IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER JUBB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 08C-07-199 JAP
	)	
THOMAS P. DOUGHERTY, D.M.D. and THOMAS P. DOUGHERTY ORAL AND MAXILLOFACIAL SURGERY, P.A.	)	
	)	
Defendants.	)	

Submitted: December 16, 2009
Decided: January 29, 2010

MEMORANDUM OPINION

The plaintiff in this dental malpractice case has filed a motion for a new trial and a motion for additur after a jury awarded him $1500 for an erroneously extracted tooth. For the reasons which follow, those motions are **DENIED**.

Facts

The facts of this case are relatively straight-forward. At the time of these events the then fifteen year old plaintiff[1] suffered from an underbite, meaning that his lower front teeth were in front of his upper front teeth. Plaintiff was treated for this and other tooth alignment problems by Dr. Gordon Honig, a local orthodontist. In 2006 Dr. Honig concluded that the orthodontic treatment had achieved its maximum benefit and that further improvement required surgical intervention. Dr. Hornig met with Plaintiff and his parents and explained that there were three options available:

- The first option was to do nothing. Dr. Honig did not recommend this option, and neither Plaintiff nor his parents deemed this option acceptable.
- The second option was to remove a tooth on the right side of Plaintiff's lower jaw, which tooth is referred to as Tooth 28 in an identification system commonly used by dentists. Removal of this tooth would provide room to maneuver Plaintiff's lower teeth backwards

[1] This action was filed by Plaintiff's mother on his behalf. During the pendency of this case, Plaintiff turned 18 at which time Christopher Jubb was substituted for his mother as plaintiff.

using orthodontic braces so that the front teeth would be properly aligned behind the upper front teeth.

- The third option was to surgically break Plaintiff's jaw and reposition it so that the teeth are properly aligned. This process, which is usually performed by an oral maxillofacial surgeon, is known as orthognathic surgery.

Dr. Honig advised Plaintiff and his parents that under any option Plaintiff would need to have his wisdom teeth and an extra tooth in the roof of his mouth (referred to as a supernumerary tooth) removed. Initially Plaintiff and his parents favored the second option, but Dr. Honig prevailed upon them to first consult with defendant Dr. Dougherty, an oral maxillofacial surgeon who performs orthognathic surgery, before making a final decision.

Shortly after the meeting with Dr. Honig, Plaintiff and his mother consulted with defendant Dr. Dougherty, who explained orthognathic surgery. In Plaintiff's case Dr. Dougherty contemplated surgically breaking Plaintiff's upper jaw and pulling it forward so that the upper teeth would be properly aligned in front of the lower teeth. At the end of the surgical procedure Plaintiff's jaw would be wired shut with a device so as to allow for the growth of bone material in the jaw which would fuse the surgically disconnected segments while at the same time maintaining the proper alignment of the jaw. Dr. Dougherty expected

that this healing process would take a few weeks, after which the device holding Plaintiff's jaw shut would be removed. This would not end the process, however. After removal of these devices, Plaintiff would need to return to Dr. Honig who would reapply orthodontic braces for final adjustment of Plaintiff's teeth.

A significant aspect of the orthognathic surgery option is that it could not be performed until Plaintiff's facial and jaw structures had stopped growing, which typically occurs in males in the late teens or early twenties. Until that time Plaintiff would not have to wear orthodontic hardware, except for a retainer. This must have had some appeal to Plaintiff, who had been undergoing orthodontic treatment for several years. In any event the testimony at trial was that Plaintiff and his parents opted for the orthognathic surgery option.

Plaintiff, this time accompanied by his father, returned to Dr. Dougherty's office on July 28, 2006 to have his wisdom teeth and the supernumerary tooth removed. Confusion arose during this visit over whether Dr. Dougherty was also to remove Tooth 28, which was to be removed only if Plaintiff pursued the second, or non-orthognathic surgery, option. Dr. Dougherty tried without success to reach Plaintiff's general dentist and in the meantime Plaintiff's father signed, albeit reluctantly, a consent to remove Tooth 28. Plaintiff was then sedated and Dr. Dougherty removed Plaintiff's wisdom teeth, the supernumerary

tooth and Tooth 28. Dr. Dougherty later conceded that he should not have extracted Tooth 28.

After the extraction of Tooth 28, Plaintiff and his family chose to proceed with the second option, *i.e.* the non-orthognathic surgery option. Dr. Honig applied orthodontic braces which Plaintiff wore for 19 months. The treatment has been completed and Dr. Honig testified at trial that Plaintiff "got a good result."

B. *The Trial*

Because Dr. Dougherty admitted he was negligent in removing Tooth 28, the only issues at trial were the injuries caused by the removal of that tooth and the damages to be awarded for those injuries. There was substantial evidence that Plaintiff suffered virtually no injury at all as a result of this extraction.

The Court has attempted to identify the universe of potential injuries, including those claimed by Plaintiff, which arguably could have been caused by the extraction of Tooth 28. The elements of that universe are discussed separately below.

1. *Pain from the extraction process*

There was no evidence about pain resulting from the extraction process itself, which was performed while Plaintiff was sedated. It should be kept in mind that Plaintiff had other teeth extracted at the same time as Tooth 28. There was no evidence that Plaintiff suffered any additional

post operative pain or discomfort as a result of the extraction of Tooth 28.

2. *Disfigurement*

There was no evidence of impairment or disfigurement resulting from the extraction of Tooth 28. The Plaintiff did not argue to the jury that he was disfigured. The space occupied by Tooth 28 was not visible to people interacting with Plaintiff, and that gap was closed during the follow-up orthodontic treatment. At trial, Plaintiff complained he did not like his teeth because they were "yellow", but as Plaintiff's counsel conceded, there was no evidence linking any discoloration of Plaintiff's teeth to the removal of Tooth 28. Plaintiff's orthodontist testified that Plaintiff got a "good result" and the jury, which had the opportunity to observe Plaintiff, would have been fully justified in concluding there was no disfigurement here.

3. *Impairment*

There was no testimony that the removal of Tooth 28 impaired Plaintiff's speech or his ability to consume food or drink.

4. *Loss of the opportunity for orthognathic surgery*

The removal of Tooth 28 did not deprive Plaintiff of the orthognathic surgery option. The unrebutted testimony (including that from Plaintiff's orthodontist) was that if Plaintiff wished to proceed with the orthognathic surgery it would be necessary only to put a small unobtrusive temporary spacer in the space previously occupied by Tooth

28 until Plaintiff was old enough for the surgery. At the time of the orthognathic surgery, an undetectable permanent implant matching Plaintiff's other teeth would have been placed in the spaced occupied by Tooth 28. Plaintiff provided little, if any, explanation why he opted away from the orthognathic surgery after the extraction.

5. *Psychological injuries*

The bulk of the evidence relating to injuries seemed to address purported psychological injuries. Yet Plaintiff, who apparently did not receive any counseling after the extraction, failed to provide any expert testimony on the nature, extent and cause of any psychological or emotional injuries he claims to have suffered. Family members provided testimony about changes in Plaintiff after the extraction. His mother testified that Plaintiff no longer "trusted doctors," his sister testified that Plaintiff seemed "angry," and his father pointed to, among other things, the fact that Plaintiff had given up playing basketball. Plaintiff himself testified about difficulties he encountered in his social life, including (in response to questions from his own counsel) offering testimony about his lack of a girlfriend since these events. But given the absence of expert testimony, it was well within the purview of the jury to dismiss this evidence as describing nothing more than typical teenage angst.

6. *Wearing braces*

At trial and again in the instant motion papers Plaintiff's counsel repeatedly stressed that as a result of proceeding with the non-

orthognathic surgery option Plaintiff had to wear braces for 19 months while in high school. This overlooks two obvious points. First, if Tooth 28 had not been removed and Plaintiff had gone forward with the orthognathic surgery option, he would still have had to wear braces, this time in his late teens or early twenties. Second, as discussed above, if the option of wearing braces in his late teens or early twenties was truly preferable to Plaintiff, that option was still open to him.

In sum, the evidence in this case easily justified a conclusion that Plaintiff was exactly in the same position he would have been if Tooth 28 had not been extracted with one exception: he would need an implant in the space occupied by Tooth 28 if he proceeded with the orthognathic surgery. The testimony at trial was that such an implant cost $1,500 -- the amount awarded by the jury.

Plaintiff's Motions

Plaintiff has filed a motion for additur and a motion for new trial. He raises an assortment of perfunctory arguments, including the unusual (unexplained) assertion that it was error for the Court to instruct the jury on proximate cause. For the most part Plaintiff's contentions cannot be resolved without reference to legal authorities. The primary arguments are that Plaintiff is entitled to an additur and that this Judge erred by declining to recuse himself. Needless to say, these arguments do not lend themselves to an intuitive approach.

Unfortunately, Plaintiff does not cite a single legal authority in either motion.

This Court has repeatedly said that it will not do the work of counsel for him. While this Court frequently does independent research to supplement that provided by counsel, Plaintiff's counsel expects the Court to do *all* of the research here. This is not acceptable. In *Gonzalez v. Caraballo*[2] this Court wrote:

> The Supreme Court has stated repeatedly that it will not consider arguments which are not fully briefed, with citations to supporting authorities. The Supreme Court just recently reiterated the obligation of counsel to provide supporting authorities:
>
> > In order to develop a legal argument effectively, the Opening Brief must marshall the relevant facts and establish reversible error by demonstrating why the action at trial was contrary to either controlling precedent or persuasive decisional authority from other jurisdictions. The failure to cite *any* authority in support of a legal argument constitutes a waiver of the issue on appeal. Accordingly, we hold that all of the legal issues raised by *Flamer* in this appeal have been waived.
>
> These principles apply with equal force to papers filed in this Court. Courts throughout the country hold that they are not obligated to do "counsel's work for him or her." The Court is not asking counsel to routinely submit arguments worthy of publication in a law review; indeed, in some instances (such as a party's failure to provide discovery) it is often unnecessary to cite any authorities. Nonetheless, in all but the simplest motions, counsel is required to develop a reasoned argument supported by pertinent authorities. Counsel's performance in this matter fell well short of that standard. ***Counsel are on notice that henceforth this Judge will summarily deny any motion filed by a represented party, involving a question of law or the application of law to fact in which the party does not meet this standard***.[3]

The failure of Plaintiff's counsel to cite *any* authority manifests both a lack of understanding of his role of an advocate on behalf of his client and a lack of respect for the Court, which counsel seems to believe is

[2] 2008 WL 4902686 (Del. Super.).
[3] *Id.* at *3 (footnotes omitted) (emphasis added).

obligated to do his work for him. Consistent with this Court's ruling in *Gonzalez*, Plaintiff's motions are summarily **DENIED**.

In his motion Plaintiff raises again (in a respectful manner) his contention that this Judge should have recused himself. Because this argument calls into question the basic fairness of these proceedings, the Court will address it despite Plaintiff's failure to provide it with any legal analysis.

The circumstances here did not require this Judge to recuse himself. As the Court explained to the parties, some months before trial this Judge accompanied a relative to a consultation with Dr. Dougherty, which lasted roughly ten to fifteen minutes. The Judge, who played no role in his relative's selection of Dr. Dougherty, had no further contact with him. The Judge did not even recognize Dr. Dougherty's name at the pre-trial conference, and it was not until jury selection, after seeing Dr. Dougherty in the courtroom, that the Judge recalled the consultation. The Judge promptly disclosed this encounter to the parties, whereupon Plaintiff asked this Judge to recuse himself.

This Judge declined to recuse himself because he felt that he could be impartial and that his impartiality could not reasonably be questioned. Two other factors weighed in this decision, although neither was determinative:

- This Judge disclosed to the parties at the pretrial conference that a few years ago he briefly made the acquaintance of

Plaintiff's father at a social affair. That encounter lasted only a matter of minutes, but was not much shorter than this Judge's encounter with Dr. Dougherty. Both Plaintiff's and Defendants' counsel expressly stated that they did not think the encounter with Plaintiff's father required this Judge to recuse himself.

- No other judges were available to try this case at the time Plaintiff asked this Judge to recuse himself. A recusal would therefore have required that the case would be rescheduled at some indefinite time in the future with another judge who would also be required to familiarize himself or herself with the file. This, of course, would delay justice to the parties. Moreover, it would work a financial hardship on Dr. Dougherty who, having already cleared his schedule of patient appointments for the week of trial, would have to do so again at the rescheduled trial.

Canon 3(C)(1) of the Delaware Judges' Code of Judicial Ethics provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." When confronted with a potential claim of personal bias or prejudice, the Delaware Supreme Court has established a two-prong test that the judge must administer. First the trial judge must be satisfied that he or she can proceed to hear the case free of bias or

prejudice concerning the moving party.[4] Second, the trial judge must objectively examine whether the circumstances require recusal due to an appearance of bias sufficient to cause doubt as to the trial judge's impartiality.[5] In addition, the Court notes that "although a judge has a duty to recuse when required, a judge also has a duty not to recuse unnecessarily."[6]

In this case, the alleged bias arose from the fact that the trial judge once accompanied his relative to a dental appointment with Dr. Dougherty. However, "[i]t is not unusual for the judge or counsel to be acquainted with a party in a case."[7] As one court observed nearly a century ago:

> [A judge] must have neighbors, friends and acquaintances, business and social relations, and be a part of his day and generation . . . the ordinary results of such associations and the impressions they create in the mind of the judge are not the "personal bias or prejudice" to which the statute refers.[8]

Indeed, the Pennsylvania Supreme Court has noted that forcing judges to recuse themselves due to "acquaintance relationships" would create "an unworkable rule."[9] Accordingly, judges in Delaware[10] as well as those

---

[4] *Los v. Los*, 595 A.2d 381, 384 (Del. 1991).
[5] *Id*.
[6] *State v. Deangelo*, 2007 WL 2472262, at *3 (Del. Super.). *See also Los*, 595 A.2d at 385 ("In the absence of genuine bias, a litigant should not be permitted to 'judge shop' through the disqualification process."); *Reeder v. Delaware Dept. of Ins*., 2006 WL 510067, at * 17 (Del. Ch.) ("[I]t is also recognized that judges who too lightly recuse shirk their official responsibilities, imposing unreasonable demands on their colleagues to do their work and risking the untimely processing of cases").
[7] *State v. Gudzelak*, 2007 WL 687225 (Del. Super.).
[8] *Ex Parte N. K. Fairbank Co.*, 194 F. 978, 989-990 (M. D. Ala.1912).
[9] *Commonwealth v. Perry*, 364 A.2d 312 (Pa. 1976) (noting that "a great deal of difference exists between an acquaintance relationship and those situations which the law recognizes by their nature, carry at least the appearance of impropriety").

across the country[11] will not automatically recuse themselves due to mere acquaintanceships.

This Judge's single brief single encounter with Dr. Dougherty does not create the appearance of bias or raise questions about the Judge's impartiality. The fact that both parties believed an encounter between Plaintiff's father and this Judge of similar duration (albeit about two years before trial) did not raise a question about this Judge's impartiality is consistent with today's decision that this Judge did not err when he declined to recuse himself.

For the above reasons, Plaintiff's motions for additur and new trial are **DENIED**.

John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary

[10] *See, e.g.*, *Downes v. State*, 2006 WL 2380752 (Del. Supr.) (holding that "a personal relationship between the Superior Court judge and the victim's family, in and of itself, is insufficient to establish a disqualifying bias); *State v. Clark*, 2007 WL 2083640 (Del. Super.) (holding that "[a] reasonable person would not question the Court's impartiality due to its minimal and remote connection to the victim's mother and therefore recusal was not warranted in this case"); *Guzelak*, 2007 WL 687225 (holding that the defendant failed to demonstrate the judge was impartial where the judge had a prior attorney-client relationship with the defendant).

[11] *See, e.g.*, *Uni-Bond, Inc. v Nat'l Steel Corp.*, 767 F.2d 922 (6th Cir. 1985) ("It is simply not to be expected that a judge must recuse himself every time he is acquainted with counsel or a party."); *In re Antonio*, 612 A.2d 650 (R.I. 1992) ("To hold that mere acquaintanceship between the bench and bar requires recusal of the trial justice, particularly in a state the size of Rhode Island, would result in a collapse of the state's judicial system."); *Wisconsin v. Grancorvitz*, 1981 WL 139068 (Wis. App.) ("A judge need not recuse himself merely because of prior acquaintance with a defendant.").