

IN THE COURT OF APPEALS OF IOWA

No. 0-521 / 90-304

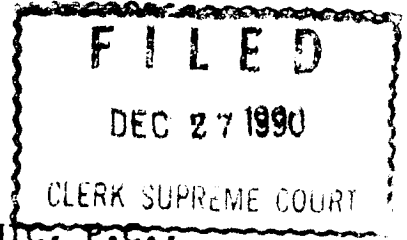
SHIRLEY A. COX and EUGENE S. COX,

Appellants,

vs.

CHARLES E. JONES, M.D., and JONES EYE CLINIC, P.C.,

Appellees.



Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Plaintiffs sued defendants for medical malpractice. The district court struck the plaintiffs' designation of expert witness as untimely under Iowa Code section 668.11 and then granted defendants' motion for summary judgment. Plaintiffs appeal. **REVERSED AND REMANDED.**

Kay E. Dull and William L. Miller, Sioux City, for appellants.

Michael W. Ellwanger of Kindig, Beebe, Rawlings, Nieland, Probasco & Killinger, Sioux City, for appellees.

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

OXBERGER, C.J.

Plaintiffs-appellants Shirley A. Cox and Eugene S. Cox appeal an order granting defendants-appellees', Charles E. Jones, M.D., and Jones Eye Clinic, P.C., summary judgment in plaintiffs' medical malpractice action against defendants and from an order striking Dr. Larry Zweben, M.D. as an expert witness. We reverse.

In November 1985, defendant Charles E. Jones removed a cataract from Shirley Cox's left eye and implanted an intra-ocular lens. On May 22, 1988, plaintiffs filed suit against defendants asserting that a subsequent loss of vision in Shirley's left eye from a retinal detachment resulted because of Dr. Jones' negligent follow-up care. The Coxes also claim the defendants failed to disclose to Shirley the potential risk of retinal detachment prior to receiving her consent for cataract surgery. On June 9, 1988, defendants answered plaintiffs' petition.

On June 6, 1989, defendants served interrogatories on plaintiffs. Plaintiffs filed answers to the interrogatories July 14, 1989. Plaintiffs' answers to interrogatories identified Shirley's treating physician as Dr. Larry Zweben.

On July 17, 1989, the defendants deposed Shirley, where she again identified Dr. Larry Zweben as her treating physician. Plaintiffs' counsel notified defendants' counsel by letter on December 21, 1989, that Dr. Larry

Zweben would be designated as plaintiffs' expert witness. The designation was made on January 9, 1990. Defendants then moved to strike the designation of Dr. Zweben as an expert witness because it was not timely filed pursuant to Iowa Code section 668.11. The trial court sustained defendants' motion to strike whereupon the defendants moved for summary judgment. The trial court also sustained this motion.

Plaintiffs argue the trial court abused its discretion in striking Zweben as an expert witness. Defendants argue the order striking the testimony is not before us because the plaintiffs' notice of appeal only stated an appeal of the order sustaining the motion for summary judgment.

A notice of appeal is jurisdictional. Lutz v. Iowa Swine Exports Corp., 300 N.W.2d 109, 110 (Iowa 1981). Substantial compliance with the notice requirements of Iowa Rule of Appellate Procedure 6(a) is sufficient as long as the notice does not confuse, mislead or prejudice the appellee. McBride v. City of Sioux City, 444 N.W.2d 85, 88 (Iowa 1989). We apply a liberal rule of construction. Miller v. Wellman Dynamics Corp., 419 N.W.2d 380, 382 (Iowa 1988). It is better for a case to be disposed of on its merits and not on a technicality. See Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 378 (Iowa 1972).

If the intent of appellant to appeal from a judgment may be inferred from the text of the notice and appellee has not been misled by the defect, the appeal will be entertained. Hawkeye, 199 N.W.2d at 378.

Defendants' reliance on Schrader v. Sioux City, 167 N.W.2d 669 (Iowa 1969) and Rosmann v. Lawler, 257 Iowa 1292, 136 N.W.2d 513 (1965), is misplaced. In Hawkeye, 199 N.W.2d at 378, the court held the rigid adherence to the rule enunciated in Rosmann, 257 Iowa at 1292, 136 N.W.2d at 513, and Schrader, 167 N.W.2d at 672, would serve no useful purpose.

A summary judgment dispositive of the entire case is a final adjudication from which appeal may be taken. Nuzum v. State, 300 N.W.2d 131, 133 (Iowa 1981). The trial court in its ruling on the motion for summary judgment relied in part on the absence of medical expert testimony occasioned by its earlier decision to strike their designation of experts. We find the notice of appeal sufficient to allow us to address this issue.

Next we address whether the trial court properly sustained defendants' motion to preclude designation of expert testimony. The testimony was stricken under Iowa Code section 668.11, which provides:

1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:

a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.

b. The defendant within ninety days of plaintiff's certification.

2. If a party fails to disclose an expert pursuant to subsection 1 or does not make an expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown.

3. This section does not apply to court appointed experts or to rebuttal experts called with the approval of the court.

Plaintiffs contend they substantially complied with this section. Plaintiffs assert they identified Dr. Larry Zweben as a witness, as a person treating Shirley because of her illness, as the person who would support their claim for permanency, and the person aware of defendants' negligence in timely filed answers to interrogatories. Plaintiffs also point out they attached copies of Zweben's medical records to their answers to those interrogatories.

Defendants contend the order striking Dr. Zweben as an expert was proper. They argue that while they knew about Zweben and his care of Shirley, they did not know Zweben was going to testify that defendant Jones breached the required standard of care.

We find the plaintiffs did comply with Iowa Code section 668.11 in answering the following interrogatories propounded by the defendants:

Interrogatory No. 9: State and set forth the full name and address of all persons known to you, your attorneys or agents who have any knowledge of the occurrences herein in question, or of the facts and circumstances surrounding the occurrences in

question, or of any other matters and things which are in any way relevant and material to any of the controverted issues herein to the extent that these are discoverable under law.

Answer: Dr. Larry Zweben
507 7th Street
Sioux City, IA 51101

Interrogatory No. 12: Identify all physicians or other health care practitioners who you claim treated you because of the injuries which you sustained as a result of the occurrence or occurrences referred to in your claim herein. State the name and address of each such physician or other health care practitioner and the dates of all appointments, office visits or treatments.

Answer: Dr. Larry Zweben
[address] (see Attached records)

Interrogatory No. 13: If you claim any permanent disability, infirmity or injury as the result of the occurrences complained of in your Petition, please describe these in detail and identify the person or persons, including experts, who will support your claim in this regard.

Answer: Loss of vision in left eye. Dr. Larry Zweben - treating physician - other experts may be identified.

Interrogatory No. 19: State specifically the name of any doctor or doctors who are aware of the relevant facts or who have stated to you, your agent or attorney, that the defendant was negligent in the particulars alleged or any other particular.

Answer: Dr. Larry Zweben, Sioux City, Iowa

A simple reading of the interrogatories would have told the defendants that Dr. Zweben of Sioux City had told the plaintiffs that defendant was negligent. The fact that the answer did not say he would be called as a witness should not have lulled the defendants to believe he would not be called as a witness. The defendants knew or should have

known if Dr. Zweben told the plaintiffs the defendants were negligent he would be called to testify.

We find significance in the fact that Dr. Zweben was Shirley's treating physician instead of a physician hired only in anticipation of litigation.

The supreme court recently addressed a similar situation involving a pretrial order prohibiting a party from designating and calling a medical expert for failure to comply with discovery deadlines. Kenny v. Whittle, No. 89-273, slip op. (Nov. 21, 1990). In Kenny, the court stated: "The pretrial order contemplated an expert hired to examine the [plaintiff] in anticipation of litigation. The expert here was not hired by the defendant for such reason. Rather, he had firsthand knowledge that would tend to rebut evidence the plaintiffs had offered." Id. at 6 (emphasis in original).

Dr. Zweben's testimony pertaining to his treatment of Shirley clearly would encompass his perceptions and opinions about the treatment she received following a recent surgery on the same eye he was called on to treat. We do not find Dr. Zweben's testimony falls within the category of expert testimony contemplated by Iowa Code section 668.11. Dr. Zweben did not acquire his knowledge about Shirley's case in contemplation of litigation, but rather in contemplation of treatment, long before the potential validity of litigation became apparent. As a

result of Dr. Zweben's treatment and opinions, the alleged negligence of Dr. Jones came to the plaintiffs' attention. We find the underlying principle enunciated in Kenny, applies equally well to this case.

As previously stated, it is better for a case to be disposed of on its merits and not on a technicality. See Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d at 378. We find the plaintiffs complied with necessary discovery deadlines because Iowa Code section 668.11 does not apply in the situation of a treating physician.

The trial court granted summary judgment on the basis the plaintiffs lacked the necessary expert testimony to present their case. In light of our decision that Dr. Zweben can testify with respect to his expert opinion about the cause of Shirley's detached retina we need not address the appellant's other issues at this time. We reverse and remand for a trial in accordance with this opinion.

REVERSED AND REMANDED.

Donielson, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

I.

I find the trial court did not abuse its discretion in sustaining the defendant's motion to preclude the designation of Larry Zweben as an expert witness under Iowa Code section 668.11. This section provides in relevant part:

1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:

a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.

b. The defendant within ninety days of plaintiff's certification.

2. If a party fails to disclose an expert pursuant to subsection 1 or does not make an expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown.

* * *

Defendant answered plaintiff's petition on June 9, 1988. Therefore, to comply with the dictates of the statute, plaintiffs were required to certify their experts by December 9, 1988. Plaintiffs filed nothing. The majority has ignored this fact and has found plaintiffs complied with the statute by virtue of answers they filed to defendants' interrogatories on July 14, 1989, over one year after defendants' answer, and over six months after

they were required by section 668.11 to certify their expert.

Furthermore, plaintiffs' answers, while they may have alerted defendants to the expert, did not certify he would be called or provide the purpose for calling him. Plaintiffs clearly did not comply with section 668.11. I would hold the trial court did not abuse its discretion in following the dictates of the statute in refusing to allow Dr. Zweben to testify.

II.

I also would affirm the trial court's decision that even without expert testimony, the record is not sufficient to support a finding Shirley did not make an informed consent to have the surgery and that Dr. Jones abandoned her. Doctors are held to such reasonable care and skill as is exercised by the ordinary physician of good standing under like circumstances. Clites v. State, 322 N.W.2d 917, 919 (Iowa App. 1982). The negligence of a specialist is based on the failure to apply the degree of skill, care, and learning possessed and experienced by specialists in similar circumstances. Perkins v. Walker, 406 N.W.2d 189, 191 (Iowa 1987).

A prima facie case of medical malpractice must normally consist of evidence which establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a causal relationship between the

violation and the harm complained of. Daball v. Hoden, 222 N.W.2d 727, 734 (Iowa 1974). Negligence of a physician can be established in several ways, including (1) through expert testimony, (2) through evidence showing the physician's lack of care is obvious enough to be within the comprehension of a person not trained as a physician, and (3) through evidence the physician injured a part of the body not involved in the treatment. Forsmark v. State, 349 N.W.2d 763, 768 (Iowa 1984); Buckroyd v. Buntten, 237 N.W.2d 808, 811-12 (Iowa 1976); McCleary v. Wertz, 222 N.W.2d 409, 412 (Iowa 1974); Perin v. Hayne, 210 N.W.2d 609, 613 (Iowa 1973); Sinkey v. Surgical Associates, 186 N.W.2d 658, 660 (Iowa 1971); Crosjean v. Spencer, 258 Iowa 685, 692, 140 N.W.2d 139, 143-44 (1966).

The question is whether plaintiffs have shown sufficient facts to support a finding Dr. Jones' lack of care is obvious enough to be within the comprehension of a person not trained as a physician. Plaintiffs contend Shirley has shown substantial evidence to support submission of the claim without expert testimony and the trial court erred in granting summary judgment. In resisting the motion for summary judgment, plaintiff Shirley Cox filed an affidavit that provided in applicable part:

On November 11, 1985, I was sent by Dr. Charles Jones, of the Jones Eye Clinic, P.C. to St. Luke's Regional Medical Center in Sioux City, Iowa, where he was to perform a cataract extraction with an implant of an intra-ocular lens

on my left eye. . . . I was prepared for the surgery and was asked to sign an informed consent form which, because of my loss of vision, I was not even able to read. It was never explained to me, at any time, the risks or complications involved with this type of surgery. The surgery was performed by Dr. Charles E. Jones. . . . In January of 1986 . . . I immediately called Dr. Jones' office to make an appointment, because I was experiencing headaches and seeing black spots.

I was seen at the Jones Eye Clinic, P.C. on February 17, 1986. I was not able to see Dr. Jones, but informed the person who examined me that I was seeing small black floaters in my left eye and that I was having trouble adjusting to my new glasses, and was also having headaches. They never even examined the retina at this time. When I was leaving the office, I ran into Dr. Jones and I indicated to him that I was having trouble and he commented "you can't hurt that eye." I was never told to return for any follow-up visit.

On December 1, 1986, I called the Jones Eye Clinic, P.C. to make an appointment to see Dr. Jones because I was experiencing loss of vision and still seeing "floaters" in my left eye. When I arrived, I was informed that my bill was not current and that Dr. Jones would not see me until I was able to pay \$50.00 on my bill. I . . . pleaded with them to let me see Dr. Jones. . . . I did not have the \$50.00

Because I was not given any help from Dr. Jones or the Jones Eye Clinic, P.C. . . . I immediately went to see another ophthalmologist, Dr. Larry Zweben. When Dr. Zweben examined my left eye retina, he found an apparent retinal detachment. He immediately referred me to the Retinal Clinic at University Hospitals in Iowa City, Iowa.

I . . . was scheduled for surgery The surgery was called a retinal reattachment for a chronic pseudophakic macula-off detachment of my left eye.

I was informed that despite the retinal detachment surgery, we did not recover any useful vision in the left eye.

Because of the negligent treatment I received from Dr. Charles E. Jones and the Jones Eye Clinic, P.C. I am almost completely blind in my left eye and I am only able to distinguish daylight from darkness in that eye.

I truly feel that the lack of care that was given me by Dr. Charles E. Jones, and the Jones Eye Clinic, P.C. was the direct cause for the damage and blindness of my left eye.

Assuming these facts to be true, the question is whether these facts support the other two theories urged by plaintiffs, namely, lack of informed consent and abandonment.

INFORMED CONSENT

Plaintiffs contend there is an issue about whether Shirley made an informed consent in agreeing to the surgery. Shirley stated in her affidavit she was unable to read the consent form she signed.

The decision to consent to a medical procedure is not a medical decision; rather it is a personal decision made by a patient with his or her doctor's advice. Pauscher v. Iowa Methodist Medical Center, 408 N.W.2d 355, 360 (Iowa 1987). In order to make this decision, a patient has the right to expect the doctor will provide him or her with the information necessary to make the decision. Id.

Absent extenuating circumstances, a patient has the right to exercise control over his or her own body by making an informed decision about submitting to a medical procedure. Pauscher, 408 N.W.2d at 358; Cowman v. Hornaday, 329 N.W.2d 422, 424-25 (Iowa 1983). Therefore, a doctor recommending a procedure generally has the duty to disclose to the patient all material risks involved in the procedure. Pauscher, 408 N.W.2d at 358. See also Cowman,

329 N.W.2d at 425. Not all risks need to be disclosed; only the material risks. Pauscher, 408 N.W.2d at 362. To recover on the basis of lack of informed consent, the patient has the burden to establish the following:

- (1) the existence of a material risk unknown to the patient;
- (2) A failure to disclose that risk on the part of the physician;
- (3) Disclosure of the risk would have led a reasonable patient in plaintiff's position to reject the medical procedure or choose a different course of treatment;
- (4) Injury.

Pauscher, 408 N.W.2d at 360. Additionally, the patient ordinarily will be required to present expert testimony relating to the nature of the risk and the likelihood of its occurrence, in order for the jury to determine, from the standpoint of the reasonable patient, whether the risk is in fact a material one. Id.

The evidence introduced only shows Shirley did not read or understand the consent form. There is no evidence of what the undisclosed risk was. There is no evidence disclosure of the risk would have lead a reasonable person in Shirley's position to reject the treatment or choose another. There is no evidence Shirley was injured by the failure to disclose. Viewing the evidence in the light most favorable to plaintiffs, I would determine they have failed to supply evidence to establish lack of informed consent. I would affirm the trial court on this issue.

ABANDONMENT

The next issue is whether there is evidence to support a finding Dr. Jones abandoned Shirley. There is evidence Shirley was turned away because of her inability to pay when she had complaints about her eyes, and after being turned away she saw another doctor and was hospitalized and had eye surgery.

A doctor who abandons a patient may be liable to the patient he or she abandons. See Estate of Smith v. Lerner, 387 N.W.2d 576, 579 (Iowa 1986). It is the duty of a physician taking charge of a case to follow the case and to give proper instructions to a patient as to his or her future acts and conduct. Barnes v. Bovenmyer, 255 Iowa 220, 227, 122 N.W.2d 312, 314 (1963). When a physician takes charge of a case his or her employment continues until ended by mutual consent, the doctor's dismissal or until the doctor's services are no longer needed. Surgical Consultants, P.C. v. Ball, 447 N.W.2d 678, 682 (Iowa App. 1989). A physician who leaves a patient in a critical stage of a disease without reason or sufficient notice to enable him or her to procure another physician is guilty of culpable dereliction of duty for which he or she is liable. McGulpin v. Bessmer, 241 Iowa 1119, 1127, 43 N.W.2d 121, 125 (1950).

While abandonment and lack of diligence in patient treatment are separate theories of medical malpractice,

there are times these theories may be undistinguishable and will overlap. Estate of Smith, 387 N.W.2d 576, 579 (Iowa 1986). What distinguishes abandonment from failure to meet the pertinent standard of care is that it requires an intent to terminate the professional relationship. Surgical Consultants, 447 N.W.2d at 682. To support recovery under the theory of abandonment, there must be evidence that the physician has terminated the relationship at a critical stage of the patient's treatment, that the termination was done without reason or sufficient notice to enable the patient to procure another physician, and that the patient is injured as a result thereof. See McGulpin, 241 Iowa at 1127, 43 N.W.2d at 125; Ball, 447 N.W.2d at 682.

Plaintiffs presented substantial evidence defendant Charles Jones refused to see her at a critical stage. However, plaintiffs introduced no evidence it was done without sufficient notice to allow Shirley to obtain another physician. In fact, Shirley's own affidavit states she immediately went to see another ophthalmologist, Dr. Zweben. Furthermore, plaintiffs have not presented substantial evidence that the damages Shirley sustained were the result of the defendants' failure to see her. I would affirm the trial court on all issues.