

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 28 1987

CLERK SUPREME COURT

BEVERLY R. LaRUE,

)

Plaintiff-Appellant,

)

Filed October 28, 1987

vs.

)

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G. PATRICK KEALEY, M.D.,

)

7-284
86-1521

Defendant-Appellee.

)

Appeal from the Iowa District Court for Muscatine County (No. C 2936
-983), Max R. Werling, Judge.

Plaintiff appeals from the denial of her motion for a new trial by the
trial court. **AFFIRMED.**

John C. Stevens of Lewis & Stevens, Muscatine, for plaintiff-appellant.

Ralph D. Sauer and Mark A. Woolums of Betty, Neuman & McMahon,
Davenport, for defendant-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ. Snell, J.,
takes no part.

DONIELSON, J.

The plaintiff brought this action for medical malpractice against the defendant on the ground that he negligently injured her right spinal accessory nerve and failed to properly diagnose her condition following the injury. The plaintiff appeals from the denial of her motion for a new trial by the trial court. The plaintiff claims the trial court erred in: (1) failing to fully and fairly instruct the jury on the issues which the jury must decide; (2) refusing to give plaintiff's requested Instruction 18; (3) refusing to give plaintiff's requested Instruction 20; and (4) failing to grant a new trial on the grounds one of the jurors had a prejudice against malpractice cases and failed to divulge the same. We affirm.

The plaintiff Beverly R. LaRue was referred to the defendant, Dr. G. Patrick Kealey, by her personal physician. Kealey performed a biopsy of an enlarged lymph node in the right posterior cervical triangle. LaRue experienced pain during the procedure and continued to have pain in her neck and shoulder. She was unable to raise her right arm. Kealey diagnosed her problem as bursitis. Three months after the surgery an examination showed LaRue had atrophy of the trapezius muscle. Later surgery revealed the plaintiff had a damaged right spinal accessory nerve.

LaRue then brought this medical malpractice action against Kealey, claiming that he negligently injured her right spinal accessory nerve, which caused paralysis of the trapezius muscle, and negligently failed to properly diagnose her condition following the injury. The jury returned a verdict for the defendant. LaRue motioned for a new trial, and that motion was denied. This appeal followed.

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

LaRue first points out that the trial court had a duty to fully and fairly instruct the jury on the issues which the jury must decide, and it is prejudicial error to fail to do so. LaRue argues that it was error for the trial court to refuse to give her requested Instruction 18, which stated that a patient is entitled to a thorough and careful examination. The trial court also refused to give plaintiff's requested Instruction 20, which stated that a failure to properly diagnose may be negligence. LaRue contends that these instructions were essential to instruct the jury on her theory of the case.

LaRue's requested Instruction 18 stated the following:

A patient is entitled to a thorough and careful examination such as his or her condition and attending circumstances will permit, with such diligence and methods of diagnosis as are usually approved and practiced by specialists under like circumstances.

The trial court overruled the objection and stated that the standard of care was set forth in the other instructions as given and felt that the requested instruction was similar to telling the jury to direct a verdict.

It is Kealey's position that Instructions 12 and 13 embodied the principles of law requested by LaRue in Instruction 18. Instruction 12 states:

In undertaking to treat a patient, a physician is bound to bring to the service of such patient and apply to the case that degree of knowledge, skill, care, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances and in similar localities; and a failure to meet such standard would constitute negligence on the part of the defendant.

Instruction 13 states in relevant part:

A physician or surgeon who holds himself out as a specialist is required to exercise that degree of skill and care ordinarily used by similar specialists in like circumstances, having regard to the existing state of knowledge in medicine and surgery, not merely the average skill and care of a general practitioner.

Under Iowa law, a trial court is not required to word jury instructions in any particular way. State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985); Knauss v. City of Des Moines, 357 N.W.2d 573, 577 (Iowa 1984). If an instruction

correctly states the applicable law, it will be deemed proper even though an alternative is available. Morrison, 368 N.W.2d at 175. The trial courts therefore generally have much discretion in framing jury instructions. United States v. Robinson, 774 F.2d 261, 272 (8th Cir. 1985). Where the trial court's instructions fairly cover the issues to be decided, and where the instructions, when viewed as a whole, sufficiently convey to the jury the appropriate legal principles applicable to the issues presented, we will find no reversible error. Bossuyt v. Osage Farmers National Bank, 360 N.W.2d 769, 774 (Iowa 1985).

As the Iowa Supreme Court has stated: "In determining whether there is an error in the trial court's failure to submit a requested instruction, we look to all relevant instructions. If the substance of the requested instruction is covered in instructions given it is not error to refuse the request made." Palleson v. Jewell Cooperative Elevator, 219 N.W.2d 8, 17 (Iowa 1974). When the matter is raised and a requested instruction is so covered, no error results from a failure to submit the issues in the form requested. Porter v. Iowa Power and Light Company, 217 N.W.2d 221, 235 (Iowa 1974); McCarthy v. J. P. Cullen & Son Corp., 199 N.W.2d 362, 367-68 (Iowa 1972).

In looking at the instructions as a whole, we find Instructions 12 and 13 adequately set forth the law on the subject. We find no error in the trial court's failure to submit LaRue's requested Instruction 18 to the jury.

LaRue's requested Instruction 20 stated the following:

Negligence on the part of the physician or surgeon may consist of the failure of the physician or surgeon to properly diagnose the plaintiff's condition.

If you find from all the facts and circumstances that the defendant failed to properly diagnose the plaintiff's condition following the surgical procedure your verdict on the question of liability for any resultant harm should be for the plaintiff.

The court believed the requested instruction was similar to a directed verdict and that the surgeon's responsibilities were contained in the other instructions, and hence did not allow the instruction.

We agree that the instructions as given by the court embodied all applicable issues, no error having occurred, taking into account the trial court's discretion in framing the jury instructions.

LaRue's final contention is that prior to jury selection, the foreman of the jury stated to another member of the jury panel that he did not believe in malpractice suits. This opinion was not disclosed during voir dire. LaRue argues that it was abuse of the trial court's discretion to deny a new trial once the jury foreman's bias was known.

The trial court indicated in its ruling on the motion for new trial:

Plaintiff attacks the verdict based upon the affidavit asserting that one of the jurors made the statement "I don't believe in malpractice suits" while seated in the courtroom and prior to being selected as a prospective juror and prior to jury voir dire. There is no showing that the juror said or did anything indicating prejudice during the jury deliberation process. It is entirely possible, once the juror hear the voir dire and learned that preconceived notions are not acceptable, that he reconsidered his position and changed his mind. In any event, there is no showing of adverse consequences to the Plaintiff; and that portion of the Motion is overruled.

The trial court has considerable discretion in determining whether to grant a new trial based on jury misconduct. Moore v. Vanderloo, 386 N.W.2d 108, 118 (Iowa 1986). Jury misconduct must be shown to influence the verdict in justifying the granting of a motion for new trial. Harris v. Deere & Co., 263 N.W.2d 727, 730 (Iowa 1978).

LaRue has not shown the statement made by the jury foreman in any way prejudiced the jury during its deliberations. We do not find there has been an abuse of discretion by the trial court in ruling against LaRue on her motion for new trial.

We therefore affirm the trial court in all respects

AFFIRMED