

STATE OF MICHIGAN
COURT OF APPEALS

LYNN MATSON KAZANOWSKI,

Plaintiff-Appellant,

v

MICHAEL E. HEATH, D.D.S and THE
HUNTINGTON GROUP, P.C,

Defendants-Appellees,

and

RANDALL L. SHAW, D.D.S. and JAMES A.
GINZLER, D.D.S.,

Defendants.

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from a judgment of no cause of action entered following a jury trial, and from the trial court's order denying her motion for a judgment notwithstanding the verdict and/or a new trial. We affirm.

Defendant performed oral surgery on plaintiff, which involved the cutting and realignment of her upper jaw. Following surgery, plaintiff suffered the loss of bone and at least one tooth, pain in her jaw, and other complications. On appeal, plaintiff argues that the jury's verdict was against the great weight of the evidence. According to plaintiff, the evidence showed that (1) before surgery, defendant did not adequately warn her of the risk of complications, (2) during surgery, defendant overexpanded her jaw, and (3) after surgery, defendant failed to inform her of the true nature of her post-surgery complications.

In reviewing a motion for JNOV, we view all evidence in a light most favorable to the nonmoving party. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). If

reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Id.* With respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Id.* This Court's function is to determine whether the trial court abused its discretion in making such a finding. *Id.* This Court gives substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence. *Id.*

In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); MCL 600.2912a; MSA 27A.2912(1). Failure to prove any of these elements is fatal. *Id.*

Plaintiff first argues that the applicable standard of care required defendant to adequately describe the risks of surgery, and that he failed to warn her of the risk of the exact complication she suffered. We conclude that the jury's verdict was not against the great weight of the evidence in this regard. The testimony at trial showed that plaintiff signed three different consent forms provided by defendant prior to her surgery. Defendant provided plaintiff with the Huntington Group oral surgery consent form on two occasions, by mailing it to her home, and again at his office. This form warned plaintiff of the risks of (1) a root canal or tooth extraction, (2) a dip in the gum tissue, (3) the loss of bone and teeth, and (4) injury to adjacent teeth. In addition, there was evidence that defendant warned plaintiff orally regarding possible tooth loss. Finally, there was no expert testimony that defendant violated the standard of care by failing to specifically warn plaintiff that she might lose all of her front teeth.¹ Under these circumstances, a reasonable jury could have found that defendant provided plaintiff with sufficient information regarding the risks of surgery to meet the applicable standard of care.

Plaintiff also argues that the great weight of the evidence demonstrates that defendant negligently overexpanded her maxilla, or upper jaw, during surgery, thus compromising her blood supply and proximately causing her complications. We disagree. Defendant consistently denied that he expanded plaintiff's jaw too far, and he testified that plaintiff's complications were an unpredictable result of her individual patient characteristics. In addition, expert witnesses testifying for defendant stated that he did not fail to meet the applicable standard of care. Under these circumstances, a reasonable jury could have found that (1) defendant did not breach the standard of care by overexpanding plaintiff's jaw or (2) that this alleged breach did not cause plaintiff's injuries. Thus, the jury could have found that plaintiff failed to establish the second and fourth elements required under *Wischmeyer*, *supra* at 484.

Plaintiff also argues that defendant was negligent because he allegedly withheld notice of the nature and ramifications of her complications after surgery. However, expert witnesses testified that defendant did not violate the standard of practice in informing plaintiff of her complications. Expert witnesses also testified that the standard of care did not require defendant to refer plaintiff for hyperbaric chamber treatment. Again, the jury could have concluded that defendant did not breach the applicable standard of care.

Because plaintiff cannot show that the overwhelming weight of the evidence favors her position on each of the above issues, the trial court did not abuse its discretion in denying plaintiff's motion for JNOV and/or a new trial.

Finally, defendant argues that the trial court erred in reading SJI2d 30.04, the "inherent risks" instruction for medical malpractice cases, to the jury. We disagree. SJI2d 30.04 states:

There are risks inherent in medical treatment that are not within a doctor's control. A doctor is not liable merely because of an adverse result. However, a doctor is liable if the doctor is negligent and that negligence is a proximate cause of an adverse result.

The Michigan Supreme Court has addressed this instruction:

Where proofs put the significance of an adverse result in issue, it may be more appropriate to explain the physician's duty of care by advising the jury that there are inherent risks in medical treatment which are beyond the physician's control. In all events, like the Standard Jury Instructions, the giving of supplemental instructions are to be determined by the trial court not in an abstract or theoretical sense, but in the context of the personality of the particular case on trial, and with due regard for the adversaries' theories of the case and of counsel's legitimate desire to structure jury argument around anticipated jury instruction. [*Jones v Poretta*, 428 Mich 132, 146; 405 NW2d 863 (1987).]

In this case, defendant testified consistently that plaintiff's complications arose not from any negligence on his part, but due to the personal characteristics of plaintiff and her unusual response to the surgery, which could not be foreseen. Defendant testified that he had performed this type of operation hundreds of times and had never had a patient suffer from complications such as plaintiff's. Accordingly, we find that the trial court did not err in giving SJI2d 30.04. See *Domako v Rowe*, 184 Mich App 137, 149-150; 457 NW2d 107 (1990), *aff'd* on other grounds, 438 Mich 347 (1991).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

/s/ Roman S. Gribbs

¹ This absence of expert testimony, by itself, was sufficient to preclude plaintiff's success on this claim. See *Paul v Lee*, 455 Mich 204, 211-213; 568 NW2d 510 (1997).