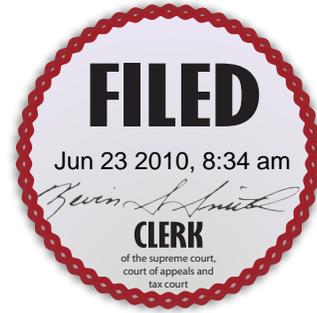


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARY ANN DANDINO, Surviving Spouse)
and Personal Representative of the Estate of)
Dennis Dandino, deceased,)

Appellant-Cross Appellee,)

vs.)

LUISITO C. GONZALES, M.D.,)
and ELKHART CLINIC, LLC,)

Appellees-Cross Appellants.)

No. 20A03-0907-CV-354

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen R. Bowers, Judge
Cause No. 20D02-0106-CT-410

June 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

After a jury returned a verdict in favor of defendants Luisito C. Gonzales, M.D. and Elkhart Clinic, LLC, (collectively “Dr. Gonzales”) on a claim of medical malpractice brought by Mary Ann Dandino (“Mary Ann”), Surviving Spouse and Personal Representative of the Estate of Dennis Dandino (“Dennis”), deceased, the trial court granted a new trial based upon one of the four contentions in Mary Ann’s Motion to Correct Error. The trial court denied the other three assertions of error. Mary Ann appeals from the denial of two of these bases, and Dr. Gonzales cross-appeals the partial grant of the Motion to Correct Error and order for a new trial. We affirm in part, reverse in part and remand for further proceedings.

Issues

The following issues¹ are raised on appeal:

- I. Whether the trial court erred in granting the Motion to Correct Errors and ordering a new trial on the basis that the trial court failed to provide the jury with the definition of “proximate cause” in the final jury instructions.
- II. Whether the trial court erred in denying Mary Ann’s motion to amend her complaint to include a claim of loss of chance.

Facts and Procedural History

On April 30, 1999, Dennis went to Elkhart General Hospital with symptoms of chest heaviness, shortness of breath and mild nausea. After diagnosing Dennis with a blockage of the left anterior descending artery, cardiologist and employee of Elkhart Clinic, Dr. Gonzales performed a cardiac catheterization and placed two stents in Dennis’s artery on May 4, 1999.

¹ The parties also raise the issue as to whether it was appropriate to tender instructions to the jury on the defense of contributory negligence. As we remand for a new trial, this issue will be addressed by the trial court.

Dennis was discharged from the hospital the next day. Dr. Gonzales recommended a cardiac rehabilitation program, a modified diet, an exercise program and prescribed Plavix and aspirin. Dr. Gonzales did not prescribe a beta-blocker.

On June 23, 1999, Dennis contacted the Elkhart Clinic to report that he was experiencing similar chest pains as before the stent procedure and then went to Elkhart General Hospital. Dennis reported that he had substernal chest pain but did not have nausea, vomiting or shortness of breath. A partner of Dr. Gonzales, Dr. Thomas Nolan, was on call and admitted Dennis overnight for observation in the chest pain unit. The next morning Dr. Nolan performed a resting EKG as well as an exercise treadmill stress test on Dennis. The first test was normal and the second only exhibited some chest discomfort. As no other irregularities were observed during the tests, Dr. Nolan concluded that the chest discomfort may be from issues with his gastrointestinal tract and prescribed Prevacid to address this possible issue. Dennis was discharged with instructions to resume normal activity, schedule a follow-up appointment and watch for changes in indigestion, nausea, shortness of breath, increased chest pain and numbness of extremities.

On July 16, 1999, Dennis saw his primary care physician at the Elkhart Clinic and reported that the Prevacid was not relieving his pain. Dennis was referred to a gastroenterologist, Dr. Boron, who performed an upper endoscopy that was normal. On August 31, Dennis had a follow-up visit with Dr. Gonzales. Dr. Gonzales charted that Dennis was still suffering from occasional epigastric discomfort with exertion. He also noted that stress tests performed by Dr. Nolan were negative for ischemia and that Dennis's blood

pressure, heart rate, and other indicators were normal. Dennis also described during the visit that when experiencing the discomfort that it tended to improve after burping. In the conclusion of his notes, Dr. Gonzales commented that the history described by the patient was atypical and that he told Dennis to watch for any significant change in the symptoms as well as to continue his exercise and diet regimen.

On September 16, 1999, Dennis was unloading pipes for a sprinkler system with his son when he experienced the same uncomfortable feeling in his upper abdomen and began rubbing his lower chest area. Although his son described him as slightly short of breath, Dennis did not appear pale or sweaty. After ten minutes, Dennis said he was feeling better. He did not report the incident to Dr. Gonzales or seek medical attention.

The next morning, Dennis went to work. His son called him around 9:30 a.m., and Dennis reported that he was feeling fine. However that afternoon, Dennis collapsed at work. One of his coworkers called 9-1-1 while another performed CPR. Dennis went into full cardiac arrest, and emergency personnel were unable to revive him. An autopsy revealed a 95% blockage of the second stent and that Dennis suffered a heart attack approximately twelve hours before his death.

On June 26, 2001, Mary Ann, Surviving Spouse and Personal Representative of the Estate of Dennis R. Dandino, filed a Proposed Complaint for Damages with the Indiana Department of Insurance, alleging that Dr. Gonzales, Dr. Nolan and the Elkhart Clinic breached the standard of care in their provision of medical treatment to Dennis. Pursuant to the Indiana Medical Malpractice Act, a medical review panel was formed. The panel was

unanimous as to the lack of evidence that Dr. Nolan failed to meet the applicable standard of care but was divided as to Dr. Gonzales and the Elkhart Clinic. One panelist concluded that the standard of care was met while the other two panel members concluded that Dr. Gonzales and the Clinic had not met the applicable standard of care.

On August 17, 2006, Mary Ann filed her first amended complaint for damages against Dr. Gonzales, Dr. Nolan and the Elkhart Clinic in Elkhart Superior Court, alleging that their medical negligence was the proximate cause of the death of Dennis. Dr. Nolan was subsequently voluntarily dismissed. A jury trial was held from March 30, 2009 to April 3, 2009. At the end of her case-in-chief, Mary Ann moved to amend the pleadings to conform to the evidence at trial to include a claim for loss of chance based on the failure of Dr. Gonzales to prescribe a beta-blocker to Dennis. The trial court took the motion under advisement and at the close of the evidence denied the motion. The trial court also denied the motion of Mary Ann for Judgment on the Evidence based on Dr. Gonzales's asserted defense of contributory negligence. Dr. Gonzales proposed two instructions on contributory negligence that were tendered to the jury over Mary Ann's objection. Mary Ann submitted a proposed instruction on loss of chance and one defining proximate cause. The trial court refused the loss of chance instruction but accepted a modified version of the definition of proximate cause. However, when reading and providing the final instructions to the jury, the trial court inadvertently failed to include the definition of proximate cause.

The jury returned a verdict in favor of the defendants, and the trial court entered judgment accordingly. On May 1, 2009, Mary Ann filed a Motion to Correct Error on four

bases: (1) failure of the trial court to instruct the jury on the definition of proximate cause; (2) denial of her motion to amend the pleadings to include a loss of chance claim; (3) denial of her motion for mistrial based on defendants' violation of an Order in Limine; and (4) denial of her motion for judgment on the evidence as to contributory negligence defense. The trial court heard argument on the Motion to Correct Error and subsequently granted the Motion as to the first contention, granting a new trial, and denied the rest of the contentions. All parties appealed.

Discussion and Decision

Standard of Review

Pursuant to Trial Rule 59(J), a trial court, if it determines that prejudicial or harmful error has been committed, shall take action to cure the error. One of the possible remedies is to grant a new trial. Ind. Trial Rule 59 (J). We review a decision of a trial court to grant a motion to correct error and order a new trial for an abuse of discretion. Singh v. Lyday, 889 N.E.2d 342, 348 (Ind. Ct. App. 2008), trans. denied. An abuse of discretion occurs when the decision of the trial court is against the logic and effect of the facts and circumstances before it. Id.

I. Omission of Proximate Cause Definition

First, the parties address whether the trial court properly granted Mary Ann's Motion to Correct Error based on its failure to include the definition of proximate cause in the jury instructions. Generally, a trial court should "define in the instructions technical and legal phrases in connection with material issues of the lawsuit if properly requested to do so."

Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975, 980 (Ind. 1993) (quoting Conder v. Hull Lift Truck, Inc., 435 N.E.2d 10, 18 (Ind. 1982)). Here, the parties had agreed on the definition of proximate cause that was to be provided to the jury, and the trial court indicated that it would be included in the final jury instructions. However, the trial court inadvertently failed to include it.

Dr. Gonzales alleges that Mary Ann waived this issue by failing to object when the trial court omitted the instruction when reading the final instructions to the jury. Indiana Trial Rule 51(C) provides in part that “[n]o party may claim as error the giving of an instruction unless he objects thereto[.]” (emphasis added). Thus, based on the language of this rule, a party requesting an instruction is not required to make a specific objection if the court subsequently fails to give that instruction to the jury. State Farm Mut. Auto. Ins. Co. v. Shuman, 175 Ind. App. 186, 201, 370 N.E.2d 941, 953 (1977); Indian Trucking v. Harber, 752 N.E.2d 168, 175 (Ind. Ct. App. 2001).

Dr. Gonzales argues that the instruction for “proximate cause” was not a mandatory instruction and therefore its omission cannot be a source of reversible error. This contention is based upon a misunderstanding of Hawkins v. Cannon, 826 N.E.2d 658 (Ind. Ct. App. 2005), trans. denied.

In Hawkins, one issue was whether a motion to correct error was improperly denied when a final jury instruction allegedly misstated the law regarding proximate cause. This Court applied the three-prong test for whether error occurred based on the provision of an instruction. Id. at 661. After reviewing the alleged erroneous instruction, it was noted that

even if the instruction on proximate cause was incomplete that it was not a mandatory instruction and any ambiguity, inaccuracy or incompleteness could be cured by another instruction that was not inconsistent. Id. at 662.

From this language, Dr. Gonzales incorrectly deduces that if an instruction is not mandatory that it need not be given to the jury. Indiana caselaw has clearly explained the meaning of mandatory instruction as one that must correctly state the elements required for a finding for the plaintiff:

A mandatory instruction has been held to be when an instruction assumes to set out all the elements essential to a recovery and directs the jury to find for the plaintiff. When this happens all the elements for recovery must be set out or it is an erroneous instruction that cannot be cured by another instruction which is given.

Cato Enters. Inc. v. Fine, 149 Ind. App. 163, 184, 271 N.E.2d 146, 160 (1971). Thus, “mandatory” describes the requirement that such an instruction be correct in and of itself. It does not mean that only instructions setting out the elements of recovery need be given: “In order to properly instruct a jury[,] it is necessary that the court state general propositions of law and their application to the case.” Id. (emphasis added).

“Proximate cause is an essential element that must be proved by the plaintiffs in a negligence action in order to establish liability.” Indian Trucking, 752 N.E.2d at 175. Defining technical and legal phrases has been described as a duty of the court. Epperly v. Johnson, 734 N.E.2d 1066, 1074 (Ind. Ct. App. 2000). As “proximate cause” is a term of art and encompasses an essential element of a negligence action, it was reversible error for its definition to be omitted from the jury instructions. Therefore, the trial court properly granted

Mary Ann's Motion to Correct Error and granted a new trial on this basis.

II. Loss of Chance

Because a new trial granted pursuant to Indiana Trial Rule 59(J) is limited to only those issues affected by the error, we must also address Mary Ann's contention that the trial court erred in denying her motion to amend her complaint pursuant to Trial Rule 15(B) to include a claim for loss of chance. Indiana Trial Rule 15(B) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

“Indiana courts have liberally applie[d] [Trial Rule] 15(B) to permit amendment of pleadings at any point in the proceedings where the parties have consented, as attested by the evidence admitted without objection, to a trial upon issues *not raised by the pleadings*.” Midway Ford Truck Ctr., Inc. v. Gilmore, 415 N.E.2d 134, 137 (Ind. Ct. App. 1981). Such a motion should not be granted if the objecting party establishes that the amendment would prejudice him in maintaining his action or defense. Woodward v. Heritage Const. Co., Inc., 887 N.E.2d 994, 998 (Ind. Ct. App. 2008). “We review a trial court’s ruling on a motion to amend the pleadings to conform to the evidence for an abuse of discretion.” Id.

Our Indiana Supreme Court has held that neither the pleadings of the parties nor the pretrial order issued by the trial court should operate to frustrate the trier of fact from finding of facts that a preponderance of the evidence permits. Elkhart County Farm Bureau Co-op. Ass'n, Inc. v. Hochstetler, 418 N.E.2d 280, 283 (Ind. Ct. App. 1981) (citing Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 93-94, 300 N.E.2d 335, 340 (1973)). However, the opposing party is entitled to some notice that the issue not pled is being tried. Id. One way this can be accomplished is when the new issue is clear by the evidence being submitted. Id. To make a loss of chance claim, Mary Ann was required to prove that the appropriate standard of care was the prescribing of beta blockers, that Dr. Gonzales did not meet that standard and that this failure resulted in an increased risk of harm, Dennis's decreased chance of survival. See Sawlani v. Mills, 830 N.E.2d 932, 940 (Ind. Ct. App. 2005), trans. denied.

While the pre-trial order did not specifically list loss of chance as an issue, it did include the contention by the plaintiff that:

Dr. Gonzales, individually and as an employee of The Elkhart Clinic, negligently decided not to prescribe beta-blockers to decrease the risk of restenosis after placing stents in his patient, Mr. Dandino, even though red flags indicating restenosis were available to Dr. Gonzales.

Appellant's Appendix at 224. Furthermore, Dr. Gonzales had the deposition of Dr. Sobol, Mary Ann's expert witness, which included statements that Dennis's chance of surviving the heart attack would have been increased if he had been prescribed beta blockers. At trial, Dr. Sobol testified that Dr. Gonzales failed to meet the standard of care by not prescribing beta blockers to Dennis. On cross-examination, Dr. Sobol explained that had Dennis been on beta blockers they would not have prevented his death from the heart attack by 100%. However,

the beta blockers would have reduced the possible incidences of cardiac events, such as a heart attack or sudden death, by approximately twenty-five percent. Defense counsel read part of Dr. Sobol's deposition in which he stated: "[Y]ou're decreasing his risk and improving his chances of survival by 25 percent. That's a lot. And that simple step was not taken." Trial transcript at 176.

Such testimony squarely places the loss of chance claim based on the failure to prescribe beta blockers at issue. Moreover, Dr. Gonzales did not object to the testimony and presented evidence by way of testimony of his expert witness that beta blockers have not been shown to decrease ventricular fibrillation during a heart attack. As sufficient evidence was presented to suggest a claim of loss of chance and the defendant did not object but presented evidence in defense of such a claim, we conclude that it was an abuse of discretion on the part of the trial court to deny the motion to amend the complaint to conform to the evidence. Therefore, on remand, Mary Ann may move to amend her complaint to add a loss of chance claim.

Affirmed in part, reversed in part and remanded for further proceedings.

MAY, J., and BARNES, J., concur.