

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

PATRICIA WAGNER,)
Plaintiff,)
)
v.)
)
BETHANY DENTAL ASSOCIATES,)
INC., MARK B. BROWN, D.M.D, AND)
BRADFORD KLASSMAN, D.M.D.)
Defendants.)

C.A. No.: 09C-09-266 FSS
(E-FILED)

Submitted: August 25, 2011
Decided: November 22, 2011

ORDER

**Upon Defendants Bethany Dental Associates and Mark B. Brown, D.M.D.’s
Motion for Summary Judgment -
GRANTED in part and *DENIED* in part.**

This case concerns dental treatment with a bad outcome. According to Plaintiff, her dentist did not do the agreed-on dental work. And, what he did, he did badly. Thus, Plaintiff has alleged breach of contract and dental malpractice. As explained below, Plaintiff’s experts do not support her malpractice claim. But, if Plaintiff is believed, Plaintiff did not receive the work for which she paid.

I.

Patricia Wagner was Dr. Brown's patient. On November 18, 2005, Dr. Brown referred Wagner to Dr. Klassman for consultation, who recommended implants and extensive cosmetic dentistry. Wagner then contracted with the dentists through Bethany Dental Associates for dental work totaling \$24,812.10.

On March 27, 2006, Dr. Brown filed-down several of Wagner's teeth and placed temporary caps. On April 25, 2006, he removed the temporary caps and placed two bridges. On May 5, 2006, Dr. Klassman performed a bone graft in the area where teeth #5 and #7 would have been implanted, and closed the surgical site with dissolvable sutures. Dr. Klassman did not make an incision to release tension between Wagner's tissue and tooth. She subsequently developed pain around the surgical area, and the bone graft ultimately failed. On May 8, 2006, Wagner visited Dr. Brown with pain complaints.

On July 11, 2006, Wagner again visited Dr. Brown with pain complaints, and he prescribed antibiotics. On August 4, 2006, both dentists saw Wagner and did not tell her about the bone graft's failure. On October 20, 2006, Dr. Klassman placed dental implants and posts without redoing the bone graft. After the implants, Wagner developed infections over the next few months and antibiotics were prescribed each time.

According to the complaint, on July 9, 2007, “Dr. Brown placed the temporary bridge, caps, and permanent bridge in.” On November 15, 2007, Wagner saw Dr. Brown with gum pain complaints. He again referred her to Dr. Klassman, whom she revisited on November 16, 2007. No further treatment was offered.

On September 30, 2009, Wagner sued Drs. Brown and Klassman, and Bethany Dental Associates, alleging: (i) both dentists were negligent; (ii) Bethany Dental Associates was negligent as the dentists’ principal; (iii) both dentists intentionally concealed surgical mistakes; and (iv) both dentists breached the surgical contract by not performing appropriate treatment. On July 14, 2011, Bethany Dental and Dr. Brown moved for summary judgment on the negligence and contract claims. On July 22, 2011, Wagner dismissed Dr. Klassman.

II.

Summary judgment is appropriate when the record “shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”¹ The court must view the evidence in the light most favorable to the non-moving party, and accept the non-movant's version of any disputed facts.²

¹ Del. Super. Ct. Civ. R. 56(c).

² *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted).

III.

Wagner alleges Dr. Brown was negligent. Generally, Wagner must prove: (i) Dr. Brown owed Wagner a duty of care; (ii) he breached his duty; (iii) and proximately caused her injury.³ Delaware's dentists are held to a "same or similar community" care standard.⁴ Wagner disclosed two experts, Dr. Donald Tilghman and Dr. Dana Kennan. Dr. Tilghman testified that, "[Brown] gave reasonably prudent care." Dr. Kennan testified, "I'm of an opinion that [Brown] probably was acting within what the community would expect." Dr. Kennan criticized Dr. Brown for "not listening" to Wagner, but also testified, "Dr. Brown didn't breach any standard of care because he did everything that he had been taught to do." The best Wagner offers is that Dr. Kennan testified, "[Brown] had not met the standards the patient wanted." Thus, Wagner's negligence claim fails.

IV.

Wagner also alleges Dr. Brown breached the surgical contract by not fulfilling its requirements. Under the contract, Drs. Brown and Klassman would remove Wagner's partial plate, perform bone grafting, place implants and caps on her existing teeth, and place full bridges in her mouth's upper-left and upper-right back.

³ *Culver v. Bennett*, 588 A.2d 1094, 1096-97 (Del. 1991).

⁴ *Ragazzo v. Truono*, 1989 WL 40922, at *1 (Del. Super. Apr. 12, 1989).

A breach of contract claim's elements are generally: (i) a contractual obligation between two parties; (ii) a breach; and (iii) damages.⁵

Bethany Dental and Dr. Brown argue there was no breach because there was no “express special promise to accomplish some definite result” with the dental surgery.⁶ In Delaware, there is an express promise rule for health care providers,⁷ but dentists are not classified as health care providers.⁸ There is a material factual dispute about the breach of contract.

Wagner had an unusual teeth alignment she wanted to keep after surgery; her teeth only met at her upper and lower molars. Dr. Brown allegedly re-aligned her teeth so they evenly met. After surgery, Wagner “felt a sensation that there was no room for her tongue,” requiring her to find a new specialist. Dr. Kennan testified, “[I]n [dental] training, you get everything to hit [evenly] and everything works the same and that’s the end of the game. It’s not what she asked for. It’s not what she got.” In other words, the deal was Wagner would keep her alignment after surgery.

⁵ *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. 2005).

⁶ *Katzab v. Chaudhry*, 2006 WL 734351, at *3 (N.Y. Civ. Ct. Mar. 22, 2006).

⁷ 18 *Del. C.* § 6851 (“No liability shall be imposed upon any health care provider in the basis of an alleged breach of contract . . . assuring results to be obtained, unless such contract is set forth in writing.”).

⁸ 18 *Del. C.* § 6801(5) (“‘Health care provider’ means a person . . . licensed by this state pursuant to Title 24, excluding Chapter 11 [Dentistry and Dental Hygiene] thereof, . . . to provide health care.”).

Instead, Dr. Brown allegedly left her with a different alignment than what she wanted.

Dr. Kennan also testified, “[Brown] had not met the standards that the patient wanted, was unable to say what else to do, and, as far as I was concerned, had not paid attention to what she asked. [Brown] didn’t fulfill her expectations.” When asked what he thought Dr. Brown should have done, Dr. Kennan testified, “Given her the room she asked for by changing the prosthetic device he was using.”

Examining the facts in the light most favorable to Wagner, it appears she contracted with Dr. Brown to perform major dental surgery and even if his work was careful enough, he did not do the work promised. Then, what he did failed. So, Wagner had to find a different specialist. At least, there is a material factual dispute about the breach of contract.

V.

For the foregoing reasons, Defendants’s motion for summary judgment is **GRANTED** as to the negligence claim, and **DENIED** as to the breach of contract claim.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary (Civil)
pc: Bruce L. Hudson, Esquire
Richard Galperin, Esquire