IN THE COURT OF APPEALS OF IOWA

No. 1-861 / 11-0335
Filed December 21, 2011

OLIVE M. MWANGI,
Plaintiff,

and

ALLENMATTHEW KIMATHI,
A Minor by His Next Friend
Olive M. Mwangi,
Plaintiff-Appellant,

vs.

KATHLEEN J. FOSTER-WENDEL
and MCFARLAND CLINIC, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Story County, William J. Pattinson, Judge.

The plaintiff appeals from an adverse verdict in this medical malpractice action. **AFFIRMED.**

Patrick G. Vickers of Vickers Law Office, Greene, for appellant.

Eric G. Hoch and Connie L. Diekema of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellees.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

The plaintiff, AllenMatthew Kimathi, appeals from an adverse verdict in this medical malpractice action, contending the district court erred in denying motions for directed verdict and for new trial. Because there was conflicting expert testimony as to whether the standard of care was breached, the district court did not err in sending the case to the jury or abuse its discretion in denying the motion for new trial. We affirm.

I. Background Facts and Proceedings.

Olive Mwangi gave birth to AllenMatthew Kimathi on June 26, 2001. On June 27, 2001, Dr. Kathleen Foster-Wendel performed a circumcision on Kimathi. When the Gomco clamp used during the procedure was removed, Dr. Foster-Wendel noted a circumferential laceration, which was repaired with six sutures. Excess foreskin remained after the circumcision.

At age seven, Kimathi underwent a revision of the circumcision to remove the excess foreskin and relieve phimosis.[1]

On April 28, 2009, Mwangi filed this action on behalf of herself and Kimathi alleging Dr. Foster-Wendel was negligent in performing the 2001 circumcision. Mwangi was dismissed as a plaintiff on May 14, 2010.[2] Kimathi's claim proceeded to jury trial on October 12, 2010.

Dr. Foster-Wendel testified she was a board-certified pediatrician and had performed hundreds of circumcisions. She stated "one to five in 200 children

[1] Phimosis is defined as "[a]n abnormal constriction of the foreskin that prevents it from being drawn back to uncover the glans." *American Heritage College Dictionary* 1045–46 (4th ed. 2004).

[2] Mwangi did not appeal from this dismissal.

who have been circumcised in the newborn period will need revisions." She explained how she performed the circumcision procedure using the Gomco clamp. With respect to Kimathi's circumcision, she stated:

> After the procedure I noticed there was a wrinkle in the skin on the shaft of the penis which is away from the circumcision site. And when I looked at it and I put a little tension on it, the skin came apart. And this was a very superficial laceration that didn't bleed. I mean it was so superficial that there was no blood at all, actually. He's darkly pigmented so the pink tissue is very obvious underneath and then—and that was the biggest thing that caught my attention at that point because I had never seen that happen and I had no idea why that had happened.
>
> Q. Do you believe that you were negligent in your performance of the circumcision? A. No. I believe I did the procedure the way I've done all my procedures, and to this day I don't know why that one did not turn out the way the others had.

Dr. Foster-Wendel stated she contacted an urologist and followed the recommendation that she repair the laceration.

When Foster-Wendel repeated that she "d[id] not know exactly how it happened," plaintiff's counsel asked:

> Q. Okay. Well you know that the reason that that shaft skin was lacerated is because it was above the plate of the clamp, right? A. Right.
>
> Q. And you know that if you check where you tighten up this clamp, you might find skin down there that does get pinched up in there and you need to do that and check that and make sure it hasn't happened, right. A. Right. I did that and I did not notice there was any skin that was there trapped.
>
> Q. Well there was a lot of excess shaft skin, I think you testified, correct? A. Yes. It was loose and redundant.
>
> Q. So there was more skin there that might be susceptible to being pulled up in that hole in the clamp, right? A. In retrospect, yes, I believe that's what happened.
>
> Q. And in retrospect isn't it true after you noticed the laceration and you said I don't know what happened here and you got to looking around, you noticed, boy, there's a lot of excess or loose skin on the shaft; it must have gone up there and pinched, correct? A. Correct.

> Q. You don't dispute that the revision that [Kimathi] had had alleviated the problems that he had with phimosis and infections, do you? A. Circumcision revision would definitely relieve those problems.

Later, the following exchange between plaintiff's counsel and Dr. Foster-Wendel occurred:

> Q. All right. When you talk about risks with respect to a circumcision, in any of your parents did you ever sit down with them and say, "Now, there's a risk that skin from your shaft will be pulled up through this hole in the clamp and that I might cut it; that there might be a laceration to the shaft of the penis"? A. I have never offered that in my pre-circumcision talk because I did not know it was even possible until after this happened.
>
> Q. You didn't know it was possible to do that? A. Never seen it before, as had the urologist I spoke to on the phone.
>
> Q. I understand you have never seen it before, but you didn't know it was a possibility? Is that your testimony? A. Yes. I mean when done properly, that shouldn't happen.
>
> Q. I'm sorry, could you repeat that? A. I said when the procedure is used correctly and you're doing it correctly, that shouldn't happen.

Dr. Foster-Wendel also testified, "I believe that you can go into a procedure, you do it by the book, and complications can still happen."

Plaintiff's expert, Dr. Max Mintz, testified he is a pediatrician and has performed over 9200 circumcisions. He stated the risks and complications associated with circumcision include "injury to the glans"; "not taking off enough foreskin or not taking off the complete foreskin"; "residual phimosis"; bleeding; and infection. He stated studies indicated that in thirty to thirty-five percent of circumcisions, there had been a failure to remove "all or almost all" of the foreskin. Dr. Mintz opined that based on his examination of the medical records, and his knowledge, training, and experience, "there was a breach in the standard of care that has to do with the amount of foreskin that was removed and the

pressure downward which caused the circumferential laceration." Dr. Mintz was asked, if thirty to thirty-five percent of circumcisions result in foreskin remaining, "why is it that in this case you believe that the foreskin that remained was—constituted a breach of the standard of care?" He responded, "Well, it's a question of amount." He stated that "for enough foreskin to completely cover the glans is a very rare occasion."

The defense offered the testimony of two expert witnesses. Dr. Christopher Cooper, a board-certified pediatric urologist, testified Dr. Foster-Wendel did not breach the standard of care in performing Kimathi's circumcision. He testified that a laceration at the time of a circumcision is a complication, not a breach of the standard of care. He stated redundant foreskin and injury to the surrounding structures are potential complications in all circumcisions. Dr. Cooper further testified that the amount of foreskin that remains after a circumcision is variable and a revision circumcision occurs twenty-five to thirty percent of the time. He stated Dr. Foster-Wendel's procedure was technically correct, yet resulted in an unexpected outcome, which was not a breach of the standard of care. On cross-examination, Dr. Cooper acknowledged he had never seen a laceration such as in this case, nor had he seen another circumcision that resulted in as much foreskin remaining.

Dr. Richard Mersch, a board-certified pediatrician, testified that he had reviewed the medical records in this case and opined that Dr. Foster-Wendel's technique was appropriate. He opined the redundant foreskin occurred because the skin did not get fully pulled into the clamp. He testified it was not a breach of the standard of care because "that's a very common side effect of doing the

procedure." He stated that the way the instrument is set up, "you just cannot see" the bottom edge of the tissue that's in the clamp; "it's a judgment and feel" how much foreskin to pull up through the clamp.

With respect to the laceration, Dr. Mersch testified it was not caused by a breach of the standard of care:

> My standard of care would be a harm coming to the penis that would affect urination, erection or ejaculation and without any intervention the penis would not be able to achieve those three events. And so in this case none of those three would have been affected by that minor laceration.

Dr. Mersch responded to the question, "But he looks different, do you think?"

> I don't know that I could say that for sure. From where I think the scar is, I've seen hyper-pigmentation on the penile shaft in the past. When I first saw the pictures, I wasn't sure if that was the laceration site or just the end of the coronal sulcas.

Plaintiff vigorously cross-examined Dr. Mersch. Part of that cross-examination was as follows:

> Q. Okay. Let's just say 5000. And you're certain you've seen 5000 circumcised penises, is that right? A. Correct.
>
> Q. All right. Out of all those penises, how many have you seen with more foreskin remaining than [Kimathi's]? A. One.
>
> Q. One? A. One.
>
> Q. So if the goal of this circumcision is to remove 100 percent of the foreskin, of the 5000 circumcised penises that you've seen, [Kimathi's] circumcision with respect to achievement of that goal would rank 4999 out of 5000, correct? A. Correct.
>
> Q. And isn't it true that when you sat down and you analyzed the—whether or not the standard of care had been met with respect to whether enough foreskin had been removed, your standard is so long as there's some foreskin removed, the standard of care is met? A. Correct.
>
> Q. So if you are going to provide expert testimony in a case like this and you get all these records and you see that one percent of the foreskin was removed, in your opinion the standard of care has been met? A. Correct.
>
> Q. And you talked about your standard of care being do no harm, correct? A. Correct.

Q. Is a laceration to the shaft of a child's penis harmful?
A. If it interferes with urination, erection or ejaculation, yes.

Two nurses testified that Dr. Foster-Wendel was consistent in her circumcision procedures using the Gomco clamp, was always careful, and always checks the tissue around the clamp before securing the apparatus.

Both parties moved for a directed verdict at the close of the evidence. The district court denied the motions stating, "at this point I think we have legitimate jury questions on all aspects of the case."

The plaintiff had no objections to the proposed jury instructions, but did request an instruction as to the timing of the plaintiff's petition and why it was not filed at a later date, which was denied.

The jury was instructed:

> Instruction No. 10
>
> You have heard testimony from witnesses who were described as experts. Persons who have become experts in a particular field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.
>
> Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons for the opinion, and all the other evidence in the case.
>
> . . . .
>
> Instruction No. 12
>
> 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 duty is negligence.
>
> Instruction No. 13
>
> AllenMatthew is entitled to recover damages in this case only if he has proven all three of the following numbered propositions:

> 1. That Dr. Foster-Wendel was negligent in connection with the medical services she provided AllenMatthew with respect to his circumcision.
> 2. That Dr. Foster-Wendel's negligence, if any, caused AllenMatthew's damages.
> 3. The amount of AllenMatthew's damages.
> If AllenMatthew failed to prove propositions 1, 2 and 3 above, he is not entitled to damages. If AllenMatthew did prove all of these propositions, he is entitled to damages in some amount.

The jury answered the special verdict No. 1 ("Was the Defendant, Kathleen J. Foster-Wendel, negligent?") in the negative. The court indicated dismissal would be entered unless post-trial motions were timely filed.

The plaintiff filed a "motion for judgment notwithstanding the verdict or alternatively for new trial," which was denied. He now appeals, contending the court erred in denying his motion for directed verdict, or alternatively to grant a new trial.

II. The District Court Did Not Err in Denying the Motions for Directed Verdict and Judgment Notwithstanding the Verdict.

A. Scope and Standards of Review. We review a district court's ruling on a motion for directed verdict for correction of errors at law. *Pavone v. Kirke*, 801 N.W.2d 477, 487 (Iowa 2011).

> A directed verdict is required only if there was no substantial evidence to support the elements of the plaintiff's claim. Evidence is substantial when reasonable minds would accept the evidence as adequate to reach the same findings. Where reasonable minds could differ on an issue, directed verdict is improper and the case must go to the jury. Thus, our role is to determine whether the trial court correctly determined if there was substantial evidence to submit the issue to the jury. In doing so, we must view the evidence in the light most favorable to the nonmoving party and take into consideration all reasonable inferences that could be fairly made by the jury.
> Our review is limited to those grounds raised in the moving party's motion for a directed verdict. Error must be raised with

> some specificity in a directed verdict motion. Furthermore, a motion for judgment notwithstanding the verdict must stand on grounds raised in the directed verdict motion. Thus, on appeal from such judgment, our review is limited to those grounds raised in the directed verdict motion.

Id. (internal quotation marks and citations omitted).

B. Discussion. To establish negligence in a medical malpractice case, the plaintiff must show (1) the standard of care for that profession, (2) the deviation from that standard, and (3) the causal relationship between the deviation and the injury. *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992). Only an expert can "testify and establish the standard of care" required by physicians in that particular school of medicine. *Id.* (citations omitted).

Plaintiff contends he met his burden to show that Dr. Foster-Wendel failed to meet the standard of care and points to the testimony of Dr. Mintz, which he characterizes as including "how the laceration occurred, what precautions were needed to prevent its occurrence, and that the failure to take those precautions constituted a breach of the standard of care." He also points to Dr. Foster-Wendel's own testimony, which he characterizes as having been "that proper use of the Gomco clamp in performing the circumcision could not produce a laceration such as that suffered" by Kimathi.

The plaintiff's motions for directed verdict, judgment notwithstanding the verdict, and new trial are all based upon his assertion that "plaintiff's evidence was sufficient legally and factually to support recovery, it was not contradicted, and the Defendants' tendered defense was factually and legally without support."

He contends the defendants' experts' opinions offer no support to the defense, claiming Dr. Cooper "openly admitted that he did not know what Dr. Foster-Wendel did that resulted in the laceration . . . but whatever it was that she had done, he was certain that she met the standard of care." Plaintiff contends Dr. Mersch's standard of care "was not consistent with the law in this case or the instruction given to the jurors." We reject the plaintiff's characterization of the testimony and resulting contention that his evidence was not contradicted.

As noted by the trial court, "the jury was presented with ostensibly credible but diametrically-opposed opinion evidence." Despite her statement that "when the procedure is used correctly and you're doing it correctly, that [laceration] shouldn't happen,"[3] Dr. Foster-Wendel testified she did not believe she was negligent in her performance of the circumcision. Rather, she testified she performed the procedure with care, as was her usual practice. Angela Carswel and Cynthia Ringgenberg, both nurses familiar with Dr. Foster-Wendel's practices, testified as to her professionalism and that she always checked the patient's tissue before clamping the apparatus. The defendants' experts testified a physician could perform a circumcision technically correctly and still have a complication. Dr. Mintz's testimony recognizing the risks and complications associated with circumcision did not negate the defendants' evidence. Drs. Cooper and Mersch found no breach of standard of care.[4] Although the

[3] Plaintiff paraphrases the doctor's testimony as "proper use of the Gomco clamp in performing the circumcision *could not* produce a laceration such as that suffered by [plaintiff]." (Emphasis added.) "Could not" and "should not" are not synonymous.

[4] Plaintiff also criticizes Dr. Mersch's testimony that a breach of care would be found in "harm coming to the penis that would affect urination, erection, or ejaculation" as "contrary to the law in this case or the instruction given to the jury." However, he provides no support for his claim. The instruction given states that failure to "use the

plaintiff contends the defendants' experts were not credible, it is peculiarly the responsibility of the fact finder to assess the credibility of witnesses. *See Top of Iowa Coop. v. Sime Farms, Inc.*, 608 N.W.2d 454, 468 (Iowa 2000).

We agree with the district court's ruling:

> [T]he very fact that the jury was presented with ostensibly credible but diametrically-opposed opinion evidence precludes me from granting either of Plaintiff's motions.
>
> . . . .
>
> Plaintiff Kimathi went to great lengths in his motion for judgment [notwithstanding] to impugn the Defendants' experts' credibility, and especially that of Dr. Cooper. Plaintiff apparently hoped that, by doing so, he could convince me that no reasonable juror would have or should have accepted the Defendants' version of the facts.
>
> Be that as it may, my obligation to view the Defendants' experts' testimony in the most favorable light to Dr. Foster-Wendel operated so as to prevent me from accepting the Plaintiff's proposition.
>
> It goes without saying that the jury's role in every case includes the responsibility to address and assess the credibility of all witnesses. *See Estate of Hagedorn*, 690 N.W.2d at 88.
>
> The jury's members in the instant case were advised by Instruction No. 6 as to how they should approach that responsibility, and they were also told that they could "consider expert testimony just like any other testimony . . . accept or reject it . . . [and] give it as much weight" as they thought it deserved. *See* Instr. No. 10.
>
> As it turned out, the jury obviously found the Defendants' expert witnesses to be more credible in this situation than that of the Plaintiff and ultimately rendered a verdict that I cannot now set aside. "If the evidence adduced at trial is conflicting on a material point or if . . . a conclusion is dependent upon the weight the fact finder gives to the evidence, a judge may not substitute his or her conclusion for that of the jury merely because he or she would have reached a different result." [citations omitted]
>
> Simply put, a jury question was most definitely presented with respect to Dr. Foster-Wendel's professional performance in this case, and because of that the Plaintiff's motion for judgment notwithstanding the verdict must be denied.

---

degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances" constitutes negligence.

The case was properly submitted to the jury because reasonable minds could differ on the issues presented when viewing the facts in a light most favorable to the nonmoving party. *See Royal Indem. Co., v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 849 (Iowa 2010). The district court did not err in denying the plaintiff's motion for directed verdict or judgment notwithstanding the verdict.

III. The District Court Did Not Err or Abuse Its Discretion in Denying the Motion for New Trial.

In the alternative, the plaintiff moved for a new trial contending the verdict was contrary to the evidence and failed to administer substantial justice. The plaintiff argued with respect to the laceration that "[a]n eminent physician who has performed nearly 10,000 circumcisions testified the defendant failed to meet the standard of care"; one of the defendant's experts "testified that such a result could be avoided if one is careful in the placement of the clamp and makes a thorough examination of the underside of the clamp before proceeding"; and Dr. Foster-Wendel "virtually admitted that she failed to meet the standard of care." Plaintiff also argues that "[b]etween the four physicians who testified they have seen more than 20,000 circumcised penises" only one "resulted in a laceration to the shaft of the penis." As to the excess foreskin, plaintiff notes that Dr. Mintz testified that he had only seen one circumcised penis with more foreskin remaining than that of the plaintiff.

A. Scope and Standards of Review. "The scope of our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion." *Channon v. United Parcel Serv., Inc*., 629 N.W.2d 835, 859 (Iowa 2001). A claim that the evidence is not sufficient to support the verdict presents

a legal question, which we review for correction of errors at law. *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

A claim that the verdict fails to effect substantial justice, is reviewed for an abuse of discretion. *Id.* at 87–88; *see also Pavone*, 801 N.W.2d at 496. ("To the extent the motion [for new trial] is based on a discretionary ground, we review it for an abuse of discretion."). To show an abuse of discretion, the complaining party must show the court exercised its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Estate of Hagedorn*, 690 N.W.2d at 88.

B. Discussion. The crux of the plaintiff's argument is that "no reasonable mind could conclude Dr. Foster-Wendel was *not* negligent."[5] Unfortunately for plaintiff, expert testimony was presented suggesting otherwise. The jury accepted that expert testimony and we cannot say as a matter of law that finding is in error. Consequently, the district court did not err in denying the motion for new trial.

Nor do we find any basis to conclude the trial court acted unreasonably or on an untenable basis in refusing to interfere with the jury's decision. The reasonableness of Dr. Foster-Wendel's actions was the proper subject of expert testimony and ultimately was for the jury's assessment. *See Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990) (stating jury should ordinarily be allowed to decide disputed fact questions). Under these circumstances, it was not the trial court's role to unilaterally determine the standard of care owed by the defendants to the plaintiff. Therefore, we find no abuse of discretion in the court's decision to

[5] The plaintiff did not request a res ipsa loquitur instruction. *See generally Sammons v. Smith*, 353 N.W.2d 380 (Iowa 1984).

deny a new trial. *See Kautman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 147 (Iowa 1977) (finding no abuse of discretion trial court's failure to grant new trial where there was conflicting medical testimony on primary issue).

We affirm.

AFFIRMED.