STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH E. SELBY,

Plaintiff-Appellee,

v

ROBERT BAKER, D.D.S.,

Defendant-Appellant.

UNPUBLISHED
October 4, 2002

No. 225737
Macomb Circuit Court
LC No. 95-004385-NH

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right the judgment in plaintiff's favor in this dental malpractice case. We affirm.

Defendant Robert Baker, a dentist and board-certified oral and maxillofacial surgeon, extracted plaintiff's four wisdom teeth on December 20, 1993, when plaintiff was 22 years old. The removal of plaintiff's lower left wisdom tooth (number 17), which was partially impacted, is at issue here. After the oral surgery, a significant portion of the left side of plaintiff's tongue was numb and she experienced pain and other adverse effects. Plaintiff filed suit in September 1995. A jury awarded plaintiff $250,000.00 at trial in June 1999.

Plaintiff's theory of the case was that defendant's incision relative to tooth No. 17 severed her lingual nerve, resulting in injuries including loss of sensation in much of the left side of her tongue, not having proper sense of taste, difficulty enunciating, drooling, and other problems. Plaintiff's expert, Dr. Allan Firestein, an oral and maxillofacial surgeon, testified that the incision defendant made to remove plaintiff's tooth No. 17 violated the standard of care and that as a result plaintiff suffered permanent injury. Dr. Firestein relied on a few sentences of defendant's discovery deposition testimony regarding the location of the incision. At trial, plaintiff maintained that defendant's trial testimony differed from his deposition testimony, i.e., that defendant conformed his trial testimony regarding the incision to meet the standard of care.

Defendant's theory of the case was that numbness to the tongue was an inherent risk in lower left wisdom tooth extractions; that defendant warned plaintiff of the risk in his consent form, which plaintiff reviewed and signed; and that although it may be true that plaintiff has a numb spot on her tongue, it did not result from a severed nerve or violation of the standard of care. Defendant maintained that he made a proper incision and that numbness such as plaintiff experiences can result from anesthesia injections or the lingual nerve being stretched (rather than

torn or severed) during the extraction process. Defendant and his expert, a board-certified oral and maxillofacial surgeon, both testified that defendant made a proper incision to extract tooth No. 17.

I

Defendant argues that the trial court improperly denied his motions for directed verdict and judgment notwithstanding the verdict because plaintiff presented insufficient evidence to sustain her claim that defendant committed malpractice by making an improper incision and transecting her lingual nerve.

This Court reviews a trial court's decisions on a motion for directed verdict and a motion for JNOV de novo. *Derbabian v S&C Snowplowing, Inc,* 249 Mich App 695, 701; 644 NW2d 779 (2002); *Morinelli v Provident Life & Accident Ins Co,* 242 Mich App 255, 260; 617 NW2d 777 (2000). This Court views the testimony and all legitimate inferences therefrom in the light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the question is for the jury. *Hunt v Freeman,* 217 Mich App 92, 99; 550 NW2d 817 (1996); *Morinelli, supra* at 260.

Defendant testified at deposition that he made the incision to the distal of the tooth in the soft tissue. Further, plaintiff's expert testified that plaintiff's injuries are consistent with a severed lingual nerve and that one does not get permanent lingual nerve damage unless there has been negligence. Defendant's expert disagreed, of course. The issue was squarely presented to the jury; defendant's expert advancing vociferously that defendant made a proper incision, and that plaintiff's expert mischaracterized defendant's deposition testimony.

We conclude that viewing the testimony in the light most favorable to plaintiff, reasonable jurors could have honestly reached different conclusions regarding whether defendant's incision resulted in the severing of plaintiff's lingual nerve and violated the standard of care. *Hunt, supra* at 99; *Morinelli, supra* at 260. Defendant's directed verdict and JNOV motions were properly denied. *Id.*

II

Defendant argues that, at minimum, the verdict was against the great weight of the evidence and a new trial is appropriate based on the arguments made in Issue I.

The trial court's denial of a motion for new trial is reviewed for abuse of discretion. *Morinelli, supra* at 261. A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e), *Domako v Rowe,* 184 Mich App 137, 144; 457 NW2d 107 (1990), aff'd 438 Mich 347; 475 NW2d 30 (1991). The trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. *Morinelli, supra.* The jury's verdict should not be set aside on this basis if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 194; 600 NW2d 129 (1999).

As discussed above, plaintiff's expert opined that the incision made to extract tooth No. 17, as described in defendant's deposition, constituted a violation of the standard of care, severed

plaintiff's lingual nerve, and resulted in permanent injury to her. The verdict was thus not against the great weight of the evidence.

III

Defendant argues he is also entitled to a new trial because of irregularity in the proceedings, challenging principally the trial court's refusal to admit a censure of Dr. Firestein printed in the journal of the American Association of Oral and Maxillofacial Surgeons (AAOMS). Defendant argues that the censure was admissible under MRE 803(17)[1], and that its exclusion was not harmless error because, without the censure evidence, Dr. Firestein was free to represent himself as unbiased and give unfounded meaning to defendant's deposition testimony.

Credibility of a witness is an appropriate subject for the jury's consideration in a medical malpractice case. *Powell v St John Hospital,* 241 Mich App 64; 614 NW2d 666 (2000).[2]

Under the circumstances presented here, however, including that Dr. Firestein's censure occurred after Dr. Firestein's trial deposition was taken on November 7, 1997, the censure regarded an unrelated matter, there was no questioning in the instant case regarding minority versus majority views, the court sought to avoid a trial within a trial, and that defendant did not make an offer of proof that defendant's expert relied on the publication until his motion for new trial, and the subject document appears to be an article, rather than a compilation, we conclude that the trial court did not abuse its discretion in excluding the evidence.

IV

Defendant further argues that the trial court abused its discretion in admitting photographs taken at Dr. Firestein's office depicting needles piercing plaintiff's tongue. We conclude there was no error in admitting the photographs, for the reasons stated by the trial

[1] MRE 803(17) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (17) Market Reports, Commercial Publications.
>
> Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

[2] *Powell, supra,* on which defendant relies, is distinguishable because the excluded evidence in that case would have shown that the witness was biased against the defendant. Here, the evidence would have shown that the witness was not a credible expert because he had been sanctioned by his peer group for failing to properly represent that his opinion might be considered a minority one.

court: "Defendant had the opportunity on cross-examination to address the completeness of the examination depicted, the method of testing and the accuracy of the testing. Moreover, such concerns—going to the weight to be given the evidence—are properly determinations of credibility left to the jury and not grounds for a new trial."

V

Defendant argues that the trial court abused its discretion by instructing the jury on informed consent and res ipsa loquitur, because there was insufficient evidence to sustain the instructions, and that the jury's verdict could be in whole or part based on unsustainable claims. Defendant further argues that the trial court erred when it read plaintiff's proposed damage instruction over defendant's objection, as it was repetitive and included injuries not sustained by the evidence.

When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law, MCR 2.516(D)(2), *Ewing v Detroit*, __ Mich App __ ; __ NW2d __ (Docket No. 225401, issued 7/9/02), a determination that is in the trial court's sound discretion. *Ewing, supra*. Jury instructions should include all the elements of the plaintiff's claim, and should not omit material issues, defenses or theories supported by the evidence. *Case v Consumers Power Co*, 463 Mich 6; 615 NW2d 17 (2000). Jury instructions are reviewed in their entirety, and reversal is not required if, on balance, the parties' theories and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). If the jury never reached an issue addressed by an erroneous instruction, no reversal is required. *Beadle v Allis*, 165 Mich App 516, 525; 418 NW2d 906 (1987).

Informed Consent

"Claims of negligence based on the failure of a physician or surgeon to adequately obtain informed consent before a procedure or to otherwise fail to instruct or advise a patient come within the general rule regarding the need for expert testimony." *Paul v Lee*, 455 Mich 204, 212; 568 NW2d 510 (1997), rev'd on other grounds *Smith v Globe Life Ins*, 460 Mich 446; 597 NW2d 228 (1999). "[T]he plaintiff must produce expert testimony regarding the standard of care applicable to advising a patient of the reasonable opening statement or in her expectations of risk in the proposed operation." *Id.* at 212.

At trial, plaintiff did not advance in opening statement or in her case in chief that she was not properly informed of the risks of the oral surgery, and that such resulted in malpractice and injuries. However, defense counsel advanced informed consent as a defense, in opening statement and throughout trial. Over defendant's objection, the court instructed the jury regarding informed consent, noting that "half the trial" had been about informed consent.

Under the circumstance that defendant testified regarding the standard of care for informed consent, we conclude the instruction did not constitute error requiring reversal.

Res Ipsa Loquitur

> Where a plaintiff raises res ipsa loquitur in the medical malpractice context, we require that the plaintiff prove that the event (1) is of a kind that ordinarily does

> not occur in the absence of someone's negligence, (2) is caused by an agency or instrumentality within the exclusive control of defendant, and (3) is not due to any voluntary action or contribution on the part of the plaintiff. [*Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995).]

"In the medical malpractice context, the crucial element, and that most difficult to establish, will often be . . . that the event is of a kind that does not ordinarily occur in the absence of negligence. A bad result will not *itself* be sufficient to satisfy that condition." *Locke v Pachtman*, 446 Mich 216, 230-231; 521 NW2d 786 (1994) (emphasis in original). "[T]he fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury." *Id.* at 231.

Dr. Firestein testified that plaintiff's injuries were consistent with the lingual nerve having been severed, were permanent, and that permanent injury to the lingual nerve does not occur absent negligence. As such, the instruction did not constitute error requiring reversal.

Damages

Defense counsel also objected to a future damages instruction, and the court as a result struck a portion of plaintiff's requested instruction so that it read: "Reasonable expense of medical care and treatment and services, including the $500 paid to the defendant, Robert Baker, D.D.S." Defendant did not request below that the instruction be further curtailed.

Defendant properly notes that after the trial court ruled that future damages for medical expenses were not appropriate and edited the instruction, plaintiff's counsel nonetheless asked the jury in closing argument to set a little aside for plaintiff for the future. We agree with defendant that this was improper argument, but defendant did not object during closing argument, and only objected after the jury was instructed. The error was thus waived.

There was evidence presented that, if believed, supported that plaintiff suffered the damages listed in the instruction.[3] Although we agree that the instruction was repetitive, the

[3] The court instructed:

> You should include each of the following elements of damage which you decide has been sustained by the plaintiff to the present time:
>
> Physical pain and suffering.
>
> Mental anguish.
>
> Fright and shock.
>
> Denial of social pleasure and enjoyments.
>
> Embarrassment.

(continued…)

instruction clearly advised the jurors that they were to determine whether each type of damage alleged had been proven, and that they were to determine whether such damage was temporary or permanent. Under these circumstances, we conclude that reversal is not warranted.

Regarding the verdict form and defendant's claimed entitlement to a reduction to present value, as the trial court noted, defense counsel did not object, and agreed on the record to the use of the verdict form.[4] We conclude there was no reversible error under these circumstances.

(…continued)

> Humiliation or mortification.
>
> Complete loss of taste on the left side of tongue from midline to its edge, and from the tip of the tongue to two-thirds back toward the throat, including loss of sensations of salt, sweet, bitter and sour.
>
> Total paralysis of the lingual nerve causing total numbness of left side of tongue from midline to its edge, and from the tip of the tongue to two-thirds back, including loss of sensations of salt, sweet, bitter and sour.
>
> Continual tongue biting causing crushing or tearing of tongue tissue between the teeth and lacerations exuding blood.
>
> Drooling of saliva from her mouth.
>
> Impaired ability to enunciate words clearly from inability to feel one's tongue to clearly form certain vowels and words.
>
> Loss of sensory perception to left side of tongue from the midline to its edge, and from the tip of the tongue to two-thirds back toward the throat, including loss of sensations of pain, feeling pressure, hot and cold.
>
> Sensation that one half of tongue is dead.
>
> You should also include each of following [sic] elements of damage which you feel plaintiff is reasonably certain to sustain in the future. And I won't repeat all those that I just gave you because they're the same that you may consider.
>
> * * *
>
> You may also consider – and I didn't put this in but it goes as to the future and the present up to this date—the disability of paralysis of the lingual nerve from the left third molar forward resulting in complete loss of sensory perception to the tongue from midline to its edge, and from the tip of the tongue to two-thirds back toward the throat.

[4] Defense counsel argued at a hearing on plaintiff's motion for entry of judgment that defendant had proposed a verdict form, that the trial court had said in chambers that the court would prefer (continued…)

Regarding plaintiff's counsel's alleged misconduct, defendant made no objections during opening statement, and did not object to some of the challenged conduct. The remaining alleged errors do not warrant reversal.

VI

Defendant's final argument is that the court improperly awarded plaintiff post-trial attorney fees for preparation and attending post-trial motions, because the hours sought were excessive and the evidentiary hearings were not caused by the rejection of mediation.

This Court reviews the trial court's award of attorney fees for abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Under MCR 2.403, awards of attorney fees are not limited to services performed before, and at, trial. *Id.* at 178-179. A reasonable attorney fee must be based on a reasonable hourly or daily rate, as determined by the trial judge, for services necessitated by the rejection of the evaluation. MCR 2.403(O)(6)(b), *Rafferty v Markovitz,* 461 Mich 265, 267; 602 NW2d 367 (1999).

Defendant does not dispute that *Joerger, supra,* permits the award of attorney fees incurred post-trial. The fees at issue were incurred in plaintiff's answering defendant's motions for JNOV, new trial and remititur, and to clarify the record in the trial court because defendant alleged in its JNOV motion that plaintiff's counsel had an ex-parte communication with a juror.[5] Defendant objected to two attorneys being present on plaintiff's behalf at the hearings and being compensated therefor. The record does not support that the trial court abused its discretion.

We note in response to the argument defendant raises in a supplemental brief on appeal that he is prejudiced by the record on appeal,[6] that although his concerns are well-founded, we conclude that the matter has been fully addressed and that the record on appeal is adequate.[7]

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to use "the simple form" proposed by plaintiff's counsel, and that the court would separate the damages and do the reductions to present value. Plaintiff's counsel disputed that version of events, and the trial court could not recall one way or the other. The trial court took the matter under advisement after noting that the safe thing to do would have been for defense counsel to state that on the record.

[5] Plaintiff obtained and filed an affidavit from the juror, Mr. Hagans, explaining what had occurred to clarify the record on appeal. Plaintiff argues, and we agree, that the clarification was necessary to clarify the record on appeal, as defendant had raised the issue in a JNOV/new trial motion and had thus made it a possible issue on appeal.

[6] In a supplemental brief, defendant argues that he is entitled to a new trial because the trial record was not properly transcribed such that defendant was denied the right to a meaningful appeal. Defendant argues that despite the fact that the trial court prepared a certified record of what occurred at trial on June 9, 1999, the present record is inadequate for appellate review.

[7] Trial began on June 8, 1999, with voir dire, jury instructions, and opening statements taking place. Defendant was called to testify as an adverse witness on June 9. His cross-examination occupied most of that day; his direct examination occupied the last thirty pages of the June 9 transcript, and continued on June 10. Much of the transcription of defendant's June 9 testimony is unintelligible or garbled, for reasons attributable wholly to the court reporter, who, after being

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Finally, defendant argues in a supplemental brief on appeal that if this Court does not reverse or remand for a new trial, it should stay the accrual of post-judgment interest for the delay in this appeal attributable to the unavailability of an accurate trial record, which was not caused by defendant. Defendant argues that this Court has the authority to do so under *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 494-495; 478 NW2d 914 (1991), and that justice requires a stay under the circumstances of this case. In the instant case, where there has been no stay, we decline to suspend the operation of the statute.

Affirmed.

/s/ Helene N. White
/s/ Janet T. Neff
/s/ Kathleen Jansen

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held in contempt and apparently jailed for failure to provide trial transcripts, could not locate her notes or back-up tapes to the June 9, 1999 testimony. The court reporter provided readable transcripts for, June 8, 10 and 11, 1999, which included some of defendant's testimony on direct examination, defendant's expert's testimony, plaintiff's mother's testimony, plaintiff's husband's testimony, plaintiff's testimony, closing arguments, and jury instructions.

As a result of the transcription problems, defendant filed a motion to remand for a new trial or, in the alternative, to settle the record. A split panel of this Court denied the motion by order dated August 14, 2000. Defendant filed a motion for rehearing and plaintiff in the meantime filed a motion to remand to settle the record. A panel of this Court granted the motion to remand to settle the record and retained jurisdiction by order dated January 30, 2001. On remand, the trial court prepared a certified record of the June 9, 1999 proceedings, to be read in conjunction with the June 9, 1999 trial transcript. We have reviewed the certified record and conclude that the record on appeal is adequate.