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Summary of Carver v. El-Sabawi, 121 Nev. Adv. Op. 3

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Carver v. El-Sabawi, 121 Nev. Adv. Op. 3 (March 24, 2005).[1]

TORTS—NEGLIGENCE AND RES IPSA LOQUITUR

Summary

An appeal from a district court judgment challenging a jury instruction, which included both a "mere happening instruction" and a res ipsa loquitur instruction, in a medical malpractice case.

Disposition/Outcome

Reversed. The Nevada Supreme Court remanded the case for a new trial on the basis that, absent additional evidence, a "mere happening instruction" and a res ipsa loquitur instruction were in conflict and very likely confused and misled the jury.

Factual & Procedural History

Appellant Jerry D. Carver suffered a nerve injury to his left arm and left hand sometime during or after an appendectomy. Carver then filed suit alleging negligence against the anesthesiologist Rashad El-Sabawi, the respondent, and surgeon Ronal Rosen, M.D.[2]

The jury in the district court trial found in favor of both doctors. Carver appealed on the basis that the district court gave conflicting jury instructions that contained language that would confuse the jury.

The district court gave a mere happening instruction, which read:

> The mere fact that an unfortunate or bad condition resulted to the patient involved in this action is not sufficient of itself to predicate liability. Negligence is never presumed but must be established by competent evidence.[3]

The district court also gave a res ipsa loquitur instruction, which read:

> The law provides for a rebuttable presumption that a personal injury was caused by negligence where the personal injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto.
>
> If you find by a preponderance of the evidence that an injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto then the rebuttable presumption operates to shift to the defendants the burden of proving, by a preponderance of the evidence, that the personal injury was not caused by negligence.
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> If, on the other hand, you do not find by a preponderance of the evidence that an injury was suffered during the course of

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[2] Dr. Rosen settled and was dismissed from this appeal. Carver v. El-Sabawi, 121 Nev. Adv. Op. at n.3.

[3] The language in this jury instruction largely tracked language found in *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962).

> treatment to a part of the body not directly involved in the treatment or proximate thereto, then the burden of proving by a preponderance of the evidence consisting of expert medical testimony or material from recognized medical texts or treatises that the personal injury was caused by negligence remains with the plaintiff.[4]

Because the district court recognized the possible conflict between the mere happening and the res ipsa loquitur instruction, they also gave the jury an instruction for clarification, which read:

> The Court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts.

Discussion

Appellant Carver argued that giving both the mere happening instruction and the res ipsa loquitur instruction inappropriately raised the burden of Carver's proof and had language that would confuse the jury. Appellee countered that the limiting instruction remedied any perceived conflict and that Appellant failed to demonstrate that the error of allowing both jury instructions affected the jury verdict. The court held that Carver had met his burden that that, but for the erroneous jury instructions, a reasonable jury may have reached a different result.

Jury instructions that tend to confuse or mislead the jury are erroneous.[5] After consideration of the entire case, a judgment may be reversed if it appears such error resulted in a miscarriage of justice.[6] Although the full record was not available on appeal, the court nonetheless examined the partial record available on appeal to ascertain whether the possibility that the error was harmless could be disregarded as improbable or remote.[7] The burden of showing prejudice will be met where a party may reasonably contend that, but for error, a different result might have been reached.[8] After review of the record, the court held that Appellant met this burden.

Of the jurisdictions who have addressed the possible conflict in offering both a mere happening instruction and a res ipsa loquitur instruction, some have found that the instructions do not conflict when offered together,[9] and yet others have held that the two instructions should not be given together because they may confuse the jury.[10]

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[4] This jury instruction was based upon NEV. REV. STAT. 41A.100(1)(d) (2005), which codifies the res ipsa loquitur theory of negligence in medical malpractice cases where it is factually applicable.

[5] Zelavin v. Tonopah Belmont, 39 Nev. 1, 7-11, 149 P. 188, 189-91 (1915).

[6] Pfister v. Shelton, 69 Nev. 309, 310, 250 P.2d 239, 239 (1952); Truckee-Carson Irrigation Dist. v. Wyatt, 84 Nev. 662, 666, 448 P.2d 46, 49 (1968).

[7] Driscoll v. Erreguible, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971); *see also Pfister*, 69 Nev. at 310-11, 250 P.2d at 239-40.

[8] *Driscoll*, 87 Nev. at 101, 482 P.2d at 294.

[9] *See, e.g.*, Bazzoli v. Nance's Sanitarium, 240 P.2d 672, 677-78 (Cal. Dist. Ct. App. 1952); Middleton v. Post Transp. Co., 235 P.2d 855, 856 (Cal. Dist. Ct. App. 1951) ("The fact that the doctrine of res ipsa loquitur is applicable in an action for personal injury does not deprive a defendant of his right to an instruction that the mere fact of injury is no evidence of his negligence of liability."); Jones v. Porretta, 405 N.W.2d 863, 874-76 (Mich. 1987) (medical malpractice); Stearns v. Plucinski, 482 N.W.2d 496, 498-99 (Minn. Ct. App. 1992) (medical

The mere happening instruction is based on the general rule of negligence as stated in *Gunlock v. New Frontier Hotel*,[11] "[t]he mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Negligence is never presumed but must be established by substantial evidence."[12] "Res ipsa loquitur is an exception to the general negligence rule, and it permits a party to infer negligence, as opposed to affirmatively proving it, when certain elements are met."[13]

Therefore, the use of the word "never" in the mere happening instruction suggests an absolute proposition that clashes with the subsequent res ipsa loquitur instruction. Additionally, giving both the mere happening instruction and the res ipsa loquitur instruction may be presumed prima facie prejudicial because it raises the strong possibility of confusing and misleading the jury.

When such cases arise where both a mere happening instruction and a res ipsa loquitur instruction would be appropriate, the district court must omit from the mere happening instruction the language that negligence is never presumed. The appropriate instruction must be presented to the jury as follows: "The mere fact that an unfortunate or bad condition resulted to the patient involved in this action is not sufficient to predicate liability."

Concurring/Dissenting Opinions

Hardesty, J., Concurring in Part and Dissenting in Part

Justice Hardesty agreed with the majority that the mere happening instruction and the res ipsa loquitur instruction were in conflict. Additionally, Justice Hardesty concurred with the jury instruction suggested by the majority in which the mere happening instruction was tailored to omit language stating that negligence is never presumed.

However, Justice Hardesty dissented with regard to the appropriate remedy for a jury instruction error. Hardesty did not agree that Appellant had met the standard for reversal, which requires that "[p]rejudice is not presumed,"[14] and that "[t]he burden is upon the appellant to show the probability of a different result."[15] Hardesty felt that the limited record submitted upon appeal did not contain sufficient evidence to establish prejudice, and therefore did not agree with the remedy of reversal and grant of a new trial to Appellant.

Conclusion

In conclusion, a district court cannot allow a mere happening jury instruction and a res ipsa loquitur without prima facie prejudicing the plaintiff because it will very likely mislead and confuse the jury. Therefore, the court distinguishes a jury instruction based on the mere

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malpractice); Miller v. Kennedy, 588 P.2d 734, 737 (Wash. 1978) (medical malpractice); Schnear v. Boldrey, 99 Cal. Rptr. 404, 408-09 (Cal. Ct. App. 1971) (medical malpractice);

[10] Rasmus v. So. Pacific Co., 301 P.2d 23, 26-28 (Cal. Dist. Ct. App. 1956) (railroad employee struck by pipe thrown by shipper's employee); Kitto v. Gilbert, 570, P.2d 544, 551 (Colo. Ct. App. 1977) (medical malpractice); Nielsen v. Pioneer Valley Hosp., 830 P.2d 270, 274 (Utah 1992) (medical malpractice).

[11] 78 Nev. 182, 370 P.2d 682 (1962).

[12] *Id.* at 185, 370 P.2d at 684.

[13] Woolsey v. State Farm Ins. Co., 117 Nev. 182, 188, 18 P.3d 317, 321 (2001).

[14] Truckee-Carson Irrigation Dist. v. Wyatt, 84 Nev. 662, 666, 448 P.2d 46, 49 (1968).

[15] *Id.* at 667, 448 P.2d at 50.

happening language used in *Gunlock v. New Frontier Hotel* where the elements of res ipsa loquitur are met, and requires use of the following jury instruction: "The mere fact that an unfortunate or bad condition resulted to the [plaintiff] in this action is not sufficient of itself to predicate liability." Based on the courts language and general survey of other jurisdictions' treatment of the issue, it appears that this modified jury instruction will be applicable in both medical malpractice and other general res ipsa loquitur situations.