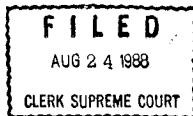


IN THE COURT OF APPEALS OF IOWA



ARTHUR N. DODGE,)

Plaintiff-Appellant,)

vs.)

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WILLIAM FOLLOWS, M.D., and)

WILLIAM FOLLOWS, M.D., P.C.,)

8-215
87-982

Defendants-Appellees.

Appeal from the Iowa District Court for Clay County
(No. 20843), James H. Andreasen, Judge.

Plaintiff appeals from a jury verdict for defendant
doctor in a medical malpractice case, challenging two jury
instructions. **AFFIRMED.**

David S. Wiggins and Frederick B. Anderson of LaMarca,
Marcucci, Wiggins & Anderson, P.C., West Des Moines, for
plaintiff-appellant.

Francis Fitzgibbons and Harold W. White of Fitzgibbons
Brothers, Estherville, for defendants-appellees.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

PER CURIAM

Plaintiff appeals from a jury verdict for defendant doctor in a medical malpractice case, challenging two jury instructions. We affirm.

During a surgical operation to relieve lower back pain, patient Arthur Dodge sustained nerve damage. As a result of the nerve damage, Dodge now has limited motion in one foot.

Dodge filed the present medical malpractice action against his doctor, alleging both negligent performance of the surgery and failure to disclose that nerve damage was a risk of the surgery. A jury returned a verdict in favor of the doctor, and Dodge has appealed from the resulting judgment.

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

Dodge contends the district court erred in an instruction on the doctor's duty to disclose risks of the surgery. During trial the doctor had suggested that he had no duty to specifically mention the risk of nerve damage because Dodge had undergone several previous lower back surgeries and was aware of the risk of nerve damage. Dodge contends the district court erroneously failed to instruct the jury that the doctor bore the burden of presenting evidence on this theory of defense. See Cowman v. Hornaday, 329 N.W.2d 422, 426 (Iowa 1983).

Instruction 11 charged the jury that Dodge had the burden of proving the doctor was negligent in failing to obtain an informed consent from Dodge as explained in Instruction 12. Instruction 12 is set out as follows:

A physician is required to obtain an informed consent from a patient prior to performing any procedure upon the patient. To obtain an informed consent, a physician must disclose to the patient all known material risks that would be significant to the patient's decision to consent to the procedure. In determining the disclosures to be made, the physician may consider the patient's age, intelligence, and prior medical history and experience.

The law presumes a person is competent to give an informed consent. To overcome this presumption, the Plaintiff must prove he was under sufficient sedation to make him incompetent to give an informed consent.

A violation of this duty is negligence. (Emphasis added.)

Specifically, Dodge contends the burden of proof should lie with the doctor with regard to the underlined sentence.

We are not persuaded by Dodge's argument that the trial court was in error. We do not find the given instructions to be incorrect statements of the law. Instruction 11 correctly states the patient has the burden of proving the elements of his claim. Pauscher v. Iowa Methodist Center, 408 N.W.2d 355, 360 (Iowa 1987). The doctor has the burden to prove any privilege not to disclose, such as in situations where the risk is either known to the patient or is so obvious as to justify a presumption on the part of the physician that the patient has knowledge of the risk. Id.

We do not agree that Instruction 12 is directing the jury to find Dodge has the burden to prove the physician's privilege not to disclose. Instruction 12 is merely informing the jury of the circumstances surrounding an informed consent. The challenged sentence is explaining only what information the physician may consider concerning the patient.

Dodge also contends the district court erred by instructing the jury that "a physician does not impliedly guarantee a good result." Dodge contends the district court erred by introducing guarantee language into the instructions, where the petition alleged only negligence and made no claim under a breach of warranty theory. Dodge relies on Bratton v. Bond, 408 N.W.2d 39, 44 (Iowa 1987), which held that "[i]n the future, however, trial courts should not give guaranty language in a medical negligence case instruction." The Bratton decision was filed June 17, 1987. Verdict in this case was rendered June 16, 1987. Thus, we do not reverse on this basis since the new change in law was not in effect at that time. Prior cases have held substantially similar instructions as given in the case at hand were not misleading, confusing, or prejudicial. See Moser v. Stallings, 387 N.W.2d 599, 605 (Iowa 1986).

Dodge also contends the trial court submitted elements of negligence to the jury which were not supported by the

evidence. After a review of the instructions as a whole, we find they embodied the correct statement of law.

Accordingly, we affirm the judgment.

AFFIRMED.