

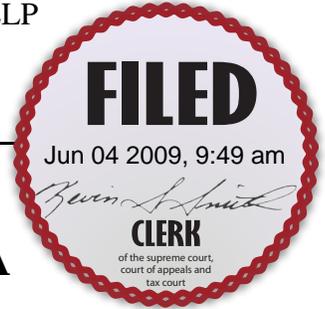
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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL GOULD, O.D.,
Appellant-Respondent,

vs.

JEFFREY B. MUSSELMAN,
Appellee-Petitioner.

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No. 49A02-0804-CV-392

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth Johnson, Judge
Cause No. 49D02-0403-CT-571

June 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

During a routine contact lens examination, Dr. Michael Gould, O.D., discovered that Jeffrey B. Musselman's intraocular pressure was abnormally high. Dr. Gould did not provide a referral to an ophthalmologist but did instruct Musselman to see an ophthalmologist that Musselman reported having seen in the past about his elevated eye pressure. Musselman agreed to see his ophthalmologist about the issue, but he never did so. Musselman later developed pigmentary dispersion glaucoma and filed a medical malpractice suit against Dr. Gould, alleging that Dr. Gould failed to meet the applicable standard of care. Dr. Gould asserted the affirmative defenses of contributory negligence and failure to mitigate damages and tendered jury instructions regarding each. The trial court refused to give the instructions, finding that they were not supported by the evidence. A jury found in favor of Musselman and awarded him \$750,000. Dr. Gould now appeals, arguing that the trial court abused its discretion by rejecting the jury instructions on contributory negligence and the duty to mitigate damages. Because there is no evidence that Musselman's alleged negligence was simultaneous to Dr. Gould's alleged negligence and because the tendered instruction on the duty to mitigate damages does not fit the facts of this case, we conclude that the evidence does not support the tendered instructions. We affirm the trial court.

Facts and Procedural History

The facts relevant to this appeal are as follows.¹ In September 1999, Dr. Gould practiced optometry at EyeGlass World in the Castleton Mall in Indianapolis. On

¹ We observe that Dr. Gould failed to specifically identify each item contained in his appendix pursuant to Indiana Appellate Rule 50(C), instead grouping all pleadings, motions, and jury instructions

September 18, 1999, Dr. Gould performed a routine contact lens examination on Musselman, who was then twenty-six years old. During this examination, pressure testing revealed that Musselman's intraocular pressures were elevated. Ex. Tab D p. 1. Dr. Gould informed Musselman that his intraocular pressures were high and asked whether Musselman had seen an ophthalmologist regarding the issue.² Musselman said yes and that he had been previously told of his high pressures. In fact, Musselman had seen an ophthalmologist previously regarding possible glaucoma. Tr. p. 413. Musselman reported this history to Dr. Gould but said that he did not have glaucoma. Dr. Gould told Musselman that he wished to refer him to an ophthalmologist or that Musselman should make an appointment with his previous ophthalmologist. Musselman responded that he would return to his previous ophthalmologist. Dr. Gould gave Musselman a new prescription for contact lenses and instructed him to return in one week for a follow-up appointment to check the lenses.

Musselman did not return for his follow-up appointment or see his previous ophthalmologist. He did not see another optometrist until March 2002, when he went to a Wal-Mart Vision Center in Noblesville after realizing that he could not see the color of a traffic light. By that time, Musselman suffered from a significant loss of peripheral vision, and the optometrist who saw Musselman informed him of the risk of blindness that was associated with his elevated eye pressures. The optometrist scheduled an

under one heading in the Table of Contents and providing that these documents are found at pages 1-114. This has hindered our review on appeal.

² Although Musselman initially contended in his amended complaint that he “was not informed . . . that his eye pressure was elevated . . . nor was he advised about any follow-up care or the possibility that he had or could develop glaucoma,” Appellant’s App. p. 99, he recites the above facts in his brief on appeal, Appellee’s Br. p. 4-6.

appointment for Musselman with a specialist and explained the importance of being treated. Musselman was ultimately diagnosed with pigmentary dispersion glaucoma and end-stage glaucoma.

Musselman filed a proposed complaint with the Indiana Department of Insurance, alleging in part that Dr. Gould “deviated from the standard of care when [he] failed to advise [Musselman] of his elevated eye pressures; failed to provide follow up care for [Musselman]; failed to refer [Musselman] for additional evaluation; [and] failed to diagnose the cause of [Musselman’s] elevated eye pressures.” Appellant’s App. p. 113. A medical review panel reviewed the evidence. Two members of the panel concluded that Dr. Gould failed to comply with the appropriate standard of care as charged in the complaint, while one member concluded that there was a material question of fact regarding Dr. Gould’s liability. *Id.* at 97. Musselman then filed an amended complaint and request for a jury trial, alleging in part: “Dr. Gould . . . [was] negligent in that [he] failed to inform the Plaintiff that his eye pressure was elevated, [he] failed to provide any follow up care to the Plaintiff, [he] failed to refer the Plaintiff for additional evaluation and/or treatment, and in other ways.” *Id.* at 99.³ In essence, in addition to alleging that Dr. Gould did not alert him that his eye pressure was elevated, the thrust of Musselman’s allegation in his complaint was that Dr. Gould insufficiently instructed him regarding proper follow-up care.

The case proceeded to a jury trial. Dr. Gould asserted the affirmative defenses of contributory negligence and failure to mitigate damages and tendered jury instructions

³ Again, in his appellate brief, Musselman includes in his recitation of the facts that Dr. Gould informed him about his elevated eye pressures during the examination. Appellee’s Br. p. 4-5.

regarding each. *Id.* at 62, 63. The trial court rejected the instructions, finding that they were unsupported by the evidence. *Id.* at 48. A jury found in favor of Musselman and awarded him \$750,000. Dr. Gould now appeals.

Discussion and Decision

Dr. Gould raises two issues on appeal: (1) whether the trial court erred by refusing to instruct the jury on contributory negligence and a patient's failure to follow a physician's instructions and (2) whether the trial court erred by refusing to instruct the jury on failure to mitigate damages. The manner of instructing a jury is left to the sound discretion of the trial court. *Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1084 (Ind. Ct. App. 2008), *trans. denied*. When a trial court refuses to give a tendered instruction, we must consider the following: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. *Cavens v. Zaberdac*, 849 N.E.2d 526, 533 (Ind. 2006). Here, the trial court refused to read the proffered instructions, concluding that there was insufficient evidence to support them. Where the question on appeal is whether an instruction is supported by the evidence in the record, we examine the trial court's decision for an abuse of discretion. *Id.*

I. Instruction on Contributory Negligence

Dr. Gould first challenges the trial court's rejection of his proffered final jury instruction on contributory negligence, modeled after Indiana Pattern Jury Instruction (Civil) 23.18. Appellant's App. p. 57, 62. The proffered jury instruction reads:

Contributory Negligence – Plaintiff’s Duty to Follow Instructions.

The plaintiff had a duty to exercise reasonable care in following the defendant’s instructions. If the defendant has proved by a preponderance of the evidence each of the following:

- (1) The plaintiff failed to follow Dr. Gould’s reasonable instructions, which were given at the time of or before the alleged act of malpractice;
- (2) A reasonably prudent person exercising reasonable care in the same or similar circumstances would have followed the defendant’s instructions;
- (3) The plaintiff’s failure to follow the defendant’s instructions proximately caused plaintiff’s alleged injuries;

then your verdict should be for the defendant.

Id. at 62. The trial court rejected the instruction after finding that it was unsupported by the evidence. *Id.* at 48.

The issue on appeal is whether there is evidence in the record to support the giving of the instruction. *Cavens*, 849 N.E.2d at 533. Under Indiana law, the common law defense of contributory negligence is available to defendants in medical malpractice cases. *Id.* at 529. Contributory negligence is the “failure of a plaintiff to exercise the reasonable care an ordinary person would for his own protection and safety.” *Penn Harris Madison Sch. Corp. v. Howard*, 861 N.E.2d 1190, 1193 n.1 (Ind. 2007). A patient’s failure to follow a physician’s instructions may constitute contributory negligence. *Harris v. Cacdac*, 512 N.E.2d 1138, 1139 (Ind. Ct. App. 1987) (citing *Jones v. Angell*, 95 Ind. 376, 380 (1884); *Fall v. White*, 449 N.E.2d 628, 633 (Ind. Ct. App. 1983)), *reh’g denied, trans. denied*. It has long been the rule that the patient “may not recover in a malpractice action where the patient is contributorily negligent by failing to follow the defendant physician’s instructions *if such contributory negligence is simultaneous with and unites with the fault of the defendant to proximately cause the*

injury.” *Cavens*, 849 N.E.2d at 529 (citing *Harris*, 512 N.E.2d at 1139-40) (emphasis added). We have previously explained that a patient’s failure to follow a physician’s instructions that occurs after the physician’s alleged malpractice goes to the question of whether the patient mitigated his or her damages rather than the question of whether the patient was contributorily negligent:

Negligence on the part of the patient or of those having him in their charge, which occurs wholly subsequently to the physician’s malpractice which caused the original injuries sued for, is not a complete defense to any recovery against the physician, but serves to mitigate the damages, preventing recovery to the extent the patient’s injury was aggravated or increased by his own negligence, or those having his custody, although he is entitled to recover for the injuries sustained prior to his contributory negligence.

Sawlani v. Mills, 830 N.E.2d 932, 942 (Ind. Ct. App. 2005) (quoting *Harris*, 512 N.E.2d at 1140), *trans. denied*. Where, however, a patient and a physician have an ongoing relationship such that the patient’s failure to follow instructions occurs *during the ongoing treatment*, we have found that the patient may be contributorily negligent and that the trial court may properly instruct the jury on contributory negligence. *King v. Clark*, 709 N.E.2d 1043, 1048 (Ind. Ct. App. 1999), *trans. denied*; *Fall*, 449 N.E.2d at 634.

Dr. Gould likens Musselman’s conduct to the conduct of the plaintiffs in *King* and *Fall* in support of his argument that the trial court should have given the proffered contributory negligence instruction. In *King*, a patient suffering from breast cancer sued her physician for failure to timely diagnose and treat her illness. At trial, the physician argued that the plaintiff was contributorily negligent by failing to seek timely medical care, failing to report her symptoms to the physician, and delaying diagnostic testing that

had been ordered by the physician. The trial court instructed the jury regarding contributory negligence, and on appeal the plaintiff argued that the instruction was improper. Concluding that the instruction was properly given, we reasoned:

[T]he medical evaluations, diagnostic testing and treatment for [the plaintiff's] cancer *occurred over a lengthy period of time*. Because the injury, the lost opportunity to survive, necessarily *occurred over this same lengthy time period*, or at least until [the patient] placed herself under the care of a different physician, the jury might reasonably infer that [the plaintiff's] actions or inactions occurred simultaneously with any fault on Dr. Clark's part to reduce her chance of survival. Inasmuch as [the plaintiff's] conduct was seemingly united with the actions of Dr. Clark, the jury could properly conclude that her conduct contributed as a legal cause to the harm that [s]he suffered.

King, 709 N.E.2d at 1048 (emphasis added) (citing *Smith v. Hull*, 659 N.E.2d 185, 191 (Ind. Ct. App. 1995), *trans. denied*). Similarly, in *Fall*, a patient died of a heart attack after being under the *extended care of a physician*. The decedent's estate filed suit against his physician, alleging multiple instances of negligent medical care. The physician tendered a contributory negligence jury instruction, arguing that the patient was contributorily negligent by failing to follow the physician's instructions and failing to provide complete and accurate information to the physician. Without discussing whether the patient's allegedly negligent conduct was simultaneous to the alleged medical malpractice, we concluded that the trial court did not err in instructing the jury on contributory negligence under the facts of the case. *Fall*, 449 N.E.2d at 634.

Unlike in *King* and *Fall*, Musselman was not under the ongoing or long-term care of Dr. Gould. Rather, Musselman had a single visit to Dr. Gould's optometry practice, and it was during this visit that the alleged malpractice occurred. We have addressed similar situations previously, where a plaintiff allegedly failed to follow a doctor's

instructions *after the completion of treatment by the defendant-doctor* during which the alleged malpractice occurred. In *Sawlani*, the plaintiff had a mammogram after noticing abnormalities in her breast, and Dr. Sawlani reviewed the films and examined the breast. Dr. Sawlani did not locate any cancer but sent a follow-up letter to the patient recommending that she return for a follow-up mammogram in one year. The patient did not do so, instead waiting twenty months until her next mammogram. At that time, another doctor discovered that she had breast cancer. The patient sued Dr. Sawlani, alleging that he committed malpractice when he failed to diagnose her illness. Dr. Sawlani countered that the patient was contributorily negligent for failing to follow his instruction, but we rejected this contention, concluding that the patient's alleged negligence in failing to follow the instruction was “wholly subsequent” to Dr. Sawlani's alleged malpractice. *Sawlani*, 830 N.E.2d at 943 (quoting *Harris*, 512 N.E.2d at 1140). Additionally, in *Harris*, we concluded that a jury instruction on contributory negligence was improperly given where the plaintiff-patient failed to exercise her neck as instructed after neck surgery performed by the defendant-physician. We explained:

[The patient's] alleged negligence in failing to exercise her neck was wholly subsequent to Cacdac's alleged negligence in performing unnecessary surgery. Therefore, contributory negligence did not apply to [the patient's] post-surgery conduct and the court erred in instructing the jury that it did. Rather, a proper instruction would have been for mitigation of damages.

Harris, 512 N.E.2d at 1140. *See also Foster v. Owens*, 844 N.E.2d 216, 221-22 (Ind. Ct. App. 2006) (where patient failed to obtain a procedure recommended by her physician after the physician's allegedly negligent surgical procedure, “the evidence of record d[id] not indicate ‘simultaneous’ fault creating a cause of action”), *reh'g denied, trans. denied*.

Likewise, here, Musselman's alleged negligence occurred wholly subsequent to Dr. Gould's alleged negligence in failing to properly instruct Musselman regarding follow-up care. The evidence does not support giving the jury instruction on contributory negligence because there is no evidence that Musselman's doctor-patient relationship with Dr. Gould was an ongoing one such that any failure to follow Dr. Gould's instructions can be considered "simultaneous" with Dr. Gould's negligence. *Cavens*, 849 N.E.2d at 529. Therefore, the trial court did not abuse its discretion by refusing to read this instruction to the jury.

II. Instruction on Failure to Mitigate Damages

Dr. Gould next challenges the trial court's rejection of his proffered final jury instruction on the duty to mitigate damages, modeled after Indiana Pattern Jury Instruction (Civil) 23.19. Appellant's App. p. 57, 63. The proffered jury instruction reads:

A patient has a duty to exercise reasonable care in following his doctor's instructions after treatment. If Dr. Gould proves by a preponderance of the evidence each of the following:

(1) The plaintiff failed to follow Dr. Gould's reasonable instructions given after an alleged act of malpractice;

(2) A reasonably prudent person exercising reasonable care in the same or similar circumstances would have followed Dr. Gould's instructions; and

(3) If you find Dr. Gould is liable for an act of malpractice;

Then you may reduce the amount of money you would otherwise award the plaintiff by the amount that you decide was proximately caused by plaintiff's failure to follow instructions.

Id. at 63. The trial court rejected the instruction after finding that it was unsupported by the evidence. *Id.* at 48.

For the evidence to support giving this jury instruction, there must have been some evidence that Dr. Gould gave reasonable instructions to Musselman after committing the alleged malpractice. However, the alleged medical malpractice was the *instruction itself* given by Dr. Gould to Musselman. And if Dr. Gould committed malpractice in this manner, there could be no evidence that Musselman “failed to follow Dr. Gould’s *reasonable instructions.*” Appellant’s App. p. 62. Dr. Gould either gave reasonable instructions to Musselman or he did not. If he did, then there was no medical malpractice as alleged by this suit. If he did not, then there were no “reasonable instructions” for Musselman to follow. Any evidence that supports one conclusion necessarily negates the other. Given the particular allegation of medical malpractice in this case, this proffered instruction is not supported by the evidence. Simply put, this instruction does not fit this case. The trial court did not abuse its discretion by refusing to give this instruction to the jury.

The trial court did not abuse its discretion by refusing to give the proffered instructions regarding contributory negligence and the duty to mitigate damages to the jury because neither instruction was supported by the evidence.

Affirmed.

RILEY, J., and DARDEN, J., concur.