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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0873**

Vickie M. Jones,
Respondent,

vs.

Michael Dan Smilanich, et al.,
Appellants,

Twin Cities Dental Center, P.A.,
Respondent on related appeal.

**Filed May 3, 2021
Affirmed
Bryan, Judge**

Hennepin County District Court
File No. 27-CV-18-9098

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Center, P.A.)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this appeal following a trial of respondent's dental negligence and fraud claims,
appellants challenge the denial of their motion for judgment as a matter of law (JMOL),

arguing that fraud is not an actionable claim and that damages for fraud are limited to out-of-pocket, economic losses. By notice of related appeal, respondent challenges the denial of her motion to enter judgment jointly against appellants and respondent on related appeal, arguing that the parties stipulated that respondent on related appeal was vicariously liable for appellants' fraudulent statements. We affirm the judgment because Minnesota law allows claims for fraud against medical providers, the jury instructions did not limit damages to out-of-pocket, economic losses, and the district court's denial of respondent's request to amend the judgment was not against logic or the facts.

FACTS

Respondent Vickie M. Jones sued appellants Dr. Michael Dan Smilanich, D.D.S., Michael D. Smilanich, D.D.S., Ltd., Smilanich Smile Design (together Smilanich), and respondent on related appeal Twin Cities Dental Center, P.A. (TCDC) for negligence and fraud relating to the dental treatment that she received over the course of several years. The parties proceeded to trial, and the jury found that Smilanich was not negligent but did commit fraud. The jury awarded Jones \$100,000 in damages resulting from Smilanich's fraudulent statements, and the district court entered judgment against Smilanich. Smilanich made a posttrial motion for JMOL, and Jones made a posttrial request to amend the judgment. The district court denied the parties' posttrial requests, and both Jones and Smilanich appeal. Given the issues raised, we address the evidence presented, the parties' discussion regarding TCDC's vicarious liability, and the jury instructions regarding damages.

Evidence Presented

The evidence presented at trial established the following facts. In 2011, Jones met with Smilanich to discuss possible dental reconstructive work. At the time, Jones had eight upper teeth remaining. Jones and Smilanich discussed a treatment plan in which Smilanich would remove the eight upper teeth, place five dental implants in her upper jaw, and make an upper plate or bridge that would be anchored by the dental implants. In mid-2013, Jones started this course of treatment with Smilanich. An oral surgeon extracted her upper teeth and inserted dental implants. Later, Smilanich placed a temporary bridge over the implants. The temporary bridge was to be replaced once a permanent bridge was made. This temporary bridge did not fit correctly and Smilanich had to place a second temporary bridge. It took several months for Jones to undergo and heal from these initial procedures. In February 2014, Jones was cleared to proceed with the next portion of the treatment.

On March 13, 2014, Jones had an appointment with Smilanich to make impressions for the permanent bridge, which was to be placed two-to-four weeks after this appointment. Prior to this appointment, a friend of Jones told her that Smilanich was losing his practice. Jones testified that her friend reported that “they’re going to close the doors on him,” “he’s filing for bankruptcy,” and “his business was in jeopardy.” Jones was concerned and asked Smilanich whether he was in jeopardy of losing his practice. When confronted with her concerns on March 13, 2014, Smilanich made the following statements to Jones: (1) this was not true; (2) he was not losing his business; (3) his personal problems were nothing to worry about; and (4) his personal problems would not affect his business or delay the completion of her dental treatment. Jones paid Smilanich the remaining amount of \$8,000

for the treatment. If she had known the truth about his financial difficulties, she would not have paid him the remaining balance.

At the time that Smilanich made these representations, he had been experiencing financial difficulties for two years and was deeply in debt. Smilanich was in default on two mortgages on his practice, and a receiver had been appointed for his dental practice since the fall of 2013. Prior to his representations to Jones, the bank had foreclosed on the mortgages, and on March 4, 2014, more than a week before making the statements in question to Jones, Smilanich received a notice of the impending sheriff's sale of his foreclosed practice, scheduled for March 25, 2014. Within two weeks of making these statements, Smilanich stopped practicing dentistry, was locked out of his Wisconsin practice, and the bank seized his patient records. Ultimately, the bank sold his practice to a new entity in April 2014. Smilanich entered substance abuse treatment and did not resume dentistry until he began working at TCDC in late August or early September 2014.

Following her March 2014 appointment, Jones attempted to make future appointments. They were all cancelled and she was unable to contact Smilanich. Jones kept calling, several times a week through the summer of 2014, but never received an answer or any information about what had happened. Jones finally received a letter from Smilanich in September 2014 informing her that he had resumed practicing at TCDC. Jones immediately made an appointment to resume her treatment for the installation of the permanent bridge. Her treatment was further delayed when some of her appointments were cancelled because Smilanich had not paid a dental assistant. Smilanich finally put the permanent bridge in place on November 6, 2015. In the time between the placement of the

second temporary bridge in 2013 and the placement of the permanent bridge in 2015, the second temporary bridge broke, cracked, and fell out on multiple occasions.

Jones presented expert testimony that the temporary bridges and dental treatment fell below the accepted standard of care. In addition, Jones presented testimony that Smilanich failed to meet the standard of care by abandoning her care with no explanation or warning. Jones was also dissatisfied with the permanent bridge. She visited two other dental providers who concluded that the permanent bridge did not fit the implants and she would need a new permanent bridge. Jones offered expert testimony that the permanent bridge caused bleeding gums, malocclusion, and bone loss.

Smilanich also testified and presented expert testimony regarding the standard of care and his treatment of Jones. This expert acknowledged that permanently abandoning a patient is below the standard of care, and Smilanich agreed that he had a duty to notify Jones of his whereabouts when he discontinued his practice in March 2014. The expert, however, concluded that Smilanich's treatment only temporarily lapsed and that the permanent bridge was not defective. Smilanich also denied ever providing any false representations to Jones.

A. Stipulation and Jury Questions Regarding TCDC's Vicarious Liability

The parties and the district court discussed the contents of the court's draft special verdict form during a conference on June 7, 2019. Counsel for Smilanich and TCDC requested that the district court remove the following question: "Did Dr. Smilanich act negligently while treating Ms. Jones at Twin Cities Dental Center in Hopkins, Minnesota?" Counsel expressed a concern that an answer to that question could conflict with a different

question: “Was Dr. Smilanich negligent in his care and treatment of Ms. Jones?” During the ensuing exchange, the parties reached an understanding that there was no longer a conflict between the interests of Smilanich and the interests of TCDC:

DEFENSE COUNSEL: Yes, so as I was thinking about that this morning, my concern is that on page 1 of the verdict form, we asked was Dr. Smilanich negligent and then the causal question.

THE COURT: Right.

DEFENSE COUNSEL: Then if you go to question number 6 where we ask whether he was negligent while he was treating at the TCDC, my concern is this: If the jury were to answer question number 1, Was Dr. Smilanich negligent in his care and treatment of Ms. Jones, and they say no, then if your answer to question number 1 is yes, then they don’t answer question number 2. But if they go to the back and they happened to say the answer to question number 6 is yes, then we’re going to have inconsistent verdicts, and it’s going to be—it’s just going to be—well, it’s going to be inconsistent. . . .

. . . .

THE COURT: Well, that would be inconsistent. And do you have a solution to propose?

DEFENSE COUNSEL: Well, so my thought is to just eliminate question number 6 and ask the agency question. So you have the negligence causation and then agency.

THE COURT: Oh, if you want number 6 out, I’m not going to make it stay in, but I thought you wanted 6 in so that if they found negligence in his care and treatment while he was on his own but not in his care and treatment when he was at TCDC, then that would separate the two out from each other. But if you don’t want it, I don’t think [plaintiff’s counsel] would object to that being removed.

PLAINTIFF COUNSEL: No, that’s a good solution to my other concern.

THE COURT: So if you want me to take 6 out, if that’s the defense request, I will do that for you.

DEFENSE COUNSEL: Well, that's my concern is that we'd have an inconsistency there that would be irreconcilable, so I think 6 should come out.

THE COURT: Okay.

DEFENSE COUNSEL: Otherwise, the other alternative would be to have the same questions 1, 2, 3, 4, and 5—

THE COURT: Again after 6.

DEFENSE COUNSEL: —again after 6, yeah.

THE COURT: And we can do it that way if you want. It's really up to you. But if it doesn't really matter to you to distinguish between the two, I mean, you're here representing both.

DEFENSE COUNSEL: I know, it doesn't really matter at this point.

THE COURT: And impliedly representing that there isn't a conflict at this point between the two.

DEFENSE COUNSEL: No, right. There was a time when that mattered, I don't believe that exists anymore, so I would ask that that be withdrawn.

On the special verdict form, the jury was asked what the district court and the parties referred to as “the agency question,” but this question only related to the negligence claim: “In treating Ms. Jones at Twin Cities Dental Center in Hopkins, Minnesota, was Dr. Smilanich acting as an agent of Twin Cities Dental Center?” The special verdict form did not contain a similar question related to the fraud claim, and because the jury determined that Smilanich was not negligent in his care of Jones, the jury did not answer the agency question related to that claim.

Jones made a posttrial request to hold TCDC vicariously liable on the fraud claim, arguing that the exchange constituted a stipulation that TCDC was vicariously liable for both negligence and fraud committed by Smilanich. The district court determined that the jury did not make a finding as to TCDC's vicarious liability, and therefore the district court had no authority to hold TCDC vicariously liable.

B. Jury Instructions Regarding Damages

The district court instructed the jury that the damages for both negligence and fraud included economic and noneconomic damages as well as past and future expenses, not just out-of-pocket expenses. For example, the district court gave the following instruction under the heading “Deciding damages for fraud and misrepresentation:”

In deciding damages, decide the amount of money that will fairly and adequately compensate Ms. Jones for the damages directly caused by relying on Dr. Smilanich’s misrepresentation.

Damages for fraud or misrepresentation are limited to

1. The difference between the actual value of the property received and the price paid for it, and
2. Any other damages that were directly caused by relying on the fraud or misrepresentation.

In addition, the district court instructed the jury regarding compensatory damages, telling the jury to include damages for past and future harm (including pain, disability, embarrassment, and emotional distress), and health care expenses for both question 7 (regarding damages for negligence) and question 15 (regarding damages for fraud):

Deciding the amount of damages

In answering Question Nos. 7 and 15, you are to decide the amount of money that will fairly and adequately compensate Ms. Jones for her past and future harm.

Items to Include

Past damages for bodily and mental harm

Items to include for past damages for bodily and mental harm:

1. Pain
2. Disability
3. Embarrassment
4. Emotional distress

Ms. Jones has experienced up to the time of your verdict.

It is difficult to put an exact value on these items that are not necessarily decided on a daily or hourly basis.

Factors to consider

You should consider:

1. The type, extent, and severity of the injuries
2. How painful the injuries were
3. The treatment and pain involved in that treatment
4. The length of time the injury or harm lasted
5. Any other factors you think are relevant.

Past damages for health care expenses

Past damages for health care expenses may include:

1. Medical supplies
2. Health care services of every kind necessary for treatment up to the time of your verdict.

Future damages for bodily and mental harm

Future damages for bodily and mental harm may include:

1. Pain
2. Disability
3. Embarrassment
4. Emotional distress

Ms. Jones is reasonably certain to experience in the future.

It is difficult to put an exact value on these items that are not necessarily decided on a daily or hourly basis.

Factors to consider

You should consider:

1. The type, extent, and severity of the injuries
2. How painful the injuries are
3. The treatment and pain involved in that treatment
4. The length of time the injury or harm is likely to last
5. Any other factors you think are relevant.

Future damages for health care expenses

Future damages for health care expenses may include:

1. Medical supplies
2. Health care services of every kind reasonably certain to be necessary for treatment in the future.

Neither party objected to these instructions, and neither party assigned error to these instructions in a posttrial motion. Although Smilanich moved for JMOL regarding the damages award, arguing that the evidence presented was not sufficient to justify the award, the motion did not mention these instructions or assert that the jury instructions regarding damages were erroneous.

DECISION

We first address Smilanich's arguments that fraud is not an actionable claim and that the damages awarded by the jury exceed the limitations for fraud damages. Then, we discuss Jones's challenge to the denial of her request to amend the judgment.¹

I. Patients' Fraud Claims Against Medical Providers

Smilanich argues that Minnesota law prevents Jones from suing him for fraud. Instead, Smilanich believes that Jones can only bring claims for negligent nondisclosure. Under this view of the law, Smilanich argues that Jones improperly pleaded her negligent nondisclosure claim as a fraud claim, and that the district court erred in denying his motion for JMOL. We are not persuaded by Smilanich's statement of the law.

Smilanich argues that the law does not recognize a claim for fraud in this case. This argument raises a question of law, which we review de novo. *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 54-55 (Minn. 2019). Smilanich relies primarily on two cases for his argument that Jones is precluded from suing for fraud: *D.A.B. v. Brown*, 570 N.W.2d

¹ Jones also argues that the district court erred by permitting Smilanich's expert witness to testify. Jones requests relief regarding this alleged error only if we grant a new trial on some other basis. For the reasons set forth below, we affirm the decisions of the district court and the jury, and therefore, we need not address this remaining issue.

168 (Minn. App. 1997), and *Paulos v. Johnson*, 597 N.W.2d 316 (Minn. App. 1999), review denied (Minn. Sept. 28, 1999). Neither case supports Smilanich’s proposed legal rule.

In *D.A.B.*, medical patients sued a doctor for failing to disclose that he was receiving kickback payments for medication that he had prescribed to the patients. 570 N.W.2d at 169. The patients alleged breach of fiduciary duty, conspiracy to breach a fiduciary duty, and fraud. *Id.* at 170. The claims were dismissed as time-barred, and the patients appealed that determination. *Id.* On appeal, this court determined that the claims were subject to the two-year statute of limitations that applied to medical-negligence claims and not subject to the six-year statute of limitations that applied to fraud claims. *Id.* at 171. This court noted that “despite counsel’s creative characterizations and foreign support, this case is a malpractice action” because the “doctor’s duty to disclose the kickback scheme presents a classic informed consent issue.” *Id.*; see also *Cornfeldt v. Tongen*, 262 N.W.2d 684, 699 (Minn. 1977) (noting a doctor’s duty to inform patients of treatment risks).

D.A.B. does not support Smilanich’s proposition because the decision does not preclude fraud claims against medical providers. It addressed the specific kickback allegations in that case, and did not articulate a new rule of law precluding fraud claims in other cases. In addition, this court characterized the omission in *D.A.B.* as a “classic informed consent issue” because the omission undermined the patients’ informed consent to take the medication prescribed. *D.A.B.*, 570 N.W.2d at 171. In contrast, the statements made by Smilanich in this case concern the solvency of his business practice, the magnitude

of his debt, and the effects of his personal problems. They do not relate to the risks of consenting to the general treatment here: receiving dental implants and a permanent bridge.

Paulos is also inapplicable to the claims at issue before us. In *Paulos*, a patient sued his doctor for negligent nondisclosure. 597 N.W.2d at 318. The district court dismissed the lawsuit with prejudice, and this court affirmed. *Id.* The patient later filed a second lawsuit against the doctor regarding the previously dismissed conduct, this time styled as a fraud claim. *Id.* The district court granted summary judgment in favor of the doctor, and the patient appealed. *Id.* On appeal, this court determined that the second lawsuit was barred by res judicata, noting that “[a] change in legal theory cannot be used to avoid res judicata.” *Id.* at 319. We conclude that *Paulos* does not support Smilanich’s proposition. Contrary to Smilanich’s argument, this court did not conclude in *Paulos* that medical providers are immune from fraud claims or that patients cannot sue for fraud. Instead, *Paulos* merely applied the principles of res judicata.

Moreover, unlike the patient in *Paulos* who alleged the same facts in both the nondisclosure and fraud suits, Jones brought a negligence claim primarily regarding the standard of care for placing temporary and permanent bridges and a fraud claim primarily regarding representations of financial solvency. The two claims do not depend on many shared factual allegations. We further note that to the extent there could have been any factual overlap in the allegations, the jury distinguished between the two claims, and Smilanich’s own arguments to the district court distinguished the misrepresentations from Jones’s course of treatment. For example, Smilanich’s attorney told the jury in her opening statement that “all these issues that are personal, financial, has nothing, nothing to do with

the dental care he provided.” Similarly, in her closing argument, she said that “Smilanich’s financial life, his personal life, his abilities as a business owner or perhaps his inabilities . . . has nothing to do with the care in this case.” In his pretrial motions, Smilanich made this distinction even more clearly, stating that his financial difficulties were not relevant to the malpractice claims because they did not relate to the course of treatment in this case. The distinct factual bases for the two claims in this case render *Paulos* inapplicable. We cannot, as Smilanich urges, interpret *Paulos* as precluding distinct claims that would not satisfy the principles of res judicata.

We therefore conclude that on this record, the district court did not err in denying Smilanich’s motion for JMOL.

II. Future Losses and Noneconomic Damages for Fraud Claims

Smilanich argues that Jones is barred from recovering the damages related to her fraud claim because, as a matter of law, fraud damages cannot exceed out-of-pocket expenses and cannot include noneconomic damages. After reviewing the proceedings, we affirm the jury’s award of damages.

The jury instructions in this case directed the jury to include more than economic, out-of-pocket expenses when calculating the damages available for fraud in question 15. Specifically, the district court directed the jury to consider past and future health care expenses as well as past and future “bodily and mental harm.” In addition, the district court included the following four components of harm in its instructions regarding damages: past and future pain, disability, embarrassment, and emotional distress. Smilanich did not object to the inclusion of future health care expenses or the components of bodily and

mental harm.² Nor did Smilanich assign error to the damages instructions in his posttrial motion for JMOL. Without a more clear indication of error, we decline to reinterpret the arguments below to include a challenge to the jury instructions. Therefore, we must consider the instructions given as the applicable law. *See Wolner v. Mahaska Indus. Inc.*, 325 N.W.2d 39, 42 (Minn. 1982) (concluding that “where a party makes no objections to jury instructions before the jury retires . . . the instructions are the law of the case”); *Jacoboski v. Prax*, 187 N.W.2d 125, 129 (Minn. 1971) (listing cases and reiterating that the jury instructions become the law of the case “[w]here no exceptions are taken to instructions to the jury and claimed error in such instructions is not assigned as grounds for new trial”); *Coenen v. Buckman Bldg. Corp.*, 153 N.W.2d 329, 334 (Minn. 1967) (noting that unobjected-to jury instructions become the law of the case).

Finally, we also observe that Smilanich does not argue on appeal that the evidence presented regarding noneconomic losses cannot support the amount of the award. In light

² In fraud cases, the general rule is that fraud damages should be measured by the plaintiff’s out-of-pocket losses. *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988). However, that general rule does not apply where “application of that rule would leave plaintiff’s loss uncompensated and would not restore plaintiff to its former position.” *Id.* at 183. This court has previously applied this exception to noneconomic damages. *See, e.g., Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 128-29 (Minn. App. 1992) (affirming fraud damages in excess of out-of-pocket economic expenses and including amounts related to “the disgrace of borrowing money,” “the strain on appellant, his wife and their two small children,” and “the anger and depression he experienced”), *review denied* (Minn. App. 29, 1992). Given the unobjected-to jury instructions in this case and because Smilanich did not assign error to those instructions in his motion for JMOL, we need not address whether those instructions fairly and correctly stated the applicable law. *See Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018) (“The district court has broad discretion in determining jury instructions, and we will not reverse where jury instructions overall fairly and correctly state the applicable law.” (quotation omitted)).

of these observations, we disagree with Smilanich's argument and affirm the jury's damages award.

III. Dispute Regarding Existence of Vicarious Liability Stipulation

By notice of related appeal, Jones argues that the district court erred when it denied her request to amend the judgment. Specifically, Jones believes that the parties stipulated to TCDC's vicarious liability and that the judgment should be entered against both Smilanich and TCDC. We review decisions regarding motions to amend for an abuse of discretion. *In re Guardianship of Guaman*, 879 N.W.2d 668, 672 (Minn. App. 2016); *Zaffke v. Wallestad*, 642 N.W.2d 757, 759 (Minn. App. 2002). Because the denial of Jones's request was not against logic or the facts in these proceedings, we affirm the district court's decision.

During the conference on June 7, 2019, the parties discussed the potential inconsistency that could arise in the verdict if the jury was asked generally whether Smilanich was negligent in his care of Jones and more specifically, whether Smilanich acted negligently while at TCDC. As part of this discussion, the district court noted that both Smilanich and TCDC had the same counsel, "impliedly representing that there isn't a conflict at this point between the two." In response, the defense attorney confirmed that while "[t]here was a time when that mattered," no conflict of interest between the defendants "exists anymore." Jones argues that this discussion equates to a stipulation of TCDC's vicarious liability for the actions of Smilanich. The district court disagreed, and denied the request.

We conclude that the district court did not abuse its discretion for three reasons. First, the discussions during the conference on June 7, 2019, related entirely to the negligence claim and did not at all discuss or mention the fraud claim. Second, the statements made by the attorneys during the conference do not amount to a stipulation of liability or agency regarding negligence or fraud. At no point during the discussion did counsel for Smilanich and TCDC concede or state that TCDC would be vicariously liable for the actions of Smilanich. A stipulation of vicarious liability requires more clear language that is absent from the record of the proceedings in this case. Such a stipulation also conflicts with the special verdict form, which—despite the discussion at the conference—required the jury to determine TCDC’s vicarious liability had it found Smilanich liable for negligence. The agency question remained, indicating that TCDC contested liability. Third, absent a stipulation, Jones’s request requires this court to make findings of liability, which we cannot do. *See Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966) (“It is not within the province of [appellate courts] to determine issues of fact on appeal.”).

For these reasons, we conclude that the district court did not abuse its discretion when it denied Jones’s request to add TCDC to the judgment.

Affirmed.