

1989

Lynn Nielsen v. Pioneer Valley Hospital, D.M. Dickson : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

490247

IN THE SUPREME COURT FOR THE STATE OF UTAH

LYNN NIELSEN,

Plaintiff and Appellant,

vs.

PIONEER VALLEY HOSPITAL, D.M.
DICKSON, and DOES I THROUGH V,
inclusive,

Defendant and Appellee.

Case No. 890247

Priority No.: 16

BRIEF OF RESPONDENT

Appeal from Judgment on Verdict of the
Third Judicial District Court of Salt Lake County
Honorable Homer R. Wilkinson

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AUG 6 1990

Clerk, Supreme Court, Utah

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to § 78-2-2(3)(j) Utah Code Ann. (Supp. 1968).

ISSUES ON APPEAL

1. Whether Pioneer Valley Hospital is a proper party to this appeal.
2. Whether a party on appeal may assign as error either giving or failure to give an instruction without first stating an exception to said instruction with enough specificity to give trial court notice of any alleged error.

DETERMINATIVE STATUTES

Rule 51 of the Utah Rules of Civil Procedure may be determinative of the issues presented in this appeal.

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of

justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

STATEMENT OF THE CASE

The Complaint, filed in October, 1986, alleged claims against the defendant hospital and anesthesiologist, sounding in ordinary negligence and malpractice, res ipsa loquitur, and failure to obtain informed consent. On February 17, 1988, defendants brought a motion for summary judgment on the ground that plaintiff failed to meet her burden of establishing by competent medical expert testimony that the defendants breached the duty of reasonable care owed to her. On April 4, 1988, the trial court granted defendants' motion for summary judgment and plaintiff appealed.

On September 16, 1988, this Court granted plaintiff's motion for summary disposition, stating: "The trial court was manifestly in error in granting summary judgment since material facts are in dispute." Further, the office of the clerk of the Supreme Court for the State of Utah referred to Nixdorf v. Hicken, as "controlling on the issue of res ipsa loquitur. Expert evidence is not necessary to establish the applicable standard of care in

this case as it appears no medical technicalities are involved." The court's ruling on plaintiff's motion for summary disposition is attached as Appendix A.

The case was tried to a jury from April 17 through the 19th, 1989, the Honorable J. Homer Wilkinson residing. Throughout the entire course of the trial, counsel for plaintiff and counsel for the defendants explained to the jury the two alternative theories of recovery to which plaintiff may be entitled. The first was a theory of ordinary negligence and to meet her burden of proof, plaintiff was required to show that the health care provided was substandard. The second theory of recovery was *res ipsa loquitur* and counsel for all parties explained that no expert testimony was needed for recovery on the doctrine of *res ipsa loquitur* if the jury was convinced that the foundational requirements of the doctrine had been met by the plaintiff. The jury was properly instructed on the two alternative theories of recovery.

During the trial, plaintiff failed to object to expert evidence presented by defendant Dr. Dickson. Further, she failed to make a clear record of any objections to proposed jury instructions, making only a surreptitious record of exceptions out of the ear shot of the court and the defendants. For these reasons, plaintiff's motion for a new trial was denied.

Plaintiff now appeals on the ground that two of the given jury instructions, which admittedly correctly reflect the law,

referred to ordinary negligence and would be inapplicable should the doctrine of res ipsa loquitur apply.

STATEMENT OF FACTS

Based on the Supreme Court's ruling on plaintiff's motion for summary disposition, and based on the fact that the Complaint, which was never amended, addressed alternative theories of recovery, both theories were presented to the jury.

Plaintiff failed to object to the introduction of expert testimony from Dr. Reichmann stating the requisite standard of care was met by the anesthesiologist, defendant Dickson.

In addition, plaintiff failed to object to the instructions proposed by defendant Dickson regarding ordinary negligence. In fact, as late as closing argument, plaintiff commented on Dr. Reichmann and the opinions he presented, and explained to the jury that Dr. Reichmann's testimony was presented as "a defense to our theory of ordinary negligence." (Transcript, p. 499.)

Thus, without voicing any objections to the proposed jury instructions and without objecting to the introduction of expert testimony regarding standard of care, plaintiff's counsel began his closing argument as follows:

Good morning ladies and gentlemen. As the judge indicated, this is my opportunity to argue this case to you and let you know what I think the evidence indicated. You have been sitting here now for two days listening, as I have, to the various witnesses testify, examining the exhibits. And you have heard my opening argument [sic] what I thought the evidence was going to show and what I thought it would mean. And I am now

going to now tell you why I think I kept that bargain with you and have made those showings.

To begin with, I would like to set forth once again the theories of law that my client is going under against these defendants. It's important because they are a little bit separate. And if you agree with one theory, then some of the Judge's Instructions may not apply to the other theory.

The first theory is the ordinary negligence theory against Dr. Dickson. This is the kind of theory that you use if someone injures you and you file a lawsuit. . . . that's one of our theories. It is just a straight on malpractice cause of action against Dr. Dickson only.

Now, our other theory is the theory that the Judge referred to as the *res ipsa loquitur* theory. This is against Pioneer Valley Hospital and Dr. Dickson. Now, this theory is different than the first one because it is a situation where we don't know what caused the injury. It is a situation where the events that occurred were under the control of someone else at a time when Mrs. Nielsen was out.

(Transcript at pp. 477-479.)

Plaintiff actually commented specifically on Jury Instruction 19; her counsel argued:

So the Judge read you some Jury Instructions in which he stated that you are not permitted to use your own standard and your own experience with physicians in determining negligence. That is true for the common, for the ordinary negligence theory that we are going under, that the doctor was just ordinarily negligence as a doctor. You can't use your own experience because you are not a doctor, but you can use your own experience under the theory of *res ipsa loquitur*. And I suggest to you, ladies and gentlemen, that your experience and my experience is that when you go into a hospital for a knee operation, you should not come out into the recovery room with your teeth broken out. It is just something that shouldn't happen.

(Transcript at p. 480.)

Thus, the jury was instructed on two alternative theories, and counsel explained the application of each theory to the jury. By way of special verdict, the jury found unanimously that plaintiff had failed to prove negligence on the part of Dr. Dickson and that the doctrine of res ipsa loquitur did not apply to Pioneer Valley Hospital or to Dr. Dickson. The jury never reached the issue of damages.

SUMMARY OF ARGUMENT

POINT I

PIONEER VALLEY HOSPITAL IS NOT A PROPER PARTY
TO THIS APPEAL.

- A. Plaintiff proceeded against defendant Pioneer Valley Hospital on a theory of res ipsa loquitur; no expert testimony was presented by either side regarding ordinary negligence.
- B. The allegedly prejudicial instructions dealt only with defendant Dr. Dickson and had nothing to do with defendant Pioneer Valley Hospital.

POINT II

PLAINTIFF MAY NOT ASSIGN AS ERROR THE GIVING
OR THE FAILURE TO GIVE AN INSTRUCTION SINCE
SHE MADE NO TIMELY OBJECTION.

- A. Throughout the course of the trial, plaintiff proceeded on alternative theories of recovery.
- B. Objections must be sufficiently specific to give the trial court notice of claimed error.
- C. As late as closing argument, plaintiff argued two alternative theories of recovery.

POINT III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE
JURY'S FINDING OF NO CAUSE OF ACTION.

ARGUMENT

I. PIONEER VALLEY HOSPITAL IS NOT A PROPER PARTY TO THIS APPEAL.

None of the issues or arguments raised by plaintiff on this appeal apply to Pioneer Valley Hospital. First, no expert testimony was presented by either plaintiff or defendant Pioneer Valley Hospital regarding the requisite standard of care.

Second, the allegedly erroneous jury instructions were proposed by defendant Dr. Dickson and had nothing at all to do with Pioneer Valley Hospital. Specifically, Instruction No. 16 dealt with the duty of care a physician owes a patient. Similarly, Instruction No. 19 described the standards applicable to physicians in their treatment of patients.

Furthermore, the instructions proposed by defendant Pioneer Valley Hospital received no objections by either defendant Dr. Dickson or plaintiff and no exceptions were taken. These instructions accurately reflect the claims as alleged against the hospital.

For example, Instruction No. 17 emphasizes that it is undisputed in this case that the physician defendant is an independent contractor and that Pioneer Valley Hospital is not

responsible for the negligent acts, if any, of such independent contractor.

Instruction No. 18 describes the duty of a hospital towards a person as that of reasonable care. There was no objection to Instruction No. 18. Similarly, Instruction No. 20 stated:

If you believe from the evidence that the things of which the plaintiff complains were caused or were occasioned by or from any cause or causes over which the defendant, Pioneer Valley Hospital, had no control, while for which it is not responsible, you must find that the hospital did not cause or contribute to the damage suffered by the plaintiff. If you believe that it cannot be determined with reasonable certainty whether the damage complained of by the plaintiff was caused by any act or failure to act on the part of the defendant hospital and its employees, whereby anything over which it had control, you must also find in favor of the defendant hospital.

Again, plaintiff took no exception to Instruction No. 20.

Instruction No. 21 instructed the jury on "unavoidable accidents." An unavoidable accident is defined as one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are defined by other instructions. "In the event a party is damaged by an unavoidable accident, he has no right to recovery, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages." Id. Again, no exception was taken to Instruction No. 21.

Finally, Instruction No. 22 instructed the jury on the doctrine of res ipsa loquitur. The jury was instructed that in certain situations it is not necessary for the plaintiff in a

medical malpractice action to present evidence of the defendants' negligence by expert testimony. Specifically, where the propriety of the treatment received is within the common knowledge and experience of the layman, expert testimony is unnecessary to establish the standard of care owed to the plaintiff. The court instructed the jury that a plaintiff must, however, establish by the evidence that: (1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant(s) used due care; (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant(s); and (3) the accident happened irrespective of any participation at the time by the plaintiff. The jury was instructed that if they found by a preponderance of the evidence that all three of the above criteria have been met then they could infer negligence from those circumstances. Based on the unanimous verdict of no cause of action, the jury apparently failed to be convinced by a preponderance of the evidence that the three foundational requirements for the doctrine of res ipsa loquitur had been met. The evidence is sufficient to support to the verdict; appellant has failed to marshal any evidence to the contrary. (The jury instructions as referenced are attached as Appendix "B.")

II. PLAINTIFF MAY NOT ASSIGN AS ERROR THE GIVING OR THE FAILURE TO GIVE AN INSTRUCTION SINCE SHE MADE NO TIMELY OBJECTION.

Appellant voiced no objections in the trial court to the correctness or completeness of the instructions that were actually given to the jury. Further, the issues raised on appeal were not adequately raised in appellant's general exceptions on the record to the trial court's decision to give defendant Dickson's proposed Instructions 16 and 19. Specifically, plaintiff failed to call to the attention of either the defendants or the court that said instructions were inconsistent or problematic. Rather, plaintiff's counsel made a private record to the court reporter well after ostensibly agreeing to the proposed instructions.

Under Utah Rules of Civil Procedure Rule 51, a party may not assign as error the giving or the failure to give an instruction unless he objects thereto, and the objection must be sufficiently specific to give the trial court notice of the claimed error. E.A. Strout W. Reality v. W.C. Foy & Sons, 665 P.2d 1320, 1322, (Utah 1983).

The specificity requirement insures that the trial court will understand the basis of the objections and have a fair opportunity to correct any errors before the case goes to the jury. Hansen v. Steward, 761 P.2d 14, 16 (Utah 1988) (citing King v. Fereday, 739 P.2d 612, 620-21 (Utah 1987)). A party who

fails to comply with this requirement is generally precluded from raising on appeal an issue based on a specific objection to jury instructions that was not presented first to the trial court.

See, id.

Admittedly, Rule 51 does permit the appellate court to address such issues even though they were not properly preserved below, but appellant must present persuasive reasons why the court should exercise such discretion. E.A. Strout W. Reality, 665 P.2d at 1322, which requires "showing special circumstances warranting such a review." Candelt Intn'l Corp. v. Dalton, 745 P.2d 1239, 1241 (Utah 1987).

Thus, by arguing alternative theories of recovery and by failing to raise specific objections to proposed jury instructions, plaintiff has waived her right to assign as error the giving of Instructions 16 and 19. Jensen v. Eakins, 575 P.2d 179 (Utah 1978).

Furthermore, the Supreme Court's summary disposition of plaintiff's first appeal did not preclude an attempt to recover on the basis of ordinary negligence; it merely stated that there were outstanding questions of fact and that the question of the application of res ipsa loquitur should be resolved by a jury. Plaintiff made no attempt to amend her Complaint and no pretrial order clarified her claim against defendants. Conversely, until closing argument, plaintiff stated that she was proceeding against the doctor on both theories, and against the hospital on

only one theory, that of res ipsa loquitur. There were no instructions to the contrary. The jury, unanimously, failed to find liability on the part of either defendant.

The instructions given were not inaccurate. No instruction misstated current Utah law. The case law relied on by appellant, Knapstead v. Smith Management Corp., 774 P.2d 1 (Utah App. 1989) dealt with a misstatement of Utah law; therefore, an erroneous instruction was given regarding the applicable standard of care and the court found the jury was misled. Such is not the case before this court as none of the instructions were erroneous nor misleading and each reflected applicable Utah law.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING OF NO CAUSE OF ACTION.

Plaintiff has failed to marshal any evidence that the jury verdict was unsupported. Plaintiff admitted that she had received no dental care for the first two decades of her life and, as a consequence, her teeth were in horrible condition. She had undergone substantial bridge work and repair. There was some evidence that her teeth were not in optimal condition at the time she was seen for surgery at Pioneer Valley Hospital. (Trial Transcript at pp. 123-130.) A plausible explanation for the damage to plaintiff's teeth was never developed by any party. Given the state of plaintiff's dental work and the question regarding instrumentality, the jury verdict may well have been

supported by as simple a concept as unavoidable accident. It is critical to note that there is absolutely no evidence in the record that the jury was confused, prejudiced or misled.

CONCLUSION

Jury Instructions 16 and 19 applied only to defendant Dr. Dickson and not to defendant Pioneer Valley Hospital. There is no evidence to attack the propriety of the unanimous verdict in favor of defendant Pioneer Valley Hospital. In fact, by pleading and then proceeding on alternative theories of recovery against the defendants, it was necessary that the jury be instructed on two theories of recovery, ordinary negligence or res ipsa loquitur. These alternative theories were explained to the jury; however, the jury failed to find persuasive plaintiff's evidence with regard to either theory. Such a verdict should be affirmed as it was well founded and there is no evidence that the jury received erroneous instructions on the law.

DATED this 2nd day of August, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By Elizabeth King
Elizabeth King
Attorneys for Defendant
Pioneer Valley Hospital

EKB464

APPENDICES

STATE OF UTAH

SALT LAKE CITY, UTAH

September 16, 1988

OFFICE OF THE CLERK

Daniel Darger, Esq.
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~~32 Exchange Place~~
Salt Lake City, Utah 84111

Lynn Nielsen,
Plaintiff and Appellant,
v. No. 880170
Pioneer Valley Hospital,
D.M. Dickson, George D. Veasy
and Does I Through V, inclusive,
Defendants and Appellee.

Appellant's motion for summary disposition of this matter is hereby granted. The trial court was manifestly in error in granting summary judgment since material facts are in dispute.

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980) is controlling on the issue of res ipsa loquitur. Expert evidence is not necessary to establish the applicable standard of care in this case, as it appears no medical technicalities are involved.

The summary judgment is reversed and this case is remanded for further proceedings.

Geoffrey J. Butler, Clerk

APPENDIX "A"

INSTRUCTION NO. 17

It is undisputed in this case that the physician defendant is an independent contractor, and that Pioneer Valley Hospital is not responsible for the negligent acts, if any, of such independent contractor. Similarly, the defendant physician is not responsible for the negligent acts, if any, of Pioneer Valley Hospital or its nurses or employees. While there are multiple defendants in this action, it does not follow from the fact alone that if one is liable, all are liable. Each defendant is entitled to a fair and independent consideration of his or her own defense, and is not to be prejudiced by the fact, if such become a fact, that you find that one of the other defendants was negligent. The instructions given you govern the case as to each defendant, to the same effect as if he were the only defendant in the action.

INSTRUCTION NO. 18

It is the duty of a hospital toward a person received as a patient to use reasonable care. A hospital is not required to guarantee that the treatment received by a patient while in the hospital will not injure or damage the patient. Rather, the hospital is only required to employ the care and skill required of hospitals under similar circumstances. Failure to use such care and skill constitutes negligence.

INSTRUCTION NO. 21

The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages.

INSTRUCTION NO. 22

The Court instructs you that in certain situations it is not necessary for the plaintiff in a medical malpractice action to present evidence of the defendants' negligence by expert testimony. Specifically, where the propriety of the treatment received is within the common knowledge and experience of the layman, expert testimony is unnecessary to establish the standard of care owed to the plaintiff. The plaintiff must, however, establish by the evidence that:

1. The accident was of a kind which, in the ordinary course of events, would not have happened had the defendant(s) used due care;
2. The instrument or thing causing the injury was at the time of the accident under the management and control of the defendant(s); and
3. The accident happened irrespective of any participation at the time by the plaintiff.

If you find from a preponderance of the evidence that all three of the above criteria have been met, then you may find an inference of negligence from those circumstances. This does not mean that negligence is necessarily established, it merely creates an inference which may be rebutted by the defendant or defendants.

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Respondent have been mailed, postage prepaid to:

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DATED this 2nd day of August, 1990.

SNOW, CHRISTENSEN & MARTINEAU

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