

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN SMITH,

Plaintiff-Appellee,

v

LOUIE KHOURI, D.D.S., LOUIE KHOURI,
D.D.S., P.C., and ADVANCED DENTAL CARE
CLINIC, L.L.C.,

Defendants-Appellants.

UNPUBLISHED
November 16, 2006

No. 262139
Oakland Circuit Court
LC No. 2003-047984-NH

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Following a jury trial, judgment was entered for plaintiff Kevin Smith in this dental malpractice action. Defendants now appeal as of right the trial court's order denying their subsequent motion for judgment notwithstanding the verdict (JNOV) and new trial, and granting in part Smith's motion for case evaluation sanctions. We affirm.

I. Basic Facts and Procedural History

On September 6, 2001, Smith sought treatment from defendant dentist Dr. Louie Khouri. On Khouri's recommendation, Smith agreed to have his lower right wisdom tooth, tooth number 32, extracted. Smith could not see or feel the tooth, and recalled Khouri saying the tooth was impacted under gum. Smith testified that, to perform the extraction, Khouri numbed his mouth and sliced the gum with a scalpel to access the impacted tooth. Following the extraction, Khouri stitched the incision.

Khouri admitted that he took only one x-ray of tooth number 32 before the extraction, and that the x-ray did not show the full root structure of the tooth. At his deposition, Khouri stated that the tooth was tipped five percent, and the x-ray showed a lighter structure, which was bone, above the crown of the tooth. At trial, however, Khouri testified that he had no opinion as to how far the tooth was tipped and that there was no structure above the crown of the tooth visible on the x-ray. Further, contrary to Smith's testimony, Khouri explained that, because 20 to 25 percent of the tooth was exposed above the gum line, he was able to perform the extraction without making an incision and, therefore, never used a scalpel. Since the tooth was tipped, Khouri removed a portion of the tooth's crown with a drill before removing the remainder of the tooth. Khouri testified that he did not lay any stitches following the extraction.

On September 11, 2001, Smith returned to Khouri's office for post-operative treatment. Smith complained that the lower right side of his face, including his tongue, was numb. Khouri informed Smith that the condition was normal and would correct itself within five to six months. Several weeks after the extraction, however, a neurologist informed Smith that, if the numbness remained after five or six months, the condition would be deemed permanent and untreatable. Because the condition did not change, Smith brought this suit.

At trial, Smith asserted that Khouri breached the applicable standard of care by using an improper technique to remove his tooth, thereby causing permanent nerve damage. Defendants claimed that Smith's injury occurred prior to the extraction, when he was injected with anesthesia, and that Khouri acted within the standard of care throughout the entire procedure.

Smith's expert witness, Dr. Roger Druckman, concluded that the manner in which Khouri extracted Smith's tooth was "a violation of the standard of care, undoubtedly." In fact, according to Druckman, Smith's injury could not have occurred absent a breach of the standard of care. After reviewing all of the evidence, and discovering that Smith did not feel a "sudden electric shock" during any of the anesthesia injections, Druckman determined that Smith's nerves must have been damaged during the extraction of the tooth. According to Druckman, Khouri initially breached the standard of care by embarking on the extraction without the benefit of an x-ray showing the entire root structure of the tooth. Druckman was able to determine from the x-ray, that the tooth was tipped 50 percent, or at a 45-degree angle, and was completely covered by bone and gum tissue. Therefore, it was imperative that Khouri begin the extraction by using a scalpel to cut the tissue, and gently lift the tissue off of the bone, creating a flap. Accordingly, contrary to Khouri's testimony, Druckman determined that Khouri must have used a scalpel to cut Smith's gum tissue. According to Druckman, because the x-ray did not show the full root structure of the tooth, Khouri made the cut improperly, severing Smith's nerves. Druckman stated that even if Khouri attempted to extract the tooth without first cutting a flap in the gum tissue, he would have ripped, torn, or stretched tissue and nerves while performing the extraction.

Conversely, defendants' expert witness, Dr. Michael Jermov, concluded that, although Khouri administered the anesthesia properly, Smith's injury occurred during an anesthesia injection. According to Jermov, even if dentists perform injections within the standard of care, permanent nerve damage may still occur. Here, Smith suffered injury to multiple nerves. Jermov testified that, because of the position of the nerves, a dentist would have to do great damage to injure multiple nerves while removing a tooth; but, because a dentist injects anesthesia where the nerves are closer together, it is more likely that multiple nerves could be damaged during an injection than during an extraction. Additionally, although a patient may feel an "electric shock" when a needle penetrates a nerve, the patient may not feel such a sensation if the nerve had already been numbed by a prior injection.

Jermov admitted that Khouri was forced to speculate regarding the relationship between the tooth's roots and the nerves because of the incomplete x-ray. Nevertheless, Jermov testified that Khouri was able to complete the extraction successfully. Jermov also admitted that, based on review of the x-ray, the tooth was at least partially covered by bone and tissue; but he stated that he could not be certain whether the tooth was entirely encased. Jermov agreed that, if a tooth is completely covered by gum tissue, a dentist must cut the tissue before extracting the tooth. If a tooth is partially exposed, however, it may not be necessary to make an incision. If a

portion of the tooth is exposed, simply cutting or cracking the tooth may be an acceptable method of extraction.

II. JNOV

A. Standard Of Review

Defendants argue that the trial court should have granted his motion for JNOV because Druckman's opinions were inconsistent with established facts and eyewitness testimony, and were, therefore, legally insufficient to establish Smith's claim of malpractice. This Court reviews de novo a trial court's decision to deny a motion for JNOV, viewing the evidence in the light most favorable to the nonmoving party.¹ A JNOV motion should be granted only if the evidence fails to establish a claim as a matter of law, or in other words, if no factual question exists on which reasonable jurors could honestly have reached different conclusions.²

B. Elements Of Medical Malpractice

"In a medical malpractice case, the plaintiff must establish: '1) the applicable standard of care, 2) breach of that standard of care by the defendant, 3) injury, and 4) proximate causation between the alleged breach and the injury.'"³ Expert testimony is required to establish the applicable standard of care and to show that the defendant breached that standard.⁴ Expert opinion is also essential in establishing causation.⁵ The evidence presented to establish causation must lead to a reasonable inference that "but for" the defendant's actions the injury would not have occurred.⁶

C. Evidentiary Support

We disagree with defendants that Druckman had no evidentiary support for his opinions and conclude that such support existed. Druckman noted that when an injury occurs during an injection, the patient generally feels an "electric shock," and because Smith did not feel such a sensation, it was unlikely that he suffered nerve damage during an injection. This testimony was based on Smith's claim that he did not feel a shock. Druckman also said it is imperative for a dentist to view the full root structure of a tooth on an x-ray before an extraction and that Khouri

¹ *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003).

² *Id.*; *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

³ *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005), quoting *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). See also MCL 600.2912a.

⁴ *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 494; 668 NW2d 402 (2003).

⁵ *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

⁶ *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 285-286; 602 NW2d 854 (1999).

breached the standard of care by failing to do so. There was evidence that the full root structure was not known before the extraction. Druckman further opined that Khouri must have sliced Smith's gum to access the impacted tooth. This opinion was based on his review of the x-ray, showing that bone and gum completely covered the tooth and that the tooth was tipped at a 45-degree angle. It was also based on Smith's testimony that he could not see or feel the tooth before the extraction and that Khouri sliced his gum and stitched the incision. Based on the record, there was adequate evidence to support Druckman's testimony.

Additionally, we disagree that Druckman's assertions were improper because they contradicted established facts and Khouri's eyewitness testimony. Expert opinions are objectionable when based on assumptions not in accord with the established facts and when they are inconsistent with the testimony of an eyewitness, and the only way to reconcile the testimonies is by disparaging the eyewitness' power of observation.⁷ However, this case is not similar to *Badalamenti, supra* or *Green, supra*. Here, Druckman rejected Khouri's testimony to a certain extent, but Khouri's testimony was not undisputed or based on subjective determinations as to the veracity of other testimony. Druckman based his opinion on an array of evidence, including the x-ray and Smith's testimony. Moreover, simply because Khouri's testimony contradicted other evidence presented at trial, specifically, Smith's own testimony, Druckman cannot be said to have ignored or rejected "established facts." Because Druckman's opinions were not unreliable or impermissibly speculative, we find that the trial court correctly denied defendants' motion for JNOV.

D. Res Ipsa Loquitor

Defendants also argue on appeal that the trial court should have granted a new trial because it improperly instructed the jury on the doctrine of res ipsa loquitor. This Court reviews a trial court's decision to deny a motion for new trial for abuse of discretion.⁸

Res ipsa loquitor "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence," and its primary purpose is to "create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act."⁹ "In a proper res ipsa loquitor medical case, a jury is permitted to infer negligence from a result which they conclude would not have been reached unless someone was negligent."¹⁰ For the doctrine of res ipsa loquitor to apply, the following conditions must be satisfied:

"(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have

⁷ *Badalamenti, supra* at 286, citing *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 499; 491 NW2d 243 (1992).

⁸ *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

⁹ *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987).

¹⁰ *Id.* at 155-156.

been due to any voluntary action or contribution on the part of the plaintiff”; and (4) “evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.”^[11]

On appeal, defendants do not contest that Smith satisfied the four elements of *res ipsa loquitur*. Rather, they argue that, based on the history and purpose of the doctrine of *res ipsa loquitur*, a jury instruction on the doctrine should not be given where a party advances a specific theory of negligence and provides expert testimony in support of that theory. Smith suggests that *res ipsa loquitur* never applies where a plaintiff relies on expert testimony.

The Michigan Supreme Court has held, with regard to the first condition required for *res ipsa loquitur*, that “the 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.”¹² Where there is no expert evidence that “but for” someone’s negligence the injury would not ordinarily occur, and where such a determination cannot be made by a jury as a matter of common understanding, *res ipsa loquitur* cannot properly be applied.¹³ Thus, our courts allow a plaintiff to use expert testimony to establish the applicability of *res ipsa loquitur*.

Further, we reject defendants’ assertion that an instruction on *res ipsa loquitur* is improper where evidence in support of a specific theory of negligence is offered. While it is true that Smith posed specific theories of negligence to the jury, there was conflicting testimony regarding exactly how his injury occurred, and *res ipsa loquitur* was designed to address situations where the cause of injury is not necessarily clear.¹⁴ We agree with the trial court that it is perfectly legitimate for a plaintiff to proceed with a specific theory of negligence and, recognizing that the jury may not find sufficient evidence to sustain that particular theory, argue in the alternative that the jury may find the defendant liable based on *res ipsa loquitur*. It is axiomatic in Michigan that parties are able to plead and go forward on alternate theories of liability.

III. Attorney Fees

A. Standard Of Review

Defendants argue that the trial court awarded plaintiff an excessive amount of attorney fees as a case evaluation sanction. We review for an abuse of discretion a trial court’s determination as to the reasonableness of attorney fees awarded as a sanction.¹⁵

¹¹ *Woodard, supra* at 7, quoting *Porretta, supra* at 150-151.

¹² *Locke, supra* at 231 (emphasis added).

¹³ See, e.g., *Woodard, supra* at 7, 9-10; *Jones, supra* at 154.

¹⁴ *Porretta, supra* at 150.

¹⁵ *Zdrojewski v Murphy*, 254 Mich App 50, 73; 657 NW2d 721 (2002).

B. Legal Standards

When a trial court determines that sanctions are appropriate, the actual costs charged are the costs taxable in any civil action, plus a reasonable attorney fee.¹⁶ The amount of the attorney fee must be based on a reasonable hourly or daily rate for services necessitated by the rejection of the case evaluation.¹⁷ Here, although it is undisputed that Smith was entitled to an award of attorney fees as a case evaluation sanction, defendants argue that the amount of the award was excessive because it was based on unreasonable hourly rates.

C. Applying The Standards

To determine a reasonable hourly or daily rate, the trial court should consider relevant criteria, including “the professional standing and experience of the attorney; the skill, time and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client.”¹⁸ Additionally, the trial court should utilize the empirical data contained in the Law Practice Survey or other reliable studies or surveys.¹⁹ And, a trial court may also consider the factors listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct, which includes as a factor, “the fee customarily charged in the locality for similar legal services.”²⁰

We have previously noted that “a trial court is in the best position to assess an attorney’s contribution to a case because trial courts are aware of the strengths and weaknesses of cases before them, the time and effort expended by the attorneys, and changes in the parties’ leverage resulting from changes in counsel (e.g., due to attorneys’ skill or reputation).”²¹ Here, the trial court concluded that \$450 per hour was a reasonable rate for Smith’s senior counsel Robert Gittleman, and we agree. Applying the relevant factors, the trial court stated:

There’s no question Mr. Gittleman’s a recognized practitioner in the area of the dental malpractice and has superlative standing in that area, has tried numerous cases. His skill, time and labor involved here was evidence [sic] from the professional way in which this case was tried. The amount in question, the results achieved . . . that was significant. The case was of difficulty because of the complexity of the issues involved. . . . There were significant expense [sic] incurred based on my review of the billings and taking all of those factors into account, I think that the 450 dollars rate is reasonable.

¹⁶ MCR 2.403(O)(6); *Dessart v Burak*, 470 Mich 37, 40; 678 NW2d 615 (2004).

¹⁷ MCR 2.403(O)(6)(b); *Dessart*, *supra* at 40.

¹⁸ *Zdrojewski*, *supra* at 72, quoting; *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990).

¹⁹ *Id.*

²⁰ MRPC 1.5(a)(3).

²¹ *Reynolds v Polen*, 222 Mich App 20, 30; 564 NW2d 467 (1997).

The trial court also granted attorney fees at the hourly rate of \$450 for senior counsel Michael Tashman and \$275 for associate counsel Lori Goldstein and Tracie Gittleman. Smith asserts that these three attorneys, like Robert Gittleman, are experienced professionals entitled to the fees granted by the trial court. Although the trial court did not specifically address the professional standing and experience of each of the other three attorneys, in granting the entire amount of attorney fees requested by Smith it acknowledged the complexity of dental malpractice actions, as well as the skill, time, and cost expended to obtain the favorable verdict in the instant case.

We are mindful of defendant's claim that the amount of the trial court's award should be reduced to reflect the median rates charged by litigation attorneys in the community, which amount is substantially less. However, although it is important to utilize empirical data in determining a reasonable hourly rate, it is equally important to consider the experience of the attorneys, the difficulty of the issues, and the skill, time, and labor involved in the case.²² Clearly, the hourly rates granted here exceed those listed in the information provided by defendants, but we cannot base a reasonable rate for Smith's attorneys on information that does not reflect the range of hourly rates charged by attorneys who specialize in certain types of complex litigation, such as dental malpractice. The attorneys involved in the case were recognized specialists.

Further, we reject defendants' argument that the amount of attorney fees granted by the trial court is excessive compared to the fees awarded in medical malpractice cases in the same locality. There was evidence that courts of this state have consistently awarded Smith's attorneys with hourly rates greater than the \$150 advocated by defendants' comparison between this case and *Zdrojewski, supra*. We are therefore persuaded that the trial court did not abuse its discretion in granting the amount of attorney fees that Smith requested.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen

²² See *Zdrojewski, supra* at 72; *Temple, supra* at 333.