

83-LW-1430 (10th)

Judith A. Danch, Plaintiff-Appellant

v.

Joseph A. Mitchell, D.D.S., Defendant-Appellee.

No. 82AP-221 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on March 15, 1983.

APPEAL from the Franklin County Common Pleas Court.

SIMAKIS & SIMAKIS CO., L.P.A., MR. JAMES K. SIMAKIS and MR. GEORGE K. SIMAKIS, for plaintiff-appellant.

MESSRS. PORTER, WRIGHT, MORRIS & ARTHUR, MR. JOSEPH W. RYAN, JR., MR. CRAIG D. BARCLAY and MR. JAMES S. MONAHAN, for defendant-appellee.

OPINION

MOYER, J.

This case is before us on plaintiff-appellant's appeal from a judgment of the Court of Common Pleas of Franklin County sustaining defendant-appellee's motion for a directed verdict at the close of plaintiff's case.

The record in this dental malpractice action reveals that plaintiff, Judith Danch, first consulted defendant, Joseph A. Mitchell, D.D.S., in May of 1979. Defendant recemented a temporary crown which had been placed on one of plaintiff's molars by a previous dentist in 1968 following a root canal treatment. According to the dental system of numbering teeth, the tooth with the previous temporary crown was tooth number 25. Defendant also discussed with plaintiff the extensive dental work which her teeth required and proposed a course of treatment. Plaintiff returned to defendant in June and received fillings in five teeth which are not at issue in this case.

On July 26, 1979, according to defendant's patient chart, defendant performed the following work on plaintiff: tooth 24-a root canal treatment and a crown veneer; tooth 25-a crown veneer (this tooth had the previous root canal); tooth 28-a root canal treatment and a temporary filling. The crowns which were placed on teeth 24 and 25 were actually temporary crowns which were intended to protect the teeth until the laboratory finished forming the permanent crowns.

At the end of this appointment, defendant realized that part of the small dental instrument called a reamer, which is used to clean out the root canal, had broken off and remained inside plaintiff's tooth. Since plaintiff was extremely nervous about the entire procedure, defendant elected not to tell her about the broken reamer.

On August 2, 1979, plaintiff returned to have the temporary crowns on teeth 24 and 25 replaced with permanent crowns. Plaintiff claims defendant was satisfied with the permanent crowns which had been delivered but defendant claims he was dissatisfied with the color of the porcelain and seated the crowns at plaintiff's insistence with Temerex, a temporary cement, until new permanent crowns could be ordered.

Plaintiff went to a university dental clinic on October 15, 1979, but the clinic would not accept plaintiff as a patient until she returned to defendant for further work. Plaintiff returned to defendant in late October or early November and defendant agreed to replace the crowns. This was plaintiff's last appointment with defendant. When plaintiff saw a new dentist (Dr. Baldini) on May 5, 1981, the temporary filling defendant had placed in tooth 28 remained in that tooth. Apparently around December of 1981 or January of 1982, the temporary filling washed out of tooth 28 and the tooth broke off in two stages.

Plaintiff raises the following two assignments of error in support of her appeal:

1. "The trial court erred in arresting the determination of the matter from the jury on defendant's motion for a directed verdict, where plaintiff had, when interpreting the evidence presented most strongly in her favor, established a prima facie case of negligence and proximate cause."

2. "The trial court erred to arrest the determination of the matter from the jury on defendant's motion for a directed verdict, and to rule in favor of the defendant on the basis of contributory negligence, where such issue was not in controversy, not pleaded as an affirmative defense, not established as a prima facie case and moot as not applicable to the facts."

The trial court must sustain a motion for a directed verdict if, after construing the evidence most strongly in favor of the party against whom it is made, the court " * * * finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *." Civ. R. 50 (A)(4).

Since plaintiff's complaint sounded in negligence, plaintiff had the burden of proving: (1) that defendant owed plaintiff a duty; (2) that defendant breached the duty; and (3) proximate cause between the breach and plaintiff's injury. Bennison v. Stillpass Transit Co. (1966), 5 Ohio St. 2d 122, paragraph one of the syllabus. In the malpractice context, plaintiff's evidence must show, in addition to proximate cause, that:

" * * * the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances * * *." [Bruni v. Tatsumi (1976), 46 Ohio St. 2d 127, paragraph one of the syllabus.]

In light of the similar training and professional competency required of both doctors and dentists, we hold that dentists are required to exercise a correspondingly high standard of care. See, 83 A.L.R. 2d 7, 24.

Plaintiff alleges that defendant was negligent and committed dental malpractice by falling below this required standard of care in the following nine different actions or procedures.

First, plaintiff claims that the root canal treatment defendant performed on tooth number 28 fell below dental standards. Plaintiff's expert witness, the dentist she consulted a year and a half after she last visited defendant, testified that this root canal treatment was "all right" and that he did not think defendant had fallen below the usual standard of care for root canal treatments. Plaintiff has not proven that the root canal treatment in tooth 28 was negligently performed.

Plaintiff's second allegation of malpractice is that the root canal treatment of tooth number 24 fell below the standard of care. Dr. Baldini, plaintiff's expert, again found that defendant's performance met the standard of care. Plaintiff did not prove that the root canal treatment on tooth 24 demonstrated malpractice.

Plaintiff's third allegation of malpractice is that defendant fell below the standard of care by performing the two root canal treatments in one office visit, thus subjecting plaintiff to unnecessary stress. Plaintiff's expert testified that performing two root canals at one appointment is perfectly acceptable dental practice and that he had done so himself. Plaintiff has failed to prove that defendant committed malpractice in this particular.

Fourth, plaintiff alleges that defendant should have told her that he had left part of the reamer in tooth number 24. Plaintiff's expert testified that he did not know whether failing to tell the patient about the reamer fell below dental standards, but that, "I just think you should tell them." Defendant testified that he did not inform plaintiff that the reamer remained in her mouth because plaintiff was so nervous about the procedures that he did not wish to further alarm her. Plaintiff has not carried her burden of proving that defendant's silence constituted malpractice.

Plaintiff's fifth allegation concerns the fact that the reamer was left in tooth number 24. Plaintiff's expert testified that he had no reason to believe that the reamer would ever cause plaintiff any problems. Furthermore, when Dr. Baldini discussed the procedures plaintiff needed to have performed on her teeth, he testified that the root canal in tooth 24 was fine and looked solid, that he would not redo that root canal, that there was no need for any treatment on it, and that the reamer probably would never have to be taken out. Plaintiff has not proven that defendant committed malpractice by leaving the reamer in plaintiff's tooth.

Plaintiff's sixth allegation concerns the temporary filling defendant placed in tooth number 28 after he performed the root canal treatment on that tooth. Plaintiff claims that, although she could not afford to have a crown veneer placed on that tooth, defendant should have used a regular (permanent) filling rather than a temporary filling. Plaintiff's expert testified that, when no crown is going to be placed on the tooth, a temporary filling is usually used to fill the hole "for at least four to six weeks to make sure it doesn't blow up or cause problems." Defendant's use of a temporary filling in tooth 28 was not proven to be below dental standards.

Plaintiff's remaining three allegations of malpractice concern the crown veneers which defendant placed on tooth 24 and tooth 25. Plaintiff's seventh and eighth claims are that the crowns themselves fell below dental standards and that defendant committed malpractice by placing them on her teeth. Defendant testified, and his patient chart shows, that plaintiff insisted that he seat the crowns because they, being permanent crowns, were more satisfactory than the temporary crowns she had been wearing. Defendant further testified that the crowns were seated with Temerex, a temporary cement, and that he had offered to make new impressions, order new permanent crowns and seat them at no charge. Plaintiff's expert testified that, although the crowns were "over contoured", bulky, and the wrong color, defendant's actions fell below dental standards only if the crowns were intended to be permanent, and that the crowns were acceptable if they were being used as temporary crowns. Since Dr. Baldini had not attempted to remove these crowns (they were still seated on teeth 24 and 25 at the time of the trial), Dr. Baldini could not tell whether they were seated with temporary or permanent cement. Plaintiff testified that she did not tell defendant she was displeased with the crowns when they were first seated, that defendant told her he would replace them at no charge to her and that she cancelled her appointments with defendant that were made for the purpose of having the crowns replaced. Plaintiff has not met her burden of proving that the crowns were permanently seated and thus fell below dental standards. Nor did she show that she was justified in not giving defendant an opportunity to correct the crowns which would have been the usual and customary practice.

Plaintiff's final allegation is that defendant committed malpractice by seating crowns on teeth 24 and 25 as one piece or as two pieces joined together in the middle so that plaintiff could not floss between her teeth. Plaintiff claimed that this looked very unnatural. Plaintiff's expert testified that joining two crowns together for strength or "splinting formability" was perfectly acceptable medical practice.

Plaintiff has not proven that any procedure defendant performed or failed to perform constituted dental malpractice. For this reason, even construing the evidence most favorably to plaintiff, reasonable minds could not conclude that defendant was negligent or that he committed dental malpractice. Plaintiff's first assignment of error is overruled.

In connection with plaintiff's second assignment of error, the trial court apparently allowed defendant to amend his answer to allege contributory negligence after the court sua sponte raised the defense and found that plaintiff had failed to exercise ordinary care for her own well being. The judge was careful to point out that:

"* * * Even assuming that there was negligence and proximate cause in this case as to Dr. Mitchell, which is not a basis for my decision, but even assuming that there was negligence, I would have to say that there was negligence on the part of this plaintiff contributing to her situation * * *." (Tr. 240.)

Since the issue of plaintiff's contributory negligence does not arise until plaintiff proves that defendant was negligent [Bush v. Harvey Transfer Co. (1946), 146 Ohio St. 657, paragraph four of the syllabus], and plaintiff has not met her burden of proof in this case, any mention of contributory negligence, regardless of whether it was erroneous, was harmless error which will not support a reversal of the judgment below. Smith v. Flesher (1967), 12 Ohio St. 2d 107, paragraph one of the syllabus. Plaintiff's second assignment of error is consequently overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

STRAUSBAUGH, J., concurs.

WHITESIDE, P.J., dissents.

WHITESIDE, P.J., dissenting.

When construed most strongly in favor of plaintiff, the evidence permits reasonable minds to reach different conclusions as to whether defendant's performance constituted negligence. There was direct expert testimony that defendant did not meet acceptable dental standards. (Tr. 198.) While different factual conclusions might be reached as to whether the work was supposed to be temporary or permanent, apparently defendant billed and was paid for permanent crowns. The leaving of a reamer in a tooth can be found to be negligent and would entitle plaintiff to recover at least nominal damages. In any event, the question is as to damages, there clearly being evidence of negligence.

While the trier of the facts could reach the conclusion of the trial court and the majority, the determination depends upon the credibility of defendant and the weight given to his testimony that he intended to do more work to complete the dental services. However, to obtain payment, he certified in August 1979 that the permanent work had been performed. See Plaintiff's Exhibit 12-E.

As to contributory negligence, there was insufficient evidence to permit submission of the issue to a jury. Only by weighing the evidence in favor of defendant and indulging in speculation would it be possible to find plaintiff contributorily negligent. Construing the evidence in favor of plaintiff as is required upon a motion for a directed verdict does not permit a finding against plaintiff.

Accordingly, I would sustain both assignments of error, reverse the judgment and remand for a new trial.