



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00247-CV

SOMMER WALKER, APPELLANT

V.

**DAVID E. PARMER, DDS, M.D., AND ALLIANCE
ORAL & MAXILLOFACIAL SURGERY, PA, APPELLEES**

On Appeal from the 141st District Court
Tarrant County, Texas
Trial Court No. 141-261629-12, Honorable John P. Chupp, Presiding

March 3, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, Sommer Walker, sued David E. Parmer, D.D.S., M.D., and his professional association for malpractice in connection with a procedure known as a bilateral sagittal split osteotomy (BSSO). After a two-day jury trial, the jury returned a verdict finding no negligence on the part of Parmer. Based upon the verdict, the trial court entered a judgment in favor of Parmer and this appeal followed. Walker contends that the jury's answer of "No" to the jury question inquiring about the negligence of

Parmer was against the great weight and preponderance of the evidence. We will affirm.

Factual and Procedural Background

Walker became a patient of Parmer's in 2009 to address a problem she had with the alignment of her lower jaw. As a result of this misalignment, Walker's teeth did not meet properly and, over a period of time, such misalignment could result in other problems occurring with her teeth.

After his initial consultation with Walker, Parmer recommended a BSSO surgical procedure to correct her jaw alignment issue. The BSSO involves fracturing the lower and upper jaw on each side of Walker's mouth and then realigning the jaws. The jaws are secured for realignment by drilling holes in the bone of the jaw and inserting fixation screws into the holes.

Parmer had Walker return to her orthodontist to have braces reattached to her teeth in an effort to gain some correction of the alignment issue before surgery. After several months, Walker returned to Parmer who, after examining her teeth and jaws, determined that he believed he could perform the BSSO procedure on her lower jaw without the necessity of surgery on her upper jaw. Two weeks before the scheduled surgery, Parmer met with Walker and her mother to explain the surgical procedure and the medical risks associated with it. After receiving this information, Walker elected to go through with the surgery.

The surgical procedure was performed on August 3, 2010. Parmer was assisted by Dr. John McPhillips.¹ Parmer performed the procedure on the right side of Walker's jaw while McPhillips performed the same procedure on the left side of Walker's jaw.² During the procedure, Parmer determined that the jaw was not properly aligned requiring him to back out the original screws and then realign the jaw. Parmer then had to drill new holes and attach fixation screws in the new position.

Walker began having issues almost immediately after waking from surgery. Specifically, Walker was experiencing pain on the right side of her mouth and tongue. Walker's description of the pain led Parmer to believe that she was suffering from something more than normal post-operative pain.

Parmer eventually came to believe that Walker had suffered a lingual nerve injury during the surgery. Initially, Parmer believed that the injury to the lingual nerve was caused by one of the fixation screws protruding an additional 2.5 mm into the inside cortical area of the bone. As a result of this conclusion, one week after the surgery, Parmer opened the area of the jaw where the suspected screw was placed and removed the screw and replaced it with a shorter screw. However, the procedure did not alleviate Walker's post-operative symptoms. In fact, Walker's condition appeared to be getting worse.

Parmer then referred Walker to Dr. John Zuniga, an oral surgeon who specialized in nerve injuries. After examining Walker and her operative records, Zuniga

¹ The BSSO procedure is normally performed by two surgeons with one working on one side of the jaw and the second surgeon working on the other side of the jaw.

² There are no complaints about the procedure performed by McPhillips.

determined that Walker was suffering a Class V nerve injury. A class V nerve injury is the most serious type of nerve injury and, in this case, meant that Walker's lingual nerve had been severed during the operation. As a result of his diagnosis, Zuniga performed a nerve excision and allograft surgery to try and repair the nerve. The surgery was only moderately successful.

As a result of the severing of the nerve during the operation, Walker filed this suit for dental malpractice against Parmer. During the trial, it became apparent that Walker's primary complaints against Parmer were two-fold. First, Walker contends that Parmer violated the standard of care by failing to use a retractor device in the medial area where the injury occurred. Second, Walker further contended that Parmer violated the standard of care when he failed to control his drill and over-drilled at the site of the fixation screws.

After hearing the evidence, the jury was asked in Question No. 1 if the negligence of David Parmer, D.D.S., M.D., proximately caused the injury in question. The jury answered "No." The trial court subsequently entered judgment for Parmer in conformity with the jury's answer to Question No. 1, and this appeal followed.

Walker contends that the jury's answer that Parmer was not negligent is contrary to the great weight and preponderance of the evidence. We disagree and will affirm.

Standard of Review

When reviewing a challenge to the factual sufficiency of the evidence, we must review all of the evidence, both for and against the fact finder's answer to the question submitted. See *AZZ Inc. v. Morgan*, 462 S.W.3d 284, 295 (Tex. App.—Fort Worth

2015, no pet.) We will set aside the jury's finding only if the evidence is so weak or the finding is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Id.* (citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curium)).

In conducting a factual sufficiency review, we are mindful of two principles to which we must adhere. First, a reviewing court may not simply substitute its judgment for that of the jury. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). In connection with this admonition, we understand that Walker was unable to persuade the jury by a preponderance of the evidence to find that Parmer was negligent. See *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988). Second, the jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761.

Contentions of the Parties

We begin with the contentions of Walker. Walker contends that Parmer breached the standard of care in failing to use a retractor device in the medial area where this injury occurred. As part of that contention, Walker posits that the use of a retractor device would have protected the lingual nerve and eliminated the possibility of a drill injury. As an alternative theory, Walker contends that, if Parmer was not going to use a retractor device, his conduct in over-drilling was a breach of the standard of care.

To support her position, Walker points first to the testimony of Parmer. Parmer testified that he did not use a retractor in the medial area where the drilling occurred. Initially, Parmer said that use of the retractor in the position he was drilling would be

impractical; however, later Parmer testified that he never used retractors in this area. According to Walker, this was a change in his testimony which the jury should have treated in some negative fashion.

Walker then presents the testimony of her expert, Alan M. Schwimmer, D.D.S., for the proposition that the standard of care in BSSO surgery was to avoid causing a lingual nerve injury and that Parmer breached the standard of care. Further, according to Schwimmer, the standard of care in a BSSO surgery requires the use of a retractor. Schwimmer further opined that Parmer breached the standard of care by failing to control the drill so as not to injure the lingual nerve.

Walker then discusses Parmer's expert's testimony. R. Gilbert Triplett, D.D.S., Ph.D, testified for Parmer. According to Walker's presentation of Triplett's testimony, Triplett testified that he regularly used a retractor and that it is advisable to use them. After reviewing the case materials regarding Walker's surgery, he could not find any reason to not use a retractor. Further, Triplett testified that, if a retractor was not used, there is a higher standard of care to avoid a drill injury to the lingual nerve. Walker then contends that the jury ignored this evidence in rendering a "No" finding on the issue of the negligence of Parmer. As such, the jury's answer to the negligence question was against the great weight and preponderance of the evidence.

Parmer's position is that what the jury heard regarding whether the failure to use retractors was a violation of the standard of care was the subject of conflicting testimony. Specifically, Parmer testified that he was not trained, either in school or as a young associate, that retractors are to always be used when conducting a BSSO

surgical procedure. He further testified that, in his opinion, the use of retractors in the specific area of Walker's surgical procedure was not practical because of the difficult angle. Triplett, Parmer's expert, testified that he did not agree with Schwimmer's conclusion that the failure to use retractors in Walker's surgery was a violation of the standard of care. Triplett further testified that he used retractors in less than half of the surgical procedures he performs.

Analysis

We begin by remembering that the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.* We further note that, when submitting this case to the jury, the trial court gave what has come to be known as the "bad results" instruction. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(e)(2). This provision provides that a finding of negligence may not be solely based upon a bad result to the claimant. See *id.*; *Chesser v. LifeCare Mgmt. Servs., L.L.C.*, 356 S.W.3d 613, 636 (Tex. App.—Fort Worth 2011, pet. denied).

When reviewing the position of Walker, it becomes apparent that she is placing significance on Parmer's alleged change of his testimony regarding the use of retractors. However one characterizes Parmer's testimony on that subject, one thing is clear, that bit of testimony was an issue of credibility and, as such, was a question for the jury to decide. See *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761.

Both Parmer and his expert, Triplett, testified that Parmer did not breach the standard of care for performing the BSSO procedure. In regard to the use of the retractor, each opined that it is simply not always practical to use retractors during a

BSSO procedure. Thus, there is competing testimony about the ultimate issue of whether failure to use a retractor was a breach of the standard of care. In such a situation, it was up to the jury to determine who to believe and how much weight to give the testimony it received. *Id.* Therefore, we cannot find that the jury's "No" answer to the negligence question was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. See *AZZ Inc.*, 462 S.W.3d at 295.

As to Walker's alternate theory that Parmer breached the standard of care by failing to control the drill, our review of the evidence does not support any conclusion that the jury's answer was against the great weight and preponderance of the evidence. See *id.* As in the previous contention, the opinion evidence was contradictory. Parmer and Triplett testified that Parmer did nothing that would be considered a breach of the standard of care in the drilling. On the other hand, Schwimmer basically concluded that the use of the drill without a retractor to buffer the drill breaches the standard of care every time. This appears to be a conclusion that, if the dentist in question did not use retractors, any damage was a result of negligence. However, the law does not support this proposition. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(e)(2).

As with the previous contention of Walker, the evidence was, at best, contradictory about whether Parmer breached the standard of care in the drilling of the fixation screws. We cannot say that such testimony would lead us to conclude that the jury's finding of no negligence was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. See *AZZ Inc.*, 462 S.W.3d at 295.

Conclusion

Having overruled appellant's sole issue, we affirm the judgment entered by the trial court.

Mackey K. Hancock
Justice