Tracy v Rapesovska
2003 NY Slip Op 30257(U)
April 11, 2003
Supreme Court, Monroe County
Docket Number: 2000/06403
Judge: Evelyn Frazee

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE : CIVIL TERM

LINDA M. TRACY and WILLIAM TRACY,

Index No. 2000/06403

Plaintiffs,

- vs -

JULIJANA RAPESOVSKA,

Defendant.

APPEARANCES: Cellino & Barnes, P.C.
16 West Main Street, Suite 147
Rochester, New York 14614
Appearing on behalf of the plaintiffs
By: Christopher G. Johnson, Esq., of Counsel

Egger & Leegant
134 South Fitzhugh Street
Rochester, NY 14608
Appearing on behalf of the defendant
By: JoAnne Leegant, Esq., of Counsel

DECISION

FRAZEE, J.

Under Insurance Law §5102(d), a fracture constitutes serious injury (see, PJI 2:88C). A fractured tooth calling for prompt repair and treatment constitutes a prima facie showing of serious injury (see, *Kennedy v Anthony*, 195 AD2d 942 [3rd Dept., 1993]). The testimony of plaintiff's treating physician, Mary Ann Panara, DDS, was that plaintiff had broken off the tip of the buccal cusp of tooth #21, and that tooth

#12 had a fracture down the middle. Dr. Panara noted a deep fracture mesially distally through the pulp of the tooth that involved the nerve. Further, Dr. Panara found an additional deep fracture in tooth #13 similar to that in tooth #12. Dr. Panara stated that the vertical fractures could not be seen on x-ray, but were observed when the teeth were opened and examined internally.

Frank Lamar, DDS, who examined plaintiff at the request of the no-fault carrier, State Farm Insurance Company, testified that he reviewed the records of plaintiff's previous dental providers, took his own panoramic x-rays, and conducted an examination of the plaintiff. As a result, Dr. Lamar identified teeth #12, 13, 14, 20 and 21 as having fractures that involve the nerves requiring endodontic treatment.

Both Dr. Panara and Dr. Lamar testified that the two month delay in treatment was not unusual or unreasonable. Dr. Lamar testified that the injury to plaintiff's teeth, five of which had endodontic treatment after the accident, was consistent with the trauma sustained in a motor vehicle accident of the type in which plaintiff was involved. Dr. Panara opined with a reasonable degree of dental certainty that the accident was the likely cause of the plaintiff's fractured teeth.

Charles Thompson, DDS, testified on behalf of the defendant. Dr. Thompson saw plaintiff eleven months after the accident and after the endodontic treatment had been performed. Dr. Thompson did not review any of the plaintiff's previous dental records or any x-rays. His examination of plaintiff's teeth was non-invasive and involved a visual exam only. Without specifying which teeth, it was Dr. Thompson's testimony that plaintiff had a number of teeth with enamel cracks that

could be detected with transillumination. He stated that these are typically associated with thermal or biting stress. He also observed that plaintiff had a number of large fillings, again, without reference to specific teeth. Dr. Thompson advised plaintiff that he could not relate her tooth injury to the motor vehicle accident because he had not been treating her all along, having first examined her eleven months after the accident, and he did not know her pre-accident condition.

In reviewing the dentists' testimony, the competency of the proof offered by Dr. Thompson comes into question. Having performed only a visual examination of plaintiff, Dr. Thompson did not have sufficient information with which to perform proper and adequate diagnosis. Further, based on the limited information before him, Dr. Thompson was unable to come to any conclusion regarding the casual connection between the accident and the condition of plaintiff's teeth.

A motion to set aside a jury verdict as against the weight of the evidence (CPLR §4404[a]) should not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence (*see*, *Gertis v Jarosz*, 284 AD2d 938 [4th Dept., 2001]; *Chin v Kaplan*, 280 AD2d 892 [4th Dept., 2001]; *Fleiss v South Buffalo Railway Company*, 280 AD2d 1004 [4th Dept., 2001]). The Court concludes that the preponderance of the evidence, as outlined above, is so great that the verdict that plaintiff did not sustain a fracture must be set aside. In fact, this is really not a matter of conflicting evidence, but one of insufficient evidence on behalf of the defendant. Since the plaintiff meets the threshold with respect to a fracture, it is not

necessary to address her other claimed injuries. Accordingly, plaintiffs' motion is granted.

So ordered.

Dated at Rochester, New York

this 11th day of April, 2003.

Honorable Evelyn Frazee
Justice Supreme Court