

STATE OF MICHIGAN
COURT OF APPEALS

LISA NIMMO FRANCOEUR,

Plaintiff-Appellee,

v

GREG D. KOMYATHY, D.D.S.,

Defendant-Appellant.

UNPUBLISHED

July 9, 2009

No. 285141

Ingham Circuit Court

LC No. 04-000859-NH

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this dental malpractice action, defendant appeals by leave granted from a circuit court order granting plaintiff’s motion for a new trial on the ground that the jury’s verdict of no cause of action was against the great weight of the evidence. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

During a root canal procedure on plaintiff’s tooth six,¹ defendant unintentionally “perforated” the root, i.e., made a hole in the side of the root of the tooth. A perforation is caused by directing the tool in the wrong direction, or by the tool going in the wrong direction whether directed there consciously or not. Defendant testified that he did not realize that a perforation had occurred. Although he felt a change in resistance as he was drilling, he believed that he had reached the pulp chamber. He decided to take an x-ray “just to make sure that we were in the direction we were supposed to be going.” Defendant’s assistant blew air into the area before the x-ray. Because of the perforation, the air went into the surrounding tissue and caused swelling of plaintiff’s face and neck, as well as extreme pain.

Plaintiff’s expert, Dr. Kirschner, testified that defendant deviated from the standard of care by causing the perforation and, further, “by causing an air, a subcutaneous air emphysema in her face and neck tissues by blowing air at a high level of compression into the root canal.” Conversely, defendant’s expert, Dr. Borlas, testified that defendant practiced within the standard of care. According to him, a perforation while trying to find the canal of the tooth is not a violation of the standard of care, but rather is a rare complication that sometimes happens. He

¹ Tooth six is the upper right cuspid, also known as a canine or eyetooth.

explained that blowing air into the area was not malpractice if defendant did not know that a perforation had occurred. The jury concluded that defendant did not breach the standard of care and returned a verdict of no cause of action.

Plaintiff filed motions for judgment notwithstanding the verdict and for a new trial pursuant to MCR 2.610(A)(1) and MCR 2.611(A)(1)(e). Plaintiff's motions focused on the strength of the evidence that defendant had breached the standard of care by causing the perforation. She argued that defendant's expert's trial testimony was tantamount to an admission that defendant had breached the standard of care because he persisted without x-rays when he was having difficulty finding the canal.

The trial court granted plaintiff's motion, but on the basis of an argument that she did not raise. Rather than focusing on the purported admission of a breach by defendant's expert, or even on the perforation itself, the court focused on the application of air after the perforation and before the x-ray. The court believed that the verdict was against the great weight of the evidence because there was "no excuse" for the introduction of air before the x-ray.

We review a trial court's ruling on a motion for a new trial based on a great-weight challenge for an abuse of discretion. *Severn v Sperry Corp*, 212 Mich App 406, 412-413; 538 NW2d 50 (1995). The trial court's function in ruling on such a motion "is to determine whether the overwhelming weight of the evidence favors the losing party." *Id.* The reviewing court determines whether the trial court abused its discretion in ruling on the motion. *Id.* Although we give substantial deference to a trial court's determination that a verdict was not against the great weight of the evidence, we afford less deference to a determination that the verdict was against the great weight of the evidence. *Id.* at 412-413.

Contrary to defendant's argument, the trial court had support for its understanding that air was applied after defendant felt a change in resistance and decided that an x-ray was warranted. At trial, the following exchange occurred when the trial court questioned defendant:

THE COURT: You've gone through something, you haven't seen the x-ray, but you have decided to have it x-rayed?

[DEFENDANT]: Correct.

* * *

THE COURT: I think the question, why wouldn't you wait to apply any air until you looked at the x-ray to find out what you were dealing with?

[DEFENDANT]: My assistant at the time, it's common practice as you are drilling teeth to rinse and dry and that's what she did prior to us taking the x-ray.

* * *

THE COURT: So you're saying that in order to take the x-ray, you had to rinse that area and put air in there?

[DEFENDANT]: I didn't say we had to, I said my assistant did.

Although the court's understanding of the facts was correct in this regard, the testimony of plaintiff's expert did not provide an adequate basis for concluding that the application of air in that circumstance was a breach of the standard of care, much less a basis for overturning a jury's verdict. Dr. Kirschner initially testified that defendant deviated from the standard of care by causing the perforation and, further, "by causing an air, a subcutaneous air emphysema in her face and neck tissues by blowing air at a high level of compression into the root canal, which forced the air into the bone and the tissues and into her face and neck areas, causing what is known as a subcutaneous emphysema." He then clarified that the questionable practice concerned the *quantity* of air that was blown:

Q. Is the use of air in and of itself the issue or is it the amount or manner in which the air is used?

A. Exactly correct.

I was trying to say that before. And that is a dentist will use air to dry something, give a little short burst or blast of air just to clean out something for a moment. But the air was constantly being blown. I don't know how long, 10, 15, 20 minutes blowing air, literally the air syringe blew the lady's face up like a balloon, and that's wrong. You don't use that much air. It is the quantity of air that's in question.

Dr. Kirschner inferred that air was blown for a substantial period as defendant attempted to repair the perforation.

Q. Who says that the air was being blown for 15 or 20 minutes straight?

A. Well, in my opinion, the dentist took a considerable period of time to attempt to make repair of the tooth. He used a Fugii cement, and that's a glass ionomer cement, to try to close that hole and he didn't do that very quickly, he did that over a period of time. I don't know how long it took him, but it certainly did not take him less than ten minutes.

Q. I'm not asking about the cement, I'm asking about how you know how long air was blown in there?

A. Because the air was being blown during that procedure. If the procedure took that long, air had to be blown for at least that long a period of time.

Thus, Kirschner believed that defendant applied air for a substantial period while trying to repair the perforation detected by the x-ray.² Significantly, Dr. Kirschner did *not* state that defendant

² Defendant denied applying air after the perforation was detected, and Dr. Borlas explained that the material that defendant used for the repair was one that did not require the blowing of air to
(continued...)

had breached the standard of care by the application of air before the x-ray, as the trial court theorized.

In summary, the trial court's reason for granting a new trial, i.e., that the record demonstrated that defendant breached the standard of care by blowing air onto the site before ascertaining that the pulp chamber had been accessed, was not supported by the expert testimony.

We also disagree with plaintiff's contention that the alternative reasons advanced below supported her request for a new trial. Contrary to plaintiff's contention, the testimony of defendant's expert was not tantamount to an admission that defendant had breached the standard of care. Dr. Borlas testified that perforation while trying to find the canal of the tooth is not a violation of the standard of care, but rather is a rare complication that sometimes happens. He stated that defendant was using the right technique and doing things appropriately, "[b]ut these things happen." Dr. Borlas explained that drilling through the side of the root instead of straight up the canal is not a breach of the standard of care. He explained that an x-ray is a two-dimensional picture of a three-dimensional object. It provides an indication regarding which direction to go in one plane, but not the other. A difference of a degree or two in approaching and going up the canal could result in a perforation. According to Dr. Borlas, most, if not all, of the perforation in this case was in the plane that would not be shown by the x-ray.

Dr. Borlas agreed that the standard of care required that whenever a dentist felt that he had lost track of the canal or was having any other difficulty, he should stop and take an x-ray. But Dr. Borlas maintained that defendant did so, stating, defendant "should have [taken an x-ray] when he felt that he was no longer able to find the canal, which is what he did."

In light of this testimony, plaintiff's argument that defendant's expert essentially admitted that defendant had breached the standard of care is unpersuasive. The overwhelming weight of the evidence did not favor plaintiff, and the trial court's decision to grant a new trial on the basis of a theory that was not supported by the testimony of plaintiff's expert was an abuse of discretion.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

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harden. According to Dr. Borlas, because of the high volume of air from the handpiece, "[o]ne little squirt of air is all that it would take" for a person's body to have that result.