STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1281

Melissa M. Keeley, as trustee for the heirs
and next-of-kin of Sky Keeley Olson,
Appellant,

vs.

Peter H. Germscheid, M. D.,
Respondent.

Filed June 8, 2010
Affirmed
Hudson, Judge

Morrison County District Court
File No. 49-CV-08-627

Teresa Fariss McClain, Hallberg & McClain, St. Paul, Minnesota (for appellant)

William M. Hart, Cecilie M. Loidolt, Damon L. Highly, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this appeal from judgment in favor of doctor-respondent in a medical-malpractice action, appellant argues that the district court erred by (1) refusing to include on the special-verdict form separate interrogatories relating to appellant's negligent-

nondisclosure theory of liability, and (2) denying appellant's motion for judgment as a matter of law. Because the jury instructions as a whole correctly stated the applicable law on negligent nondisclosure, and because the jury's determination of negligence may be sustained on the evidence presented, we affirm.

FACTS

Appellant Melissa M. Keeley first visited respondent Dr. Peter M. Germscheid, a family-practice physician practicing in Little Falls, for prenatal care when she was expecting her first child in 2001. When appellant was 38 weeks pregnant, her membranes ruptured, and labor was induced with Pitocin. During her delivery, a condition known as shoulder dystocia developed. Shoulder dystocia occurs when the baby's shoulders become lodged behind the mother's pubic bone due to the opposing angles of the baby and the mother's pelvis. The shoulder dystocia noted during appellant's 2001 delivery lasted about two or three minutes, after which respondent performed maneuvers to dislodge the shoulders and deliver the child. The child had a low Apgar score on delivery, but he was resuscitated and suffered no lasting effects.

Appellant became pregnant with her second child in early 2005 and again visited respondent for prenatal care. A notation placed in appellant's medical record at her first prenatal visit specified a history of shoulder dystocia. Respondent testified that this notation indicated that he discussed shoulder dystocia with appellant, although he did not use that term in the discussion. He testified that he told her that her "first baby got stuck" and "we'll have to be aware of that as [the] pregnancy progressed." Appellant testified

that, after her first pregnancy, respondent did not discuss the history of shoulder dystocia or her risk for that condition.

In August 2005, appellant was hospitalized with contractions. Respondent testified that he then told appellant that "because her baby got stuck before, I'd like to get this baby delivered before it got too big to deliver vaginally again." He testified that he preferred a trial of labor, and if that was unsuccessful or the baby showed signs of distress, he would perform a cesarean section. He testified that the standard of care would have been to attempt a trial of labor and that he had done this before with other patients who had risk factors. He did not tell appellant that her baby could die as a result of vaginal delivery because he estimated the risk of death from shoulder dystocia to be about one per one thousand. He stated that a risk of death exists with any vaginal delivery, and if it happens it is "absolutely" significant to the patient. The nurse present during this visit noted in appellant's medical chart that respondent had "discusse[d] options with patient."

At 5:00 a.m. the next morning, respondent started Pitocin to induce labor. He documented that he would have appellant labor for about eight to ten hours, and if there was no change, he would stop the Pitocin and decide either to wait or have a cesarean delivery. Respondent testified that, by 10:00 p.m., he offered appellant a cesarean section, but she declined to have a cesarean or to continue with Pitocin. Respondent discontinued the Pitocin, but he kept her in the hospital overnight because he "didn't want [her] to leave without having the baby one way or the other." He testified that, the

next morning, he told her that he wanted to get the baby delivered, but she said she wanted to go home and wait for spontaneous contractions.

Appellant's boyfriend, the baby's father, testified that respondent offered a cesarean and that he and appellant rejected that option because they both wanted her to have a "natural birth," but the decision to discontinue Pitocin was appellant's. Appellant initially testified that she did not know that shoulder dystocia could be a risk with delivery, but later testified that "it could be possible" that respondent discussed the option of a cesarean. She testified that she knew that the baby getting stuck could cause some trouble with breathing, but not that the baby could have a brain injury or die.

Appellant next saw respondent on August 30, 2005. Respondent testified that he was then "very upset" that the baby had not yet delivered and "extremely worried" that appellant "would get into trouble by continuing to wait." He testified that he offered her another trial of labor but that she did not want that option. He did not offer a cesarean section that day because he "had offered it three times before." He then ordered additional testing to determine whether the baby was at risk. An ultrasound revealed that the baby had an estimated weight of approximately nine pounds but did not show other risk factors. Respondent discussed the size of the baby with appellant, and she came to the hospital for delivery on the morning of September 5.

Appellant was induced with Pitocin and labored throughout the day with a regular labor pattern. She testified that she asked respondent for a cesarean section, but he stated that he did not see a need for one. Appellant's sister-in-law testified that respondent indicated that if the baby was not delivered by 6:00 p.m., he would perform a cesarean

section, but a cesarean was not performed. At about 8:30 p.m., when the baby's head was delivered, shoulder dystocia developed. The dystocia lasted about six minutes, and respondent performed prescribed maneuvers to deliver the baby. But the baby had no respiratory rate at birth, resuscitation was unsuccessful, and the baby died.

Appellant filed suit in Morrison County district court, alleging that respondent: (1) negligently treated her by failing to document her risk factors for shoulder dystocia, to refer her to an obstetrician, or to have one present at delivery; and (2) negligently failed to disclose her increased risk of shoulder dystocia and injury, should she elect a vaginal delivery, so that she was not informed of the risks of vaginal delivery and did not give informed consent to that delivery, which resulted in the baby's death.

At trial, appellant presented evidence from experts Dr. Sander Kushner, an osteopathic family physician, and Dr. Frank Bottiglieri, an obstetrician. Dr. Kushner offered the opinion that because appellant was at risk for shoulder dystocia with her second delivery, respondent failed to meet accepted standards of practice by not referring her to an obstetrician and by failing to inform her of the potential complications of shoulder dystocia, including the risk of injury or death to her baby. Dr. Kushner testified that offering a cesarean section after a failed attempt at labor would not meet the standard of care unless the doctor told the patient about the potential risks of vaginal delivery. He testified that the recommendations listed in Bulletin No. 40 of the American College of Obstetrics and Gynecology (ACOG), an article on shoulder dystocia, were consistent with accepted standards of care for a family-practice physician.

Dr. Bottiglieri cited an article that indicated a recurrence rate of 13.8 percent for shoulder dystocia. He testified that the disclosures made in this case were not sufficient to meet the standard of care for informing a patient of the risk of recurrent shoulder dystocia, and that more specific risks should have been discussed.

Respondent presented expert-witness testimony from Dr. Bruce Ferrara, a neonatologist, and Mark Matthias, a family physician. Dr. Ferrara testified that based on medical literature, the death rate from asphyxia due to shoulder dystocia was between two and three per one hundred thousand deliveries. Dr. Matthias gave his opinion that appellant had risk factors for shoulder dystocia, including maternal size, the size of the baby, and previous shoulder dystocia, but that respondent was "well within the scope of his practice to continue to follow her and manage her labor."

Dr. Matthias testified that he agreed with AGOG Bulletin No. 40, which stated that "shoulder dystocia is most often unpredictable and unpreventable" and that although risk factors could be identified, their predictive value was "not high enough to be useful in a clinical setting." He agreed that the ACOG bulletin referred to a history of shoulder dystocia being associated with a recurrence rate of one percent to 16.7 percent. He also referred to an additional article that stated that the incidence of death from shoulder dystocia was found to be 0.025 per one thousand deliveries. He testified that the estimated weight of appellant's baby did not place her in the category for which a planned cesarean delivery was recommended in Bulletin No. 40; that the standard of care did not require respondent to tell her about the risk of death to her baby if she tried to

deliver vaginally; and that he believed respondent acted appropriately by discussing risks and options, not getting an obstetrical consult, and allowing her to have a trial labor.

Appellant submitted proposed jury instructions that included separate special-verdict interrogatories on each element of negligent nondisclosure, following the pattern jury instruction for that theory of negligence in the Minnesota Civil Jury Instruction Guide. *See* 4A *Minnesota Practice*, CIVJIG 80.25 (2006). Respondent proposed instead a verdict form containing a single special-verdict question on negligence, following the pattern jury instruction for medical malpractice. *See* 4A *Minnesota Practice*, CIVSVF 80.90. After hearing arguments on this issue, the district court furnished the jury with a single, special-verdict question relating to the defendant's negligence: "Was defendant Peter Germscheid, M.D. negligent in the care and treatment he provided to Melissa Keeley?"[1] The district court, however, also provided the jury with oral and written instructions that included all of the elements of negligent nondisclosure as stated in CIVJIG 80.25.

After a five-day trial, the jury returned a verdict in favor of respondent. The district court denied appellant's motion for a new trial or judgment as a matter of law, and this appeal follows.

[1] The jury also received special-verdict questions on causation and damages, including whether, if the jury found respondent to be negligent, such negligence was a direct cause of the child's death.

D E C I S I O N

I

The district court has "considerable discretion" in forming special-verdict questions. *Kohoutek v. Hafner*, 383 N.W.2d 295, 302 (Minn. 1986). Absent an abuse of that discretion, this court will not reverse the district court's denial of a motion for a new trial based on a challenge to the formulation of jury instructions. *See id*. at 300.

> The charge of the [district] court must be viewed in its entirety and from a practical and commonsense point of view. . . . [A] new trial will not be granted where requested instructions are refused when the general charge fairly and correctly states the applicable law. All that is required is that the charge as a whole convey to the jury a clear and correct understanding of the law.

Id. (quoting *Cameron v. Evans*, 241 Minn. 200, 208–09, 62 N.W.2d 793, 798–99 (1954)).

A patient who submits a medical-malpractice action on a theory of negligent nondisclosure must prove that, although he or she was aware of the nature and character of a medical treatment, the patient "was not properly informed of a risk inhering in the treatment, the undisclosed risk materialized in harm, and consent to the treatment would not have been secured if the risk were disclosed." *Cornfeldt v. Tongen*, 262 N.W.2d 684, 699 (Minn. 1977) (*Cornfeldt I*). A physician has a duty to disclose a risk of treatment if the doctor knows or should have known of the risk and "if a reasonable person in what the physician knows or should have known to be the patient's position would likely attach significance to that risk" in deciding whether to consent to treatment. *Id*. at 699, 700. The scope of the duty to disclose risks encompasses information that "a skilled practitioner of good standing in the community would reveal," as well as "risks not

generally considered by the medical profession serious enough to require discussion with the patient" if "the doctor is or can be aware that [the] patient attaches particular significance to [those] risks." *Kinikin v. Heupel*, 305 N.W.2d 589, 595 (Minn. 1981) (citing *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980) (*Cornfeldt II*)).

The Minnesota Civil Jury Instruction Guide recommends the use of jury instructions that list each element that must be proved on a negligent-nondisclosure theory. *See* CIVJIG 80.25. Thus, the recommended pattern jury instruction contains special-verdict interrogatories specifying each of these elements: (1) the doctor knows or should know about the risk involved in the treatment or alternatives; (2) the risk of alternative treatment is significant enough that the doctor should inform the patient of it, including whether the doctor knows or should have known that a reasonable person in the patient's position would view it as significant, or it is the kind of risk that a doctor customarily tells a patient under similar circumstances; (3) the doctor failed to inform the patient; (4) a reasonable person in the patient's position would not have consented to treatment if the risk had been known; and (5) the undisclosed risk was a direct cause of harm. *Id*.

Appellant argues that the district court erred by failing to submit to the jury special-verdict-form interrogatories specific to her negligent-nondisclosure theory. She maintains that the general negligence special-verdict question did not correctly state the applicable law, so that the jury was deprived of the opportunity to fully and fairly consider the issue of negligent nondisclosure.

The Minnesota Supreme Court has held, in a factually similar case, that the district court did not err by submitting to the jury a single special-verdict question on malpractice, rather than a series of special-verdict interrogatories setting forth the elements of negligent nondisclosure. *Kohoutek*, 383 N.W.2d at 300. In *Kohoutek*, a patient alleged that medical professionals negligently failed to inform her about the risks of vaginal delivery when shoulder dystocia developed during labor and delivery, and her child died as a result of oxygen deprivation. *Id*. at 296–97. The district court instructed the jury on issues of negligent treatment and negligent nondisclosure. *Id*. at 297. The court submitted to the jury a special-verdict form which asked whether the conduct of each defendant amounted to malpractice, but it did not submit special-verdict interrogatories listing the elements of negligent nondisclosure. *Id*. at 297–98. The supreme court concluded on review that: (1) the special-verdict question on "malpractice" did not confuse the jury because the use of that term, along with "negligence," in the jury instructions, effectively informed the jury that the two terms required the same standard of proof; and (2) because the district court separately instructed the jury on the elements of negligent nondisclosure, "the jury was reasonably informed of the two separate claims in negligence." *Id.* at 302.

Appellant argues that *Kohoutek* did not reach the issue presented here: whether a general negligence question on a special-verdict form is legally sufficient to inform a jury of the elements of negligent nondisclosure, which must be proved. She points out that both *Cornfeldt I* and *Cornfeldt II* strongly endorse the use of special-verdict interrogatories in negligent-nondisclosure cases. *See Cornfeldt I*, 262 N.W.2d at 699,

n.11 (stating that "[i]t is proper to submit the issue [of whether a doctor should have knowledge of a risk] to the jury as a special interrogatory in a special verdict"); *Cornfeldt II*, 295 N.W.2d at 640 (concluding that, when special-verdict interrogatories had been submitted to jury, district court erred by ordering judgment for the plaintiff on an element that had not been submitted for jury's finding). And she maintains that the district court's failure to provide special-verdict interrogatories on each element of the negligent-nondisclosure claim deprives her of the right to have the jury determine each issue of material fact. *See Hill v. Okay Constr. Co., Inc.*, 312 Minn. 324, 340, 252 N.W.2d 107, 118 (1977) (stating "requirement that [a] special verdict encompass all questions of material fact . . . [to] ensure the parties their constitutionally guaranteed right to a jury trial").

But we review the district court's jury instructions in the context of the instructions as a whole, not just the special-verdict form. *See Kohoutek*, 383 N.W.2d at 301. The supreme court in *Kohoutek* specifically concluded, in a negligent nondisclosure case, that when jury instructions adequately inform the jury of the relevant law and no jury confusion exists, a particular form of special verdict is not required. *See id.* at 302; *see also Duxbury v. Spex Foods, Inc.*, 681 N.W.2d 380, 388 (Minn. App. 2004) (concluding that district court has no obligation to adopt jury instruction guide special-verdict form as long as law is correctly stated), *review denied* (Minn. Aug. 25, 2004). The supreme court's language in *Cornfeldt I* and *Cornfeldt II*, while favorable to the use of particular special-verdict interrogatories, does not require them in every negligent nondisclosure case. *See* Minn. R. Civ. P. 49.01(a) (giving district court discretion in use

of special interrogatories); *see also Hill*, 312 Minn. at 340, 252 N.W.2d at 118 (stating that district court has discretion to formulate special-verdict questions "in the form of ultimate fact questions").

Here, the district court gave the jury specific written and oral instructions on the elements listed in CIVJIG 80.25. The court told the jury:

> A failure to tell a patient about the risks of treatment or the availability of alternative treatment is negligence if: One, the doctor knows or should know about the risk involved in surgery or treatment are [sic] or alternatives to the surgery or treatment. Two, the risk or alternative treatment is significant enough that the doctor should tell his patient about it. The risk—or the existence of alternative treatment is significant if (a) the doctor knows or should know that a reasonable person in the Plaintiff's position would regard it as significant; or (b) it is the type of risk or alternative treatment that a doctor customarily tells a patient about under similar circumstances. Now, number three, the doctor does not tell the patient about the risk or alternative treatment. Four, a reasonable person in the patient's position would not have consented to the treatment or surgery if the risk or alternative treatment had been known. And five, the undisclosed risk is a direct cause of death to the patient.

Although it would have been advisable for the district court to have furnished the jury with special-verdict interrogatories that included the specific elements of negligent nondisclosure, the district court specifically outlined those elements for the jury in written and oral instructions. Because the district court's instructions as a whole fairly and correctly stated the applicable law, the court did not abuse its discretion by declining to use special-verdict interrogatories on each element of negligent nondisclosure.

Further, even if the district court had improperly failed to submit a more detailed special-verdict form, we could not conclude that any error sufficiently prejudiced

appellant as to require a new trial. The district court told the jury that it "must consider all the instructions together" in arriving at a verdict. And during closing argument, appellant's trial counsel reiterated the elements necessary to determine the negligent-nondisclosure claim and specified what answer on the special-verdict form would be favorable to her client on that issue. *See Lommen v. Adolphson & Peterson Constr. Co.*, 283 Minn. 451, 456, 168 N.W.2d 673, 677 (1969) (concluding that new trial was not warranted for failure to give specific jury instruction when counsel "fully, clearly and vigorously addressed" issue in closing arguments, which "explained and were . . . consistent with the court's general instructions").

II

Appellant argues that the district court erred by failing to grant her motion for judgment as a matter of law (JMOL) on the issue of negligent nondisclosure. This court reviews de novo the district court's decision on a JMOL motion. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). Under Minn. R. Civ. P. 50.01, JMOL should be granted "only in those unequivocal cases" in which, on the evidence taken as a whole, a contrary verdict would be manifestly against the evidence or could not be maintained under controlling law. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly, & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (citation omitted) (applying Minn. R. Civ. P. 50.01). This court will not set aside a jury's verdict "if it can be sustained on any reasonable theory of the evidence" or unless the evidence is "practically conclusive against the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (citation omitted).

Appellant argues that respondent, by his testimony, admitted three of the five elements of negligent nondisclosure: that he knew of the risk of treatment, that he failed to inform her of that risk, and that the risk was a direct cause of harm. She maintains that the district court could have decided, as a matter of law, that the remaining elements were met because the record shows that the specific risks of injury or death from recurring shoulder dystocia were significant enough so that respondent should have told her about them, and that if the risks had been known, a reasonable person in her circumstances would not have consented to a vaginal delivery.

The jury found that respondent was not negligent in his care and treatment of appellant. In reaching this determination, the jury could have reasonably relied on respondent's testimony and the testimony of his experts that he sufficiently informed appellant of the risk of recurring shoulder dystocia by telling her that "the baby could get stuck" again and that she could have a difficult delivery. The jury could also have credited respondent's testimony that he offered appellant the option of a cesarean section as an alternative to a vaginal birth.

Appellant argues that respondent had the duty to inform her of more specific risks of shoulder dystocia, including the risk of infant death. But "[d]octors have a duty to disclose risks of death or serious bodily harm which are a significant probability." *K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995). The district court correctly instructed the jury that a risk is significant enough to require disclosure if a doctor knows or should know that a reasonable person in the plaintiff's position would regard it as significant, or if it is the kind of risk that, under similar circumstances, a doctor customarily tells a

patient. Dr. Matthias testified that in many cases, shoulder dystocia resulted in a delivery without complications, and that in other cases, it resulted in brachial plexus injury, which often resolved. Dr. Ferrara testified that in 25 years in practice as a neonatologist, he had not seen a child's death from shoulder dystocia. On this record, the jury reasonably could have determined that the risks of death or serious harm as a result of shoulder dystocia were not significant enough to require disclosure of those risks. The district court did not err by denying the motion for judgment as a matter of law.

Affirmed.