of intervening and superseding cause. We reverse and remand for new trial.

I. Background Facts and Proceedings. Enrique Garcia ("Garcia") and four companions were together on the evening of March 28, 1998. An unidentified man approached in a vehicle and talked to one of Garcia's companions. The man offered to pay Garcia and his companions $100 each to beat up Daniel Hernandez ("Hernandez") who allegedly owed money for a drug transaction. The man led Garcia and his companions to Hernandez's home. Four of the men, including Garcia, entered the home where they assaulted Hernandez with a baseball bat and beer bottles. In the melee, one of the men shot Hernandez four times. Two bullets entered the victim's right leg, while the other two perforated both of his lungs and his stomach.

Hernandez was transported to Iowa Methodist Medical Center where he underwent surgery for his abdominal and chest wounds. The pulmonary injury required removal of a portion of one of his lungs and repair of a stomach perforation. Hernandez soon developed Acute Respiratory Distress Syndrome ("ARDS"), a condition which often develops in trauma victims despite successful treatment of the wounds which provoked the treatment. The blood vessels of ARDS patients typically leak and their body tissues retain fluid and swell. The

treatment protocol for the condition requires infusion of additional fluids to keep internal organs properly perfused and commonly includes use of a ventilator.

Hernandez's treatment regimen included insertion of a tracheostomy tube. While shaving the patient, a nurse "nicked" the trach tube and caused a leak which decreased the effectiveness of the ventilation. A treating physician decided the trach tube should be replaced. Unfortunately, the patient's neck edema was so severe the replacement tube could not be inserted in a timely fashion. Hernandez could not breathe without mechanical assistance and he was asphyxiated.

Garcia was charged with murder in the first degree. The State filed a motion for adjudication of law points to establish the testimony of Garcia's medical expert, Dr. Lawrence Repsher ("Dr. Repsher"), on the issue of causation was irrelevant and therefore inadmissible. Garcia resisted the motion, contending his due process rights would be infringed if he were prevented from presenting a causation defense through a qualified expert. The district court ruled the defense of intervening/superseding cause was not available to the defendant because negligent medical care was not, as a matter of law, the sole proximate cause of Hernandez's death, and the testimony of Dr. Repsher was irrelevant and therefore inadmissible. A jury subsequently found Garcia guilty of murder in the first degree.

II. The Medical Testimony. The State presented expert testimony of Dr. Francis Garrity ("Dr. Garrity") who performed an autopsy on Hernandez. Dr. Garrity testified, in relevant part, that Hernandez would have died from the

gunshot wounds had he received no medical treatment and the decision to put Hernandez on the ventilator was precipitated by ARDS occasioned by the gunshot wounds. Dr. Garrity also testified the medical decisions – including the decisions to replace the leaking trach tube and to utilize high doses of narcotic medications – were the result of the gunshot wounds. He added Hernandez had worsening ARDS and a number of failing organ systems before the medical care providers attempted to replace the trach tube, and would have died within three or four days even if the "surgical misadventure" with the tube had not occurred. He stated Hernandez had an extremely poor prognosis even if the trach tube had been successfully replaced and the gunshot wounds "were, in fact, the inciting event, the proximate cause, the incident that resulted in everything essentially that followed." Dr. Garrity concluded the gunshot wounds initiated the chain of events leading directly to Hernandez's death. The State also presented the testimony of Dr. Akella Chandrasekhar ("Dr. Chandrasekhar"), a treating physician, in an attempt to explain and justify the medical treatment provided to Hernandez at the hospital.

Garcia attempted to offer the testimony of Dr. Repsher to counter the testimony of the State's medical experts. Dr. Repsher is a graduate of Harvard College and the University of Rochester School of Medicine. He is board certified in both internal medicine and pulmonary diseases, and practices the specialties of pulmonology and critical care medicine in the State of Colorado. In preparation for his testimony, Dr. Repsher reviewed the medical records of Hernandez and the depositions of the State's medical experts. At the hearing on

the State's motion, he testified, in relevant part, as follows: (1) the cause of Hernandez's death was asphyxiation due to "iatrogenic loss" (inappropriate removal) of the tracheal cannula; (2) medical care provided to Hernandez was below the prevailing standard of care in several respects, including the introduction of excessive fluids; administration of improper medications (beta blocker – Metoprolol – which exacerbated a weak left ventricle, and Nimbex - a paralyzing agent employed immediately prior to the attempt to change the tube); and administration of excessive doses of other medications (Dilaudid and Lorazepam); (3) the medical decision to attempt to replace the tracheal cannula was "outrageous" under the circumstances (there "was just no – absolutely no reason to do it and all sorts of reasons not to do it. I mean it was just extraordinary. . . . It's completely irrational . . . a grossly irrational therapeutic maneuver . . . . "); (4) the asphyxiation of Hernandez was "solely and immediately caused by the removal of the tube;" and (5) there was less than a fifty percent chance Hernandez would have died as a result of the gunshot wounds and ARDS if he had received appropriate medical care.

The district court concluded, as a matter of law, the defense of intervening/superseding cause was not available to Garcia, and did not receive the testimony of Dr. Repsher into evidence.

III. Standard of Review. Our review of evidentiary rulings is for abuse of discretion. *State v. Haskins,* 573 N.W.2d 39, 45 (Iowa App. 1997). In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly

unreasonable." *State v. Greene,* 592 N.W.2d 24, 27 (Iowa 1999); *State v. Halstead,* 362 N.W.2d 504, 506 (Iowa 1985). With regard to opinion evidence, the "general rule in this jurisdiction is one of liberality in the admission of opinion evidence." *State v. Rains,* 574 N.W.2d 904, 916 (Iowa 1998); *State v. Hummell,* 228 N.W.2d 77, 82 (Iowa 1975).

Where a defendant claims infringement of his constitutional right to present a defense, our review is de novo. *State v. Peterson,* 532 N.W.2d 813, 816 (Iowa App. 1995).

IV. The Merits. Principles of causation normally associated with civil tort litigation have a proper application in criminal cases. *Murray v. State*, 512 N.W.2d 547, 550 (Iowa 1994). Proximate cause is generally a fact question for the jury. The issue may be decided as a matter of law only in exceptional cases. Iowa R. App. P. 14(f)(10); *Vogan v. Hayes Appraisal Assocs., Inc.*, 588 N.W.2d 420, 424 (Iowa 1999). In addition, a motion to adjudicate law points may only be used to resolve issues that are legal in nature and cannot be used to address factual issues. *See State v. Hawkins,* 356 N.W.2d 197, 199 (Iowa 1984); *State v. Marti,* 290 N.W.2d 570, 579 (Iowa 1980). We consider, then, whether this case is an exceptional case which justifies the exclusion of the defendant's expert witness's testimony on the issue of proximate cause and the district court's decision, as a matter of law, the defense of intervening/superseding cause is unavailable to Garcia in this case.

A defendant in a criminal case has a due process right to present evidence of his defense. This court has observed:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as

> well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Peterson, 532 N.W.2d at 816 (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019, 1023 (1966)). The district court permitted the State to present medical evidence supporting the proposition various aspects of the medical care was appropriate and necessary, and tending to prove the gunshot wounds proximately caused Hernandez's death. Due process would require Garcia be permitted to contest the State's evidence and theory of the case by presenting countervailing evidence.

Garcia sought to defend against the charge by challenging the State's evidence on proximate cause. He offered the testimony of Dr. Repsher, a board certified pulmonologist, to support his contention medical care provided to Hernandez was an intervening/superseding cause of his death. The district court decided, as a matter of law, medical treatment was not the sole proximate cause of Hernandez's death; and expert testimony advancing a contrary view was therefore irrelevant and inadmissible. Garcia claims: (1) his board certified medical expert's testimony medical care constituting an outrageous deviation from the standard of care was the sole proximate cause of Hernandez's death should have been admitted in evidence; and (2) his expert's testimony raises a fact question on the defense of superseding cause.

Acts or omissions of medical care providers cannot constitute a superseding cause if they are "normal consequences" of the situation created by Garcia's criminal conduct. *See State v. Murray*, 512 N.W.2d 547, 551 (Iowa 1994) (death of comatose eighty-one-year old woman after family decided to withhold nourishment and medication was, as a matter of law, normal consequence of the situation created by Murray's criminal conduct); *Davis v. State*, 520 N.W.2d 319, 320 (Iowa App. 1994) (placement of a feeding tube in a patient in a persistent vegetative state resulting in bacterial peritonitis and death was a normal consequence of the medical condition caused by the stab wound). The analytical framework employed by the courts in these cases is derived from Restatement (Second) of Torts which provides:

> **§ 443. Normal Intervening Force.** The intervention of a force which is a *normal consequence* of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.

Restatement (Second) of Torts § 443, at 472 (1965) (emphasis added). An interpretive comment to section 443 notes "the word normal is not used in this Section in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary." *Id.* at § 443, cmt. b, at 472-73.

Comment c. to section 443 suggests the culpability of the intervening actor is a relevant consideration:

> Thus, if the actor's negligent conduct puts another in peril, the fact that a third person who intervenes to avert it should realize his incompetence to give safe aid does not necessarily relieve the actor from responsibility for the harm caused by the third person's interference. On the other hand, if the third person officiously

> intervenes *when his incompetence is so great that an ordinary person would realize the grave danger of meddling with the situation*, his interference may be regarded as so extraordinary as to relieve the actor from liability.

Id. at § 443, cmt. c, at 473 (emphasis added).

The State contends we should view the alleged acts and omissions of medical negligence by medical care providers in this case as "normal" sequelae of the gunshot wounds inflicted by one of Garcia's companions. The State relies upon *State v. Murray*, 512 N.W.2d 547 (Iowa 1994). Defendant Murray severely bludgeoned and robbed an eighty-one-year-old woman. The victim remained comatose for fourteen weeks after neurological surgery necessitated by the assault. A medical decision was then made to reduce nourishment via a feeding tube and to withhold medications from the elderly comatose victim who was apparently not expected to recover from the injuries. Defendant Murray contended the medical decision to withhold nourishment and medications was gross negligence that would support a superseding cause instruction. He apparently offered no expert medical testimony to support a finding the medical care provided to the victim was, in any way, extraordinary or the victim had a meaningful chance of survival but for the medical treatment provided to her.[1] The *Murray* court concluded the medical decisions for cessation of medication and

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[1] Our assumption there was no evidentiary dispute on causation in *Murray* is founded upon the court's observation "rules that restrict an actor's responsibility under theories of superseding cause are for the court to apply rather than the jury." *State v. Murray*, 512 N.W.2d 547, 550 (1994) (citing Restatement (Second) of Torts § 443, at 473 (1965)). Reliance upon this language would be correct only if the facts as to causation were undisputed. Restatement (Second) of Torts § 443 cmts. b. & c, at 473 (1965).

nourishment were, as a matter of law, normal consequences of the situation created by Murray's criminal conduct. *Id.* at 551.

In sharp contrast, Garcia supported his claim of entitlement to the superseding cause defense with expert medical testimony showing grossly negligent medical care was the sole proximate cause of death of Hernandez who, but for the treatment, had better than a fifty percent chance of survival. While it is true ordinary negligence occasionally occurs in the course of medical treatment, we do not read the applicable law to require us to hold acts of outrageous or gross negligence must be viewed as "normal."[2]

The State also cites *Davis v. State,* 520 N.W.2d 319 (Iowa App. 1994), in support of its assertion the superseding cause defense is not available under the circumstances of this case. Davis stabbed her victim in the chest. During a surgical procedure required to treat the resulting heart damage, the victim suffered brain damage from lack of oxygen. The patient was thereafter in a persistent vegetative state and unable to take nourishment. Medical care providers surgically inserted a feeding tube into the victim's stomach. The opening for the tube in the wall of the stomach was slightly larger than the tube, allowing fluid to leak into the abdominal cavity. The victim developed peritonitis and died. Davis presented no expert medical testimony to support her claim negligent medical care was a superseding cause of the victim's death. She

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[2] Indeed, though we need not, and do not, decide the question in this case, it might be argued the court should not, for important policy reasons, ever characterize outrageous or grossly negligent departures from applicable standards of medical care as "normal" in any context.

sought, but did not receive, a jury instruction on superseding cause. On direct appeal from her conviction of second-degree murder, she claimed unsuccessfully that the district court erred in failing to instruct on superseding cause. She then sought postconviction relief contending her trial counsel were ineffective when they failed to present expert testimony to support the superseding cause defense. The medical expert who was retained by Davis for the postconviction proceedings, however, opined (consistent with the State's expert testimony) the underlying cause of death was the stab wound to the victim's chest. *Id.* at 320. The district court granted summary judgment on the postconviction relief proceeding on the ground Davis had shown no prejudice as a result of the court's denial of her request for a superseding cause instruction.

The facts in *Davis* are factually distinguishable in important respects from those in the case now before this court. There is no indication Davis presented expert testimony in the murder trial or in postconviction proceedings supporting a finding the medical care provided to the victim was grossly negligent or outrageous. Furthermore, Davis presented no expert medical evidence that would support a finding grossly substandard medical care was the sole proximate cause of the victim's death. Thus, Davis is not dispositive of the issue facing this court.

We have considered the State's assertion the medical care provided to Hernandez was not negligent or abnormal. This argument, however, goes to the weight of Dr. Repsher's testimony rather than to its admissibility. Though there is a factual basis supporting the State's argument in the record, Dr. Repsher's

opinions would support a finding the medical care was grossly negligent, outrageous and the sole proximate cause of the victim's death. Consequently, the fact finder should have considered Dr. Repsher's opinions and the superseding cause defense.

The State also relies upon the "chain-of-events" analysis to support the district court's determination Garcia's infliction of the gunshot wounds was the sole proximate cause of Hernandez's death. The first principle of this analysis is Hernandez would not have been subjected to the series of alleged medical misadventures if he had not been shot by Garcia and taken to the hospital. Moreover, if he had not sustained bullet wounds to the chest and resulting lung damage, he would probably not have contracted ARDS and might not have required insertion of a trach tube. While there is some logical appeal to the argument, we are not inclined to decide this issue with reference to chronological sequence alone. Since consequence need not always be inferred from sequence, the fact the gunshot wounds could be deemed the first "link" in the "chain of events" is not dispositive. Where substantial evidence in the form of expert medical testimony supports a finding the decedent would, more likely than not, have lived but for the alleged outrageous medical treatment, a rational fact finder could conclude a superseding cause constituting the sole proximate cause intervened to cause Hernandez's death.

We have carefully reviewed the record in this case. We believe the testimony of Dr. Repsher does constitute substantial evidence from which the jury could determine the sole proximate cause of Hernandez's death was a

series of medical mistakes that culminated in the outrageous and grossly negligent removal of the trach tube and the resulting asphyxiation. Under the circumstances, the district court erred in refusing to receive the defendant's expert testimony and in refusing to consider the superseding cause defense.[3]

Having determined a new trial will be necessary, we do not reach the other issues raised by Garcia.

REVERSED AND REMANDED FOR NEW TRIAL.

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[3] By our decision, we do not take a position on the merits of the superseding cause defense. We decide only the defense is available to the defendant and should have been considered by the district court.