STATE OF MICHIGAN

COURT OF APPEALS

MARGARET CYBAK,

Plaintiff-Appellant,

v

DAVID J. POWELL, D.D.S., ROBERT M. D'ORAZIO, D.D.S., and ROBERT M. D'ORAZIO, D.D.S., P.C., d/b/a/ DENTAL IMPLANT INSTITUTE,

Defendants-Appellees.

UNPUBLISHED
March 6, 2007

No. 273399
Macomb Circuit Court
LC No. 05-003235-NH

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

In this dental malpractice case, plaintiff appeals from the circuit court's order granting summary disposition to defendants, two dentists and the business entity through which they practice. We reverse and remand. This case is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff went to defendants' office to have two teeth extracted. Defendant Powell extracted one apparently without incident. His work on the other resulted in the breaking of the tooth, leading to his administering a second anesthetic injection and attempting to extract the remnants in pieces. In time, Powell asked defendant D'Orazio for assistance, and D'Orazio completed the extraction. Afterward, plaintiff complained of numbness from her lower lip to the bottom of her chin, resulting in a crooked smile and difficulty pronouncing some words.

Plaintiff's expert testified on deposition that the cause of plaintiff's injury was faulty applications of anesthetic or faulty extraction techniques and opined that the latter was the more likely culprit. Asked which of the three root extractions were done improperly, the expert replied, "There could have been one, two, or all three roots that were improperly manipulated and could have caused the injury," adding that "since both doctors had a hand in the socket with instruments in the socket, I would say that it would be impossible to assess a percentage of responsibility." Pressed for the relative likelihoods that the injections of anesthetic or the surgical techniques caused the injury, the witness replied, "As far as percentages are concerned, I couldn't guess at that," and added, "There are some things just unknowable about certain things, and one of them is forensic evaluation of dental procedures that result in injuries. Some of them

are pretty cut and dry, [but] these kinds of instances are not, because you had multiple procedures and multiple events occurring."

The trial court granted defendants' motion for summary disposition on the ground that "[y]ou can't have a jury guessing and it's not supported by competent evidence to go to the jury."

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Plaintiff argues that the evidence was sufficient to create a question of fact for jury resolution, relying on the doctrines of alternative liability and concert of action.

> The concert of action claim is a true joint tort . . . . Even if defendant caused no harm himself, he is liable for the harm caused by his fellows because all acted jointly.
>
> The alternative liability theory, on the other hand, involves not a joint tort, but rather, involves independent acts by two or more tortfeasors, all of whom have acted wrongfully, but only one of whom has injured plaintiff. . . . Rather than deny the innocent plaintiff his recovery because he cannot prove which of two or more wrongdoers injured him, the courts impose joint liability on all wrongdoers. In cases of alternative liability, a defendant is free to absolve himself of blame and cast the entire burden on his fellows, even if it be shown that he acted wrongfully, but that defendant must bear the burden of proving that his wrongful act was not the cause of plaintiff's injury. [*Abel v Eli Lilly & Co*, 94 Mich App 59, 73; 289 NW2d 20 (1979) (citations omitted), aff'd as modified on other grounds 418 Mich 311; 343 NW2d 164 (1984).]

Depending on whether defendants are deemed to be acting in concert or independently, one of the two doctrines will impose liability. It would seem the more accurate analysis is to say that the two dentists acted in concert to extract the tooth. As this Court in *Abel*, *supra* at 72, explained:

> It is well-established that if two or more persons engage negligently in concerted activity, and as a result plaintiff is injured, all are liable even though only one directly caused the injury. *McCoy v DeLiefde*, 376 Mich 198, 205; 135 NW2d 916 (1965) (opinion of Souris, J.). Liability is imposed on all because all have joined in breaching their duty of care to plaintiff, and he was injured as a result of that breach.

In affirming, the Supreme Court noted that, under the concert of action theory, "a plaintiff need only allege that the defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed." *Abel*, 418 Mich at 338.

In the case at bar, the two dentists worked together to extract the tooth. Plaintiff's expert will testify that both breached the standard of care and were negligent in the procedures that each performed. Either's negligence could be responsible for plaintiff's injury, though presumably only one actually directly caused the injury. Specifically, plaintiff's expert testified that the surgical technique of both doctors "was not consistent with what would be a surgical technique in detail to elevate and remove tooth number 17." The expert was also critical of the technique used to inject the anesthetic, but concluded it was slightly more likely that the fault lay with the surgical technique employed.

The situation described by plaintiff's expert fits neatly into the concerted activity doctrine. Both dentists worked together to achieve the tooth extraction and both breached their duty of care to plaintiff. And plaintiff was injured as a result of that breach.

Even if we were to conclude that both defendants were not engaged in a concerted activity, then the alternative liability theory would apply. The requirement under this theory is that all tortfeasors have acted wrongfully, although only one injured the plaintiff, but the plaintiff is unable to establish which of the tortfeasors actually caused the injury. This doctrine applies to the case at bar because, according to plaintiff's expert, both dentists breached the standard of care and negligently treated plaintiff. Indeed, the illustration used by our Supreme Court in *Abel, supra* at 326, from the case of *Summers v Tice*, 33 Cal 2d 80; 199 P2d 1 (1948), is similar in concept to the case at bar. In *Summers*, the plaintiff argued that he was negligently shot at by both of his two hunting companions, but only one shot hit him. The plaintiff was unable to ascertain which of the two companions actually fired the shot that hit him. Our Supreme Court, *Abel*, *supra* at 326-327, explained the decision as follows:

> The *Summers* court agreed, as a preliminary matter, that both defendants were at fault in having acted negligently toward the plaintiff. The court also recognized that plaintiff had failed to meet his traditional burden regarding cause in fact. Only one shot had injured plaintiff; both defendants could not have shot it. Since the most the plaintiff could prove was a 50% probability that either of the defendants had caused the injury, plaintiff had failed to establish that either one of the defendants was more likely than the other to have caused the injury.
>
> The court then decided—as a matter of policy—that it was preferable that the two wrongdoers, both of whom had acted negligently toward the plaintiff and had created the situation wherein plaintiff was injured, should bear the burden of absolving themselves rather than leaving the innocent plaintiff remediless. Therefore, the court placed the burden of proof on the issue of causation in fact upon the defendants.

In the case at bar, plaintiff's expert opines that both of the individual defendants directed a negligent act at plaintiff, either one of which could have caused plaintiff's injury (but presumably only one of which actually did). This is, in our mind, the same as the two hunters who shot at the plaintiff in *Summers*, both of whom were negligent but only one of whom caused injury. Indeed, if anything the argument is stronger in the case at bar to impose liability on defendants. In *Summers*, the defendant who did not in fact injure the plaintiff still would not have injured the plaintiff even if the other defendant had not caused injury. But in the case at bar, plaintiff's expert's testimony leaves open the possibility that the only reason that one of the

events did not cause plaintiff's injury was only because the injury had already occurred. That is, if an earlier negligent act is what caused plaintiff's injury, then plaintiff may have still been injured by a subsequent negligent act had the earlier negligent act not occurred. That is, it may well be that the act which did not injure plaintiff only failed to injure her because the damage was already done by an earlier act.

For the above reasons, we believe that liability may be imposed upon both defendants under one or both of the theories. Of course, under both theories, one defendant may absolve himself of responsibility by demonstrating that the other was, in fact, the cause of plaintiff's injury. *Abel*, *supra* at 73.[1]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio

[1] We also note that it is unclear to us how the trial court justified granting summary disposition to the corporate entity. Even if the individual doctors were entitled to summary disposition because their personal liability could not be established, because it could be established that one of the corporation's employees caused the injury, presumably the corporation would remain liable under a respondeat superior theory. In any event, that issue is not raised and our resolution of the issues that were raised renders it unnecessary to address this topic.