

Zell v Bass
2020 NY Slip Op 34710(U)
February 24, 2020
Supreme Court, Nassau County
Docket Number: Index No. 604599/2017
Judge: Helen Voutsinas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 25
Present: Hon. Helen Voutsinas, J.S.C.

X

NICOLE ZELL,

Plaintiff,

Index #: 604599/2017
Motion Sequence No.: 001

-against-

Motion Submitted: 1/3/20

BARRY D. BASS, D.D.S.,

Defendant.

Short Form Order

X

The following papers were read on this motion:

Plaintiff's Notice of Motion, Affirmations in Support, Exhibits 1
Defendant's Affirmation in Opposition, Exhibit 2
Reply Affirmation 3

Upon the foregoing papers, the motion by Defendant, Barry D. Bass, D.D.S., for an Order pursuant to CPLR 3212 granting summary judgment and dismissing this action is determined as herein provided.

Plaintiff Nicole Zell commenced this action to recover damages for personal injuries she sustained as a result of defendant's alleged dental malpractice. It is alleged that Dr. Bass negligently extracted the roots of tooth #31 from plaintiff on September 2, 2015, allegedly resulting in plaintiff developing symptoms stemming from decreased sensation of her lower lip, chin and jaw.

In her bill of particulars, plaintiff alleges that Dr. Bass departed from good and accepted dental practice, inter alia: "in failing and omitting to order or perform a preoperative CT scan of the mandible; in failing to ascertain the location plaintiff's mandibular nerve structures preoperatively; . . . in failing to identify plaintiff's mandibular canal preoperatively or intraoperatively; in failing to identify plaintiff's inferior alveolar nerve preoperatively or intraoperatively; in drilling in too close of a proximity to nerve structures; in drilling into plaintiff's inferior alveolar nerve; in placing a sharp dental instrument into contact with plaintiff's inferior alveolar nerve; in drilling into the mandibular canal and contacting the IAN with a high speed rotary instrument; in over drilling the buccal osteotomy; . . . in performing unnecessary surgery; in extracting retained root tips that were non-pathological, ankylosed, had no opposing tooth and where preoperative imaging revealed that the apex of the roots of tooth #31 were superimposed over the superior cortical border of the mandibular canal; in over aggressively creating a buccal

window; in drilling the osteotomy too far inferiorly and deeply; in drilling with a round bur around root apices; in failing to protect the IAN from injury; in failing to avoid contact with the IAN; in failing to leave the retained roots in place, observing and re-evaluating over time; in failing to perform a pulp test; . . . in removing retained ankylosed roots in an improper manner using improper technique; in causing iatrogenic injury that was not caused or contributed to by plaintiff and which was caused by an instrumentality in defendant's exclusive control and which does not ordinarily occur absent negligence; in failing to identify vital anatomy such as the inferior alveolar nerve so as to avoid penetration into and injury to a vital anatomical structure; . . . in failing and omitting to timely refer plaintiff to a repair surgeon for microsurgical evaluation and repair; in failing and omitting to timely refer plaintiff to a neurologist; in failing to expeditiously diagnose iatrogenic paresthesia; in failing and omitting to inform plaintiff of the risk of nerve damage or paresthesia and in failing to obtain informed consent to treatment.

The following facts are undisputed:

On March 20, 2015, plaintiff was seen by general dentist, Eric Fisher, D.D.S., who performed a comprehensive oral examination of plaintiff and took a health history. Four (4) bitewings and a panoramic x-ray were taken. The images revealed two (2) partially erupted molars, including tooth #31. On July 20, 2015, Dr. Fisher noted the need to restore tooth #31 due to a lack of healthy tooth structure remaining after the excavation. At that time, Dr. Fisher performed a direct pulp cap and informed Plaintiff that she may need a root canal. On August 12, 2015, Dr. Fisher noted that the tooth had a poor prognosis and might require an extraction, graft and implant and plaintiff was informed and consented to the treatment. On August 19, 2015, in an emergency visit, plaintiff complained of discomfort. Root canal was scheduled for the next visit.

On September 2, 2015, at 11:45 a.m., tooth #31 was still causing discomfort to plaintiff. She requested to have the tooth extracted since the prognosis was so poor. Dr. Fisher agreed and then an informed consent form was reviewed and signed by plaintiff. The consent form included the following language:

3. Lower tooth roots may be very close to the nerve **and surgery may result in a numb feeling of the chin, lip, gums or tongue which may last for weeks, months or rarely, be permanent.** On upper teeth whose roots are close to the sinus, a sinus infection may develop, a root tip may enter the sinus, and /or an opening from the mouth to the sinus may occur which could require later medication or surgery.

4. I understand that **no guaranteed results have been offered or promised and I give my free and voluntary consent for treatment.** . . . [emphasis as supplied by defendant]

Dr. Fisher administered 1.8 cc 3% carbocaine and ½ 1.8cc 2% lido 1:100 by local injection. The temporary crown was removed. The tooth was found to be "extremely stable and brittle". Dr. Fisher sectioned the mesial and distal roots and attempted a routine extraction. The tooth did not move at all and appeared ankylosed. Dr. Fisher then took two (2) periapical films to gauge the

progress of the procedure. Due to the combination of the tooth being brittle and ankylosed and the root tips being very slender, Dr. Fisher referred plaintiff to Dr. Bass to evaluate removing the root tips since they appeared very close to the inferior alveolar canal.

On September 2, 2015, the plaintiff arrived at Dr. Bass' office having come directly from Dr. Fisher's office. Another informed consent form was signed by plaintiff for Dr. Bass to complete the extraction of tooth #31 begun by Dr. Fisher. The informed consent form appears to be identical to the informed consent form signed by plaintiff for Dr. Fisher.

Dr. Bass made an apical/buccal purchase point and removed the whole mesial root and distal. He closed with 2 black silk sutures and scheduled a follow up visit for suture removal. The next scheduled appointment was September 9, 2015. On September 8, 2015, plaintiff was seen by Dr. Bass for complaints of numbness. Dr. Bass removed the sutures, noted parasthesia of plaintiff's lip, and scheduled a return visit for two (2) weeks. On September 25, 2015, plaintiff experienced itchy skin and pins and needles. Dr. Bass prescribed Clindamycin 300 TID x 15 tabs and Peridex. On September 30, 2015, Dr. Bass noted that plaintiff's gingiva was still inflamed and she was still itchy. She was directed to return in one (1) week. On October 9, 2015, plaintiff's gingival margin of tooth #31 was still inflamed and Dr. Bass performed a deep curettage. He prescribed Doxycycline 100 BID x 10 and directed plaintiff to continue with Peridex. He further noted that the area of plaintiff's numbness was decreasing and a map showed the improvement areas. Another visit was scheduled for October 23, 2015. On the next visit, Dr. Bass noted not much change in plaintiff's numbness and the tooth #31 area was ok. He prescribed Clindamycin x 20 and directed plaintiff to return in 3-4 weeks. On November 12, 2015, plaintiff was seen for the last time by Dr. Bass who noted that plaintiff could feel a pinprick on the gingival and inside of her lip. He noted that the outside skin had a small area of numbness. Dr. Bass directed plaintiff to return in five (5) weeks but she never came back.

Defendant argues that there is no evidence that anything which defendant did or did not do was a proximate cause of any of plaintiff's alleged injuries; that there is no evidence that plaintiff's injuries were the result of the extraction performed by Dr. Bass and not by the attempted, but not completed extraction of the tooth by plaintiff's general dentist, Dr. Fisher; that plaintiff was fully informed of the proposed treatment and possible risks associated with the extraction and agreed to the treatment by Dr. Bass.

The evidence submitted by defendant include the pleadings, his and plaintiff's deposition testimony, the deposition testimony of Joseph Zell, plaintiff's husband, plaintiff's medical records, and the affirmation of Harry Dym, D.D.S., a dentist licensed to practice in the State of New York.

While defendant fails to furnish his own affidavit, Dr. Dym's affirmation states that based on his review of, *inter alia*, plaintiff's dental records and x-rays, the pleadings and the deposition transcripts of plaintiff, defendant and nonparty witness Joseph Zell, "[i]t is [his] opinion, within a reasonable degree of dental certainty, that the care and treatment provided to Nicole Zell by Barry D. Bass, D.D.S., from September 2, 2015, through November 11, 2015 . . . was at all times in conformity with good and accepted dental practice. It is also my opinion, within a reasonable

degree of dental certainty, that none of the injuries claimed by Nicole Zell were proximately caused by any care and treatment rendered by Dr. Bass.”

Dr. Dym further states that “[i]t is my opinion, within a reasonable degree of dental certainty, that the Informed Consent Form signed by NICOLE ZELL prior to the treatment performed by Dr. Bass is valid and appropriate in all respects and clearly and accurately describes the possible risks associated with the procedure performed by Dr. Bass.”

Dr. Dym further opines that based upon the extensive history of emanating pain from tooth #31, the roots had to be removed regardless of the proximity to the canal, and that any CT scan or cone beam images would not have altered, in any way, the approach or technique that was employed by Dr. Bass to remove the roots. He states that the root remnants could not have been allowed to remain in place, given that there was a necrotic process in place within the pulp and nerve system of tooth #31.

Dr. Dym asserts that there is no evidence, and nothing to indicate, that Dr. Bass drilled into plaintiff’s inferior alveolar nerve (“IAN”), and that there are many other possible reasons for plaintiff’s altered nerve sensation that may have occurred without any deviation from the standard of care. Dr. Dym states that the IAN block administered by Dr. Fisher could result in IAN injury. Also, misdirected apical pressure, possibly applied by Dr. Fisher during his attempted extraction, may have caused bone compression to the underlying IAN resulting in possible nerve conduction alteration. According to Dr. Dym, the only injection administered to plaintiff was by Dr. Fisher, a general dentist, who was unable to complete the extraction he began, requiring Dr. Bass, an oral and maxillofacial surgeon, to properly complete the extraction.

Dr. Dym avers that “it is my opinion within a reasonable degree of dental certainty that Dr. Bass did not contact or injure Nicole Zell’s inferior alveolar nerve . . . that the care, treatment, management, and the verbal/written instructions and consents of Barry D. Bass on September 2, 2015 through November 12, 2015, are in conformity with standards of dental care in their entirety. . . that, on September 2, 2015 through November 12, 2015, the care and treatment rendered to Nicole Zell by Dr. Barry D. Bass, D.D.S. conformed to good and accepted dental practices, there were no departures by Barry D. Bass, D.D.S., no causal connection between the alleged departures and the injuries alleged by Nicole Zell, and, that no alleged actions or alleged inactions on the part of Barry D. Bass, D.D.S., caused or contributed to Nicole Zell’s alleged injuries.

Based on the foregoing, defendant presented a *prima facie* case that he did not depart from accepted standards of dental care in his treatment of plaintiff.

In opposition to the motion, plaintiff submits, *inter alia*, the affidavit of plaintiff’s expert, whose name has been redacted. The proffered expert is an oral and maxillofacial surgeon, licensed in the State of Washington. The expert states that she has reviewed the submissions of defendant’s expert, Harry Dym, D.D.S., the deposition transcripts, plaintiff’s bill of particulars, the respective records and x-rays of Dr. Fisher and Dr. Bass, and the records of plaintiff’s subsequent treating dentist, David Sirois, D.M.D., Ph.D., and the cone beam CT scan ordered by Dr. Sirois and taken on November 12, 2016. Plaintiff’s expert opines that, based upon her review of the foregoing, and with a reasonable degree of dental/oral and maxillofacial certainty, and based on national standards

of care that do not vary state to state, "it is [her] opinion that Dr. Bass departed from the standard of care in several respects with regard to his treatment of plaintiff . . . and that his departures caused harm by severely injuring her right inferior alveolar nerve, leaving her with permanent numbness, pain and other symptoms."

Plaintiff's expert detailed several alleged acts of negligence in Dr. Bass' treatment of plaintiff. First, she asserts that the procedure to perform the extraction/removal of the retained roots of tooth #31 was unnecessary and not indicated because on x-ray, there was no pathology present in the subject roots to warrant removal, especially where the IAN was at high risk for injury because on x-ray, the roots of tooth #31 are superimposed over the mandibular (IAN) canal with sclerotic bone extending below the canal. Plaintiff's expert opines that the proper course of treatment was to evaluate, obtain radiographic imaging and observe before performing high risk oral surgery. In her opinion, the proper course of treatment would have been to leave the retained roots in place because there are no signs or symptoms of infection and they were ankylosed and to follow the patient over a period of months to ascertain whether the retained roots were causing any dental issues.

Plaintiff's expert further opines that plaintiff was referred to Dr. Bass by Dr. Fisher for evaluation of the retained roots, due to his inability to remove them and the associated high risk of damaging the IAN if they were removed; but Dr. Bass did nothing to determine the risks and benefits of removing the tooth roots or leaving them in. The expert opines that Dr. Bass failed to evaluate the medical/dental necessity for removal of the tooth roots and simply undertook to perform an oral surgical procedure that posed a risk of injury to plaintiff's IAN, without so much as taking an x-ray. According to plaintiff's expert, the close proximity of the retained roots to the mandibular nerve canal, apparent on the x-rays taken by Dr. Fisher, which show that the roots of tooth #31 were superimposed over the mandibular nerve canal, together with the fact that the roots were ankylosed, non-reactive and bio-compatible (unlikely to cause future problems) are the reasons why their removal was unnecessary. In the expert's opinion, this was a departure from the standard of care that placed plaintiff at increased risk of harm and a competent producing cause of her injuries.

Plaintiff's expert also opines that Dr. Bass' use of a 2mm round bur to drill a buccal osteotomy and create an apical buccal purchase point on the retained roots was a departure from the standard of care, because the use of such a bur in the manner described by Dr. Bass in his deposition, blocks the surgeon's view of the roots and causes him to operate in the blind. The expert refers to a study published in the Journal of Oral and Maxillofacial Surgery in 2012 where it was reported that the IAN is located as close as 0.5mm to the buccal cortex, where Dr. Bass was drilling, and the average distance of the IAN to the buccal cortex was reported to be less than 2mm. Accordingly, the expert opines that "it is [her] opinion, to a reasonable degree of dental/oral and maxillofacial surgery certainty, that Dr. Bass injured plaintiff's right IAN with a 2mm round surgical bur when he blindly drilled into her buccal cortex, causing traumatic injury to her right inferior alveolar nerve."

Plaintiff's expert also refutes any suggestion by defendant's expert that Dr. Fisher may have caused injury to plaintiff's right IAN, arguing that there is no proof in the record to support

such a claim. She avers that there is no evidence radiographically or in the records that Dr. Fisher in any way contacted plaintiff's right mandibular nerve canal or IAN. She further states that Dr. Bass admits in his deposition that prior to his treatment of plaintiff there was no evidence that Dr. Fisher perforated her mandibular nerve canal and there was no evidence of damage to either the mandibular nerve canal or IAN. However, such damage is evident on images from the post extraction panorex taken by Dr. Bass and on the CBCT ordered by plaintiff's treating dentist, Dr. Sirois. Plaintiff's expert states that "based on these facts, it is [her] opinion that it is more likely than not, that any traumatic injury to Ms. Zell's right IAN was caused by Dr. Bass during the drilling into the buccal cortex of her mandible with a 2mm round bur. . . ."

Finally, plaintiff's expert also opines that Dr. Bass did not obtain a proper informed consent, consisting of a discussion concerning all of the risks, benefits and alternatives to treatment. Dr. Bass never discussed nor offered plaintiff any alternative treatment, such as leaving the retained tooth roots in place and observing them over time. The informed consent form of Dr. Bass did not discuss the increased risk of injury to the IAN based on the close proximity or superimposition of the tooth roots to the mandibular nerve canal. Nor does the informed consent form discuss the possibility of permanent pain as a result of the proximity of the tooth roots to the mandibular nerve canal.

The requisite elements of proof in a dental malpractice action are a departure from accepted standards of dental practice, and that such departure was a proximate cause of plaintiff's injuries. (*See Fagan v. Panchal*, 77 AD3d 705 [2d Dept 2010]; *LaVecchia v. Bilello*, 76 AD3d 548 [2d Dept 2010]; *Koi Hou Chan v. Sammi Yeung*, 66 AD3d 642 [2d Dept 2009]). On a motion for summary judgment the defendant dentist has the initial burden of establishing the absence of any departure from accepted practice or that plaintiff was not injured thereby. (*See LaVecchia v. Bilello, supra; Koi Hou Chan v. Sammi Yeung, supra. See also Deutsch v. Chaglassian*, 71 AD3d 718 [2d Dept 2010]).

The Court finds that the affidavit of plaintiff's expert was sufficient to raise triable issues of fact in opposition to the prima facie showing by defendant. Plaintiff's expert witness affidavit identifies material issues of fact regarding defendant's treatment of plaintiff and causation of plaintiff's injuries. Specifically, plaintiff's expert contends that the root extraction was unnecessary and that it would have been safe and prudent to leave the roots in place and evaluate plaintiff over time; that defendant negligently failed to evaluate plaintiff prior to performing surgery on plaintiff; that defendant's use of a 2mm round bur to drill into the roots of tooth #31 was negligent based on the known anatomical distance between the buccal cortex of the mandible and the IAN; and that defendant failed to obtain proper informed consent because he never explained to plaintiff what alternative treatment was available nor that plaintiff was at increased risk of nerve injury due to the proximity of her tooth roots to her nerve canal. Plaintiff's expert opines that defendant departed from the standard of care in his treatment of plaintiff, and that his departures caused plaintiff's injuries.

Defendant argues that the affidavit of plaintiff's expert should be disregarded because, *inter alia*, she is licensed to practice only in the State of Washington, and the affidavit fails to set forth her education, training, skill, knowledge or experience as to the standard of dental and

Defendant argues that the affidavit of plaintiff's expert should be disregarded because, *inter alia*, she is licensed to practice only in the State of Washington, and the affidavit fails to set forth her education, training, skill, knowledge or experience as to the standard of dental and maxillofacial care in New York in 2015. The Court rejects this argument. An expert need not be from the exact same locality as where the occurrence took place. It is sufficient if the expert attests to familiarity with either the standard of care in the locality or to a minimum standard applicable locally, statewide, or nationally. (*M.C. v Huntington Hosp.*, 175 AD3d 578, 580-81 [2d Dept 2019]; *McCullough v. University of Rochester Strong Mem. Hosp.*, 17 AD3d 1063 [4th Dept 2005]; *Hoagland v. Kamp*, 155 AD2d 148, 150 [3d Dept 1990]; *Payant v. Imobersteg*, 256 AD2d 702, 705 [3d Dept 1990]).

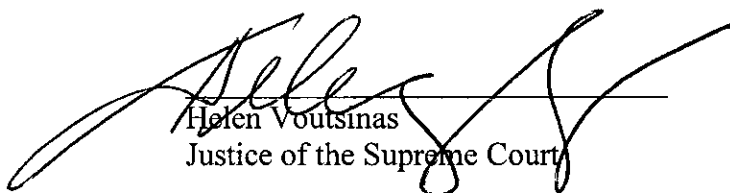
Here, plaintiff's expert has a D.D.S. degree and is a Board Certified Oral and Maxillofacial Surgeon and a Diplomate, American Board of Oral and Maxillofacial Surgery. She avers that "[a]ll of [her] opinions are made to a reasonable degree of dental/oral and maxillofacial certainty and based on national standards of care that do not vary from state to state." The affidavit of plaintiff's expert sufficiently identified, and assessed the defendants' conduct against, a relevant standard of care.

Where the parties' experts present conflicting opinions as to departures from accepted dental practice, summary judgment must be denied. (*See Robinson-Reese v. Kopp*, 62 AD3d 980 [2d Dept 2009]). The conflicting opinions raise a credibility issue which must be resolved by a jury (*Shehebar v Boro Park Obstetrics and Gynecology, P.C.*, 106 AD3d 715 [2d Dept 2013]; *Adjstv New York City Health & Hosp. Corp.*, 63 AD3d 865 [2d Dept 2009]; *Shields v Baktidy*, 11 AD3d 671 [2d Dept 2004]).

Accordingly, summary judgment dismissing plaintiff's claims of dental malpractice must be denied.

This constitutes the decision and order of the Court.

Dated: February 24, 2020
Mineola, NY


Helen Voutsinas
Justice of the Supreme Court

ENTERED

FEB 27 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE