IN THE COURT OF APPEALS OF IOWA

No. 2-136 / 11-0872
Filed June 27, 2012

NICOLLE DAVIS, Individually and on behalf of her children, and ANDREW DAVIS,
Plaintiffs-Appellants,

vs.

JAMES F. PAUL, D.D.S., M.S., M.D., and PLASTIC SURGERY CENTER, P.C.
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

Nicolle Davis appeals district court rulings denying her motions for directed verdict, judgment notwithstanding the verdict, and a new trial which alleged insufficient evidence, cumulative evidence, and an improper jury instruction. **AFFIRMED.**

Pressley Henningsen and Emily Anderson of Riccolo & Semelroth, P.C., Cedar Rapids, for appellants.

Connie Alt and Nancy J. Penner of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Nicolle Davis appeals following the jury verdict finding Dr. James F. Paul not negligent in cutting her spinal accessory nerve during surgery to remove a lymph node. Davis challenges the district court's denial of her motions for directed verdict, judgment notwithstanding the verdict, and for a new trial arguing: (1) the jury's verdict in favor of Dr. Paul was not supported by sufficient evidence and was contrary to the law, (2) the district abused its discretion by allowing the defendant to call two expert witnesses to give testimony regarding the standard of care, and (3) the district court erred when it instructed the jury that a physician or surgeon is not a guarantor of favorable results.

We affirm the ruling of the district court for three reasons: first, the record contained sufficient evidence that Dr. Paul satisfied the standard of care to send the question of negligence to the jury; second, the testimony of Dr. Paul's two expert witnesses was not cumulative because each expert testified as to the standard of care in their separate medical specialties; and third, Davis did not preserve error on the use of the word "guarantor" in Jury Instruction No. 17 because she did not object on that ground before the instruction went to the jury.

I. Background Facts and Proceedings

In January 2006, Davis underwent a routine physical by her family physician, Dr. Kopp. The examination revealed a swollen lymph node in the posterior triangle of her neck on the right side.[1] Dr. Kopp instructed her to return to have the lymph node checked in six months. When Davis returned seven

[1] The posterior triangle of the neck is the area bordered by the clavicle (collarbone) and the sterna mastoid and trapezius muscles.

months later, the lymph node remained swollen. Dr. Kopp suggested further evaluation, sent Davis for an ultrasound, and, after reviewing the ultrasound, recommended Davis see a surgeon to discuss having the lymph node removed.

Davis consulted with Dr. James F. Paul. Dr. Paul practices as a plastic and reconstructive surgeon in Davenport, Iowa, and has training and education in dentistry, oral surgery, general surgery, craniofacial surgery, and pediatric plastic surgery. After examining Davis, Dr. Paul gave her three options for treatment of the swollen lymph node: aspiration with a needle, observation for six months, or surgical removal. Davis chose to have Dr. Paul remove the lymph node. Before operating, Dr. Paul discussed possible risks of the surgery with Davis and provided her with the standard American Society of Plastic Surgeons informed consent form for skin lesion/skin tumor removal, which lists a potential for injury to deeper structures including nerves.[2]

Dr. Paul removed Davis's lymph node on August 8, 2006, with no apparent complications. Davis subsequently began experiencing pain in her neck. During a follow-up appointment with Dr. Paul, Davis mentioned her pain. The doctor thought her pain related to a preexisting back condition she suffered. After continued pain and problems with Davis's right arm strength and range of motion, her physical therapist referred Davis to a neurologist, who ordered two electromyograms (EMGs), tests which evaluate and record electrical activity produced by skeletal muscles. The second test revealed an injury to Davis's spinal accessory nerve, which controls the trapezius muscle. It is located in the posterior triangle of the neck, in close proximity to the lymph nodes in that area.

[2] Davis does not raise an issue involving informed consent.

But the position of the spinal accessory nerve is highly variable and its path can be unpredictable.

The neurologist referred Davis to the Mayo Clinic, where neurosurgeon Dr. Robert Spinner performed surgery on July 2, 2007, to repair her spinal accessory nerve. During surgery, he found the nerve had been traumatically severed and repaired it with a graft from a nerve in Davis's leg. Due to the extent of the injury to the spinal accessory nerve, Dr. Spinner predicts Davis will not fully recover her right arm strength and range of motion.

Davis, her husband, and her children filed a timely medical malpractice claim against Dr. Paul and his practice, Plastic Surgery Center, P.C., on August 5, 2008. Davis claims Dr. Paul cut through her spinal accessory nerve without identifying it and without extenuating circumstances during surgery to remove her swollen lymph node. The district court held a jury trial from April 4–8, 2011. Before the presentation of evidence, Davis filed a motion in limine requesting, among other things, the district court limit Dr. Paul to calling one expert witness, alleging the testimony of more than one expert would be cumulative and prejudicial for the jury. Because both plastic surgeons and otolaryngologists—commonly referred to as E.N.T. (ears, nose, and throat) surgeons—remove lymph nodes, Dr. Paul planned to call two standard-of-care expert witnesses: Dr. Scott Graham, an E.N.T. surgeon, and Dr. Loren Schechter, a plastic surgeon. Davis planned to call one expert witness to testify about standard of care, Dr. Robert Stern, an E.N.T. surgeon. The district court denied Davis's motion in limine, and all three experts testified at trial.

During his testimony Dr. Paul admitted he transected the spinal accessory nerve during Davis's surgery, but claimed his performance did not breach the standard of care. The jury returned a verdict in favor of Dr. Paul, finding him not negligent.

Davis sought a directed verdict at the close of the evidence and filed a timely motion for judgment notwithstanding the verdict and motion for a new trial. Davis argued she was entitled to a judgment notwithstanding verdict because the jury's verdict was not supported by the evidence. Alternatively, Davis argued she was entitled to a new trial because: (1) the jury's verdict was not sustained by sufficient evidence and was contrary to law, (2) she did not receive a fair trial because the court permitted Dr. Paul to call two experts offering cumulative evidence regarding the standard of care and unduly emphasized Dr. Paul's theory of the case, and (3) Instruction No. 17 improperly introduced contract language into a negligence claim. The district court denied these motions.

Davis filed a timely notice of appeal renewing the same three issues. Davis asks us to remand the case to the district court to enter judgment in her favor on the issue of liability and order a new trial on the issue of damages. In the alternative Davis asks us to remand the case for a new trial with instructions to limit Dr. Paul's expert testimony to one witness regarding the standard of care and to refrain from giving the "guarantor" instruction. The parties agree Davis preserved error by moving for a directed verdict and filing post-trial motions for the first two issues, but Dr. Paul contests Davis's preservation of error relating to Instruction No. 17.

II. Standards of Review

We review rulings on motions for judgments notwithstanding the verdict and new trials for legal error. *Easton v. Howard*, 751 N.W.2d 1, 4–5 (Iowa 2008); *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). "In doing so we 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." *Easton*, 751 N.W.2d at 4. "When reasonable minds would accept the evidence as adequate to reach the same findings, evidence is substantial." *Id.* "Where reasonable minds could differ on an issue, directed verdict is improper and the case must go to the jury." *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009). "On appeal our role is to determine whether the trial court correctly determined there was sufficient evidence to submit the issue to the jury." *Easton*, 751 N.W.2d at 5. In reviewing a denial of a motion for a new trial based on an insufficiency of evidence claim, we also examine the district court's decision for the correction of errors at law.

On the issue of the number of expert witnesses, we review admission of relevant evidence for an abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). District courts are allowed "broad discretion concerning the admissibility of evidence. That discretion extends, of course, to the balancing of probative value versus prejudice under Iowa Rule of Evidence 5.403."[3] *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 149 (Iowa 2002).

[3] Iowa Rule of Evidence 5.403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Evidence is not inadmissible simply because it is cumulative, and the admission of such evidence rests largely in the discretion of the trial court." *State v. Maxwell*, 222 N.W.2d 432, 435 (Iowa 1974). The discretion to limit cumulative evidence is based on concerns about undue prejudice and delay as well as timeliness of court proceedings. *See* Iowa R. Evid. 5.403. "Reversal [is] warranted only if the trial court clearly abused its discretion to the prejudice of the complaining party." *Horak*, 648 N.W.2d at 149.

We review claims of improper jury instructions for legal error. *DeBoom*, 772 N.W.2d at 5. Trial court error in giving instructions does not warrant reversal unless prejudice results. *Id.* Prejudicial error occurs when the district court "materially misstates the law." *Id.* "[W]e consider the instructions in their entirety and will not reverse if the instructions have not misled the jury." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265 (Iowa 2000).

III. Analysis

A. Did the district court properly allow the jury to consider Dr. Paul's liability?

Davis argues the district court should have granted her post-trial motions based on the wording of marshalling Instruction No. 12.[4] That instruction

---

[4] Jury Instruction No.12 reads:

> Plaintiff claims that Dr. Paul was at fault. In order to prevail on this claim, the plaintiffs must prove all of the following propositions:
>
> 1. Dr. Paul was negligent by failing to meet the standard of care in the following particular:
>
>   a. In cutting through Nicolle Davis's spinal accessory nerve without identifying the spinal accessory nerve or without extenuating circumstances.
>
> 2. Dr. Paul's negligence, if any, was a cause of the plaintiffs' damages.

directed the jury to find Dr. Paul negligent if he failed to meet the standard of care by cutting through her spinal accessory nerve without identifying it or without extenuating circumstances. Davis argues because Dr. Paul admitted in his testimony to cutting the nerve without indentifying it and without extenuating circumstances, the evidence could support only a jury finding of negligence.[5] In response, Dr. Paul argues the district court properly denied the motions because showing he severed Davis's spinal accessory nerve during surgery did not alone prove he was negligent. He explains that the jurors had to first decide whether he violated the standard of care. We find Davis's argument misconstrues the necessary elements of negligence embodied in Instruction No. 12.[6]

To establish negligence in a medical malpractice case, the plaintiff must show the applicable standard of care, a violation of that standard, and a causal relationship between the violation and the injury. *Kennis v. Mercy Hosp. Med.*

> 3. The amount of damage.
>
> If the plaintiffs have failed to prove any of these propositions, the plaintiffs are not entitled to damages. If the plaintiffs have proved all of these propositions, the plaintiffs are entitled to damages from the defendants in some amount.

[5] Davis does not argue the doctrine of res ipsa loquitur should apply.

[6] Jury Instruction No. 12 follows the language of Iowa Civil Jury Instruction 700.1 for negligence claims, which reads:

> Essentials For Recovery. The plaintiff must prove all of the following propositions:
>
> 1. The defendant was negligent in one or more of the following ways:
>
> a.
> b.
> c.
>
> 2. The negligence was a proximate cause of damage to the plaintiff.
>
> 3. The amount of damage
>
> If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

Ctr., 491 N.W.2d 161, 165 (Iowa 1992). Contrary to Davis's assertion that subsection 1 of Instruction No. 12 defined Dr. Paul's admitted cutting of the nerve without identifying it or without extenuating circumstances as a failure to meet the standard of care and negligent, Instruction No. 12 instead correctly asked the jurors to determine *whether* Dr. Paul's specific act of cutting Davis's nerve without identifying it or without extenuating circumstances failed the standard of care and therefore constituted negligence.

The jury instructions in this case, when read together, correctly stated the law. *See Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 536 (Iowa 1999) ("Jury instructions are to be read and considered as a whole, not piecemeal or in artificial isolation."). Instruction Nos. 13 and 14 defined negligence as when a surgeon or specialist violates "the degree of skill, care, and learning ordinarily possessed and exercised by" surgeons and/or specialists "in similar circumstances." Therefore, for the jury to find Dr. Paul at fault, it was required to determine that his cutting of Davis's spinal accessory nerve was negligent because it violated this standard of care. Instruction No. 15 directed the jury to determine the standard of care and whether Dr. Paul failed to meet that standard based on only the opinions of the physicians testifying during trial. When there is disagreement about the standard of care between expert witnesses, it is not the district "court's role to unilaterally determine the standard of care owed by the defendants to the plaintiffs." *Hagedorn*, 690 N.W.2d at 88. Evaluating the persuasiveness and weight of conflicting testimony and choosing which expert to believe are determinations reserved for the jury. *See id.* The three physicians

testifying to the standard of care disagreed about whether Dr. Paul's cutting of the nerve violated the standard of care for Davis's surgery.

The jury received proper instructions defining negligence as a breach of the standard of care and the expert testimony offered a factual dispute whether Dr. Paul's act of cutting the nerve—without identifying it and in the absence of extenuating circumstances—constituted a breach of the standard of care. We find the district court correctly submitted the question of Dr. Paul's negligence to the jury.

B. Did the district court err when it allowed Dr. Paul to call two expert witnesses to give testimony regarding the standard of care?

Davis argues the district court should have limited Dr. Paul to one expert witness because the testimony of Dr. Schechter and Dr. Graham, considered together, was cumulative. Davis claims that because she called only one expert witness to testify regarding standard of care, allowing Dr. Paul two expert witnesses was unduly prejudicial. We do not find that the defense experts provided cumulative evidence, especially considering they offered perspectives from two different specialties. Dr. Paul called an expert witness from his own field, plastic surgery, and an E.N.T. surgeon, the specialty of Davis's witness.

As exhibited in their testimony, even though both specialties perform lymph node removal from the posterior triangle of the neck, plastic surgeons and E.N.T. surgeons can differ in how they perform the surgery, including the techniques they employ, the instruments and tools they use, the way they position the patient's body, and their choice of anesthesia. For instance, Dr.

Schechter testified he places patients on their sides during lymph node removal surgery, similar to the position Dr. Paul placed Davis in during her surgery. Dr Graham prefers patients positioned somewhere between their back and side. Dr. Graham also prefers to use general anesthesia for lymph node removal, as does Dr. Stern. Dr. Schechter often uses local anesthesia, as Dr. Paul did during Davis's procedure. In addition, Dr. Graham routinely uses a nerve stimulator during surgery but not loupe magnification, while Dr. Schechter does the opposite, like Dr. Paul. These differences in specialty practices are particularly important because the court instructed the jury to determine the standard of care based solely on the testimony of the expert witnesses at trial. Courts from other jurisdictions have reached similar conclusions on the admissibility of testimony from multiple experts representing different fields. *See, e.g., Dahan v. UHS of Bethesda, Inc.*, 692 N.E.2d 1303, 1311 (Ill. App. 1998) (holding trial court correctly allowed expert testimony on internist's standard of care as not cumulative to testimony of neurologist and hematologist); *Knotts ex rel. Knotts v. Hassell*, 659 So.2d 886, 892 (Miss. 1995) (rejecting claim that pediatric neurologist's testimony was cumulative to neonatologist's opinion); *Bergamaschi v. Gargano*, 742 N.Y.S.2d 322, 323 (N.Y. App. Div. 2002) (reversing for abuse of discretion where trial court refused to allow defendant to call both orthopedic surgeon and neurologist); *Hooper v. Chittaluru*, 222 S.W.3d 103, 110 (Tex. Ct. App. 2006) (finding expert testimony of cardiologist was not cumulative to expert testimony of internist in medical malpractice action).

In addition, the testimony of Dr. Paul's second witness, Dr. Graham, lasted less than two hours. Assuming the evidence was cumulative, his relatively brief participation did not unduly burden the jury or waste time to the degree the district court abused its discretion. Because the record shows a divergence between the information provided by Dr. Schechter and Dr. Graham, we affirm the district court's finding that while the doctors' testimony may have been similar, both provided distinct viewpoints to the jury, and therefore, their testimony was not cumulative.

C. Did the district court err when it instructed the jury that a physician or surgeon is not a guarantor of favorable results?

In her third claim Davis alleges the district court erred in giving the jury the following instruction: "A physician or surgeon, in treating a patient, is not a guarantor of favorable results." Dr. Paul initially offered this instruction with the word "insurer" instead of "guarantor." The court amended the instruction to use the word "guarantor" at Davis's request.

In outlining her appellate argument, Davis asserts the district court erred in giving Instruction No. 17 because: (1) the instruction confused the jury by introducing contract language into the case, (2) the instruction unduly emphasized Dr. Paul's theory of the case, and (3) the instruction did not apply because Davis never argued Dr. Paul guaranteed her anything. But Davis only expands on the merits of the first argument concerning the term "guarantor." *See Midwest Automotive III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 431 n.2

(Iowa 2002) (holding random mention of an issue without elaboration or supporting authority fails to preserve the claim for appellate review).

Iowa Court Rule 1.924 states "all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal." *Id*. According to the record, Davis objected to Instruction No. 17 during trial on three grounds: (1) it overly emphasized Dr. Paul's point of view, (2) it was not supported by the facts, and (3) it would not allow for a fair and just verdict to be rendered. None of these grounds for the objection mentions the use of the word "guarantor." Not only did Davis fail to raise the objection, she also affirmatively agreed to the use of the word "guarantor." *Hackman v. Beckwith*, 64 N.W.2d 275, 281 (Iowa 1954) (stating "it is elementary a litigant cannot complain of error which he has invited or to which he has assented").

Davis first raised the issue of contract language in the instruction in her post-trial motion. In *Grefe & Sidney v. Watters*, 525 N.W.2d 821 (Iowa 1994), the Iowa Supreme Court considered a similar situation in which a party raised a different argument about a jury instruction on appeal than it asserted at trial. The court ruled that "[s]ince Watters did not assert her analogy to medical malpractice jury instructions and relevant case law as a basis for her objection at trial, but only raised that ground for the first time on appeal, she failed to preserve error on this assignment." *Watters*, 525 N.W.2d at 824; *accord Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 638 (Iowa 1998) ("A party therefore may not amplify or

change the grounds on appeal."); *see also Hunt v. Breneman*, 45 N.W.2d 138, 139 (1950) (raising objection to instruction in motion for new trial did not preserve error). Therefore, because Davis assented to the word "guarantor" and failed to timely object to Instruction No. 17 on the ground she now argues on appeal, we find Davis did not preserve the error.

We find the district court properly submitted the question of Dr. Paul's negligence to the jury, the district court did not abuse its discretion in allowing the defense two expert witnesses from different practice specialties, and Davis failed to preserve error on her appellate challenge to the use of the word "guarantor" in Instruction No. 17.

AFFIRMED.