

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JASON NARENKIVICIUS,

Plaintiff,

v.

WILLIAM M. LOCANTE, D.D.S.,

Defendants.

GEORGE BAILEY, Memphis, Attorney for Plaintiff.

RICHARD GLASSMAN, Glassman, Jeter, Edwards & Wade, Memphis, Attorney for
Defendant.

MODIFIED AND AFFIRMED

Opinion filed:

TOMLIN, Sr. J.

This is a dental malpractice case. Jason Narenkivicius ("Plaintiff") filed suit against William Locante, D.D.S. ("Defendant") in the Circuit Court of Shelby County, alleging that the defendant had been guilty of negligence in performing a routine root canal procedure on him, that later produced an infection. Following a bench trial the court gave plaintiff a judgment in the amount of two thousand two hundred thirty five and 68/100 (\$2235.68) dollars in special damages and forty thousand (\$40,000.00) dollars in compensatory damages.

On appeal, defendant has set forth some four issues, which in essence deal with the specific findings relative to defendant's negligence and plaintiff's lack of negligence. We restate them as follows: Did the trial court err (1) in finding that defendant was guilty of professional negligence in his treatment and care of plaintiff that resulted in plaintiff's injuries and damages; (2) in finding that plaintiff was not guilty of contributory negligence. Defendant also presents an issue to the effect that the trial court's award of forty thousand (\$40,000.00) dollars in compensatory damages was excessive. Likewise, plaintiff seeks to have defendant's appeal declared frivolous. For the reasons hereinafter stated, we affirm the judgment of the trial court, but reduce plaintiff's compensatory damages to twenty thousand (\$20,000.00) dollars. We find no

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Cecil Crowson, Jr.
Appellate Court Clerk

frivolous appeal.

On September 29, 1991 plaintiff developed a painful toothache. The following day, he visited and was examined by defendant, who indicated that plaintiff needed a root canal in the tooth involved. Defendant proceeded to perform a root canal and afterward placed a temporary crown over the tooth. On the following day, plaintiff returned to defendant's office to have a permanent crown made. At that time plaintiff had no swelling and was able to treat his pain with nothing but aspirin. Over the course of that week plaintiff returned to defendant's office several times because the temporary crown continued to fall off. During the week the pain continued to increase, to and through the 7th of October. On that date plaintiff returned to defendant's office, complaining of pain. Defendant prescribed an analgesic, Vicodin. Two days later plaintiff returned to defendant's office because of increased pain. Plaintiff testified that on the October 9th visit he informed defendant that the area around his tooth was painful, tender, and swollen. Defendant stated that he only remembered plaintiff mentioning the pain he was experiencing and that the examination of the area complained of on that date showed no sign of any swelling. Defendant performed no further diagnostic tests.

At this point the testimony becomes even more conflicting. Defendant states the he specifically told plaintiff on the October 9th visit that if his jaw swelled any more, for him to come back and contact his office as soon as possible. Plaintiff denies ever receiving such a warning from defendant. At that time defendant did prescribe Anaprox, a narcotic analgesic. From Friday through Sunday, October 11—13, plaintiff's pain and swelling increased substantially. On that Saturday, plaintiff attended his collegiate homecoming football game and by late that evening his lip had begun to swell. On Sunday, October 13th, the entire right side of plaintiff's face was swollen and his right eye was swollen almost shut. Plaintiff telephoned the defendant's office that day and as a result thereof, a prescription for penicillin and a narcotic pain reliever were made available for him to pick up. It was nearly two weeks after the root canal procedure had been performed that plaintiff received his first prescription from

the defendant for an antibiotic.

Plaintiff returned to defendant's office on October 14th for further examination. At that time, defendant sent plaintiff to see Dr. David Zelig, who examined plaintiff and diagnosed his condition as an infection from the root canal procedure. Dr. Zelig drained the infected area and prescribed an antibiotic and narcotic pain reliever for him. Upon awakening the next day and discovering that the swelling had not receded, plaintiff returned to Dr. Zelig's office. He was subsequently admitted to the hospital for treatment of a severe infection. Plaintiff underwent general anesthesia during which a surgical incision was made to allow the infection to drain. Plaintiff was released after two days in the hospital. Plaintiff testified that on the day of his release, October 17, most of the pain resulting from the infection and subsequent surgery had almost subsided.

I. The Issue of Defendant's Negligence

Our scope of review on appeal is *de novo* upon the record in the trial court. All findings of fact made by that court come to this court with a presumption of correctness, and, absent an error of law we must affirm these findings, unless we find the preponderance of evidence to be otherwise. T.R.A.P. 13(d).

Dr. J. Fred Case, an endodontist, testified as an expert witness on behalf of the plaintiff. As defined by Dr. Case, an endodontist is a dentist who has through specialty training limited his practice to the treatment of pulpal disease. Primarily an endodontist performs root canal treatments and also performs certain surgeries. Dr. Case was qualified as an expert in this field by virtue of his medical training, residency and practice, which he began as a specialized one in Memphis in 1978. Dr. Case also was an assistant clinical professor in endodontics at the University of Tennessee Dental School. After describing to the court what a root canal procedure is and why and under what circumstances such a procedure would be performed, Dr. Case testified as to the standard of care to be followed in the performance of such a procedure:

Q. And, Dr. Case, in the performance of this procedure is there - - do dentists, general dentists and endodontists in the performance of this procedure, is it important or does it matter whether or not the technique used is aseptic?

A. Yes, it matters a lot. The standard of care in endodontics whether one be a general practitioner or an endodontist would be to isolate the tooth in question from the saliva, from the oral contaminants in the mouth, and make that access opening only after the rubber dam is placed to protect the inside of the tooth that may only be inflamed from being contaminated with bacteria from the rest of the mouth.

Dr. Case further testified that he had reviewed the records of the plaintiff's treatment at St. Frances Hospital, the treatment records of the plaintiff belonging to the defendant and had reviewed the defendant's deposition. Dr. Case then testified as follows:

Q. Dr. Case, let's first address the issue of the rubber dam. Do you have an opinion to a reasonable degree of dental certainty as to whether or not the use of a rubber dam in the performance of a root canal is the acceptable professional practice in Shelby County and similar communities?

A. Yes, I do have an opinion, and that opinion is that the use of a rubber dam either by an endodontist or a general practitioner is the standard of care, or is what any reasonable prudent dentist would do in the treatment of a rubber dam -- of a root canal treatment.

Q. All right, sir. Is the need for the use of that rubber dam, is that related in any way to the aseptic technique that you discussed earlier?

A. Yes, it is. A variety of texts list reasons for using a rubber dam, and listed usually foremost at the top of that list would be to protect the inside of the tooth from contamination from the oral environment, or asepsis. It's an aseptic technique.

Dr. Case testified that the purpose of the barrier formed by the rubber dam is to prevent saliva, bacteria and the microorganisms that they contain, usually *Streptococcus*, *Strep Mutins*, and *Strep Viridans* from penetrating the tooth on which the root canal is being performed. Dr. Case also noted that the hospital records of plaintiff indicated that the infection in his tooth and jaw was *Strep Viridans*. Defendant conceded that he did not use a rubber dam in performing this process.

In addition, Dr. Case testified that defendant perforated plaintiff's tooth by virtue of using a file that was too large. And while no evidence was presented as to whether

this in and of itself fell below the standard of care, Dr. Case testified that the failure of defendant to use a rubber dam was important in that this failure provided “a very logical sequence of events” for carrying the *Strep Viridans* deep into a bony area that resulted in a serious infection some ten days later.

Dr. Case further testified as follows:

Q. All right, sir. And do you have an opinion to a reasonable degree of medical certainty as to whether or not the filing into the bone without the presence of a rubber dam is acceptable professional practice in Memphis and Shelby County?

A. No, it's my opinion that that is not.

Q. All right, sir. Now, would it be acceptable professional practice for a general practitioner doing endodontics?

A. No, it would not.

Q. Doctor, do you have any opinion as to whether or not there is a separate standard of care for general practitioners doing endodontics versus a specialist doing endodontics?

A. It's my understanding that there is not a separate standard of care.

Q. You say there is none?

A. There is not.

Plaintiff's counsel called defendant to the stand to testify regarding his root canal procedure. Defendant testified that in his opinion it was not mandatory to use a rubber dam in root canal therapy. He stated that the reason for not using a rubber dam on plaintiff was the only way he could have done it was “to clamp the gingiva or on down the alveolar ridge” and that it would have been traumatic in his opinion on the plaintiff to do that. Stated another way, defendant testified that there was not enough tooth to clamp onto. At this point plaintiff's counsel offered into evidence the Marquette University Endodontic Clinic Manual by Drs. Austin, McWalter and Tilk, the latter person having served as defendant's instructor. This manual stated in part that “use of a rubber dam is mandatory for all root canal treatment.” Defendant conceded that it provided for no exceptions.

Defendant further acknowledged that he was acquainted with an endodontist

named Dr. Franklin Weine, who wrote a textbook entitled “Endodontic Therapy.” Defendant conceded that Dr. Weine’s textbook stated that “however, once access is obtained, the rubber dam should be placed immediately, and under no circumstances should an enlarging instrument be used without its presence.” Continuing, Weine’s treatise stated:

Several excuses are given for avoiding the use of a rubber dam in endodontic therapy, but all are basically procrastinations and easily refutable. Some of the excuses offered are the additional time required for application, barely more than a few seconds, plans for the tooth to be left open anyway, and lack of super gingival tooth structure.

Defendant admitted that the latter given reason or excuse was the reason that he did not use a rubber dam in this instance.

Lastly, defendant was asked about certain portions of the text of “Pathways to the Pulp” by Drs. Cohen and Burns. Read into the record as a basis of inquiry of defendant was the following:

The advantages and absolute necessity of the rubber dam must always take precedence over convenience and expediency, a rationale often cited by clinicians who condemn its use. The rationale for use of the rubber dam in endodontics is that it insures the following: “(3) a surgically clean [area] isolated from saliva, hemorrhage, and other tissue fluids.”

When questioned about this portion of the text, defendant stated that while the authors proclaimed that the standard of care in endodontics is that it is mandatory to use a rubber dam, he stated that he disagreed with that, stating “there is a lot of evidence to prove that it does not.” However, he offered none during his cross-examination.

Defendant’s expert witness Dr. Ken Issacman, a Memphis dentist, on the issue of the use of the rubber dam as a standard of care in Memphis, testified that he was of the opinion that probably half of the endodontic procedures were performed [in Memphis] with the use of the rubber dam and half were not. He admitted however, on cross-examination, that he had no basis in fact for this opinion. He did not testify that defendant did not fall below the standard of care, but did testify that the standard of care was the same for a general practitioner doing a root canal as it was for a specialist.

Dr. Isaacman further stated that he recognized plaintiff's expert witness, Dr. Case, as having superior training, education, experience and knowledge of treatment modalities and decisions regarding endodontics.

As to the issue of whether or not defendant's failure to timely prescribe antibiotics was negligence and contributed to plaintiff's infection, Dr. Case testified that the continued existence of pain for almost nine days following the performing of the root canal procedure would be indicative of an infection. He also stated that the use of an antibiotic within nine days of a root canal procedure, with a reasonable degree of medical certainty, would have prevented any serious infection from occurring. He stated that defendant's failure to dispense an antibiotic was a judgment which was neither reasonable nor prudent and was the direct and proximate cause of plaintiff's severe course of infection. Dr. Case further stated that the later use of an antibiotic (penicillin) by another physician resolved plaintiff's infection, thereby demonstrating that the infection could have been effectively treated if an antibiotic had been administered earlier by the defendant. Considering all of the above, we are of the opinion that the evidence does not preponderate against the findings of the trial court in regard to these issues. We find them to be without merit.

II. Plaintiff's Comparative Fault and Excessive Damages

A. The Comparative Fault Issue.

In earlier days we would couch this issue as to whether or not plaintiff was guilty of proximate contributory negligence. Since McIntyre v. Balentine, 833 S.W.2d 53 (Tenn. 1990) the issue should be stated as to whether or not the trial court erred in failing as a result of this record to find plaintiff guilty of some percentage of contributory fault. There was basically conflicting evidence in regard to this issue. Defendant testified that he specifically advised plaintiff on the ninth day following the root canal procedure: "Jason, if you swell, you call me right away." Defendant

admitted on cross-examination that there was no documentation in his medical notes or records concerning this alleged warning. On the other hand, plaintiff denied ever receiving such a warning from the defendant. Plaintiff further testified that on Sunday, October 13, upon noticing that the entire right side of his face had begun to swell, he called defendant's office seeking an appointment. Defendant was out of town and instructed plaintiff to come to defendant's office the following day. In the meantime, defendant's secretary notified another doctor to call in a prescription for a painkiller and penicillin. The following day, October 14th, the plaintiff went to defendant's office who examined him and sent him to see Dr. David Zelig.

After hearing this contradictory evidence, at the conclusion of all the proof, the trial judge weighed the evidence and found no fault on the part of plaintiff for the injuries and damages he received. In Galbreath v. Harris, 811 S.W.2d 88, 91 (Tenn. App. 1990) this court stated that:

Findings of the trial court that are dependent upon determining the credibility of witnesses are entitled to great weight. The reason for this is that the trial judge alone has the opportunity to observe the manner and demeanor of the witnesses while testifying. On an issue which hinges on the credibility of the witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings.

This issue is without merit.

B. The Amount of Damages.

Defendant contends that the action of the trial court in awarding plaintiff forty thousand (\$40,000.00) dollars in compensatory damages is excessive. Plaintiff's saga began on September 30, 1991 and in essence came to an end on October 17, 1991. Plaintiff was a patient of defendant from September 30th until October 14th, when he was sent by defendant to see Dr. David Zelig, who began treating him. On the following day he hospitalized him for two days, during which time he performed surgery to relieve the pain and the infection. For a number of these days plaintiff complained of substantial to severe pain. At the same time, he was not in pain

sufficient to deter him from attending a weekend reunion. Plaintiff testified that upon leaving the hospital following the second surgery the pain was quickly gone. No proof was presented regarding any anatomical disability or physical impairment as a result of either the root canal procedure or the subsequent surgery. The evidence preponderates against the amount of the judgment awarded. In our opinion, the compensatory damage award should be reduced to twenty thousand (\$20,000.00) dollars.

Accordingly, the judgment of the trial court is affirmed in all respects except, as set forth hereandabove, the award for compensatory damages is reduced from forty thousand (\$40,000.00) dollars to twenty thousand (\$20,000.00) dollars. We are of the opinion that plaintiff's contention that defendant's appeal is frivolous is without merit. Costs in this cause on appeal are taxed one-third

(1/3) to plaintiff and two-thirds (2/3) to defendant, for which execution may issue, if necessary.

TOMLIN, Sr. J.

CRAWFORD, P. J. (CONCURS)

FARMER, J. (CONCURS)