

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Brenda Mielke and James Mielke

Court of Appeals No. L-07-1356

Appellants

Trial Court No. CI-200606181

v.

Laurence M. Baibak, M.D. and
Arrowhead Plastic Surgeons, Inc.

DECISION AND JUDGMENT

Appellees

Decided: June 5, 2009

* * * * *

James M. Tuschman and R. Ethan Davis, for appellants.

Peter R. Casey, III, and Jeffrey M. Stopar, for appellees.

* * * * *

HANDWORK, J.

{¶ 1} This appeal from a judgment of the Lucas County Court of Common Pleas involves medical malpractice and loss of consortium claims filed by appellants, Brenda and Jim Mielke. After a trial, the jury found in favor of appellees, Laurence M. Baibak, M.D., and Arrowhead Plastic Surgeons, Inc.

{¶ 2} Brenda Mielke has a history of recurring benign parotid tumors in her neck/cheek area near the parotid gland, which produces saliva. In 1979, she felt a small lump behind her left ear. Brenda's eye, ear, nose and throat specialist referred her to Dr.

Andrew W. Miglet, in Columbus, Ohio. Dr. Miglet removed the tumor. After the surgery, Brenda experienced "facial weakness" for a short time.

{¶ 3} In 1991, Mielke again felt a lump behind her left ear. At that time, she consulted with appellee's father, Dr. George Baibak, a plastic surgeon, who described the lump as a "preauricular lump." Dr. Baibak then performed a parotidectomy. He removed not only a benign mixed tumor, but also performed an almost total removal of the parotid, "taking the deep lobe and the superficial lobe." During the surgery, the doctor noted that the lower half of the lobe was "all in scar" and that he dissected the facial nerve "out of facial scar," that is, he freed the facial nerve from the scar tissue. Brenda again experienced facial weakness, which gradually dissipated.

{¶ 4} In the spring of 2002, Mielke once again discovered a small lump behind her left ear. She contacted Dr. George Baibak's office, learned that he had retired, and that appellee had taken over his father's practice. Brenda first consulted with appellee on April 17, 2002. After his first examination, appellee noted that there was "a dumb bell shaped mass or a true mass, about 1 1/2 centimeters each, rubbery, ovoid" behind and below Brenda's ear. Because Mielke felt a tingling in her ear when the doctor pressed on the mass, appellee was of the opinion that she had a neuroma¹ on her auricular nerve as a result of the 1991 surgery. In the alternative, he believed that the mass might be scar tissue. Because the site of the current mass was "so far from where the tumor was when"

¹Dr. Lawrence Kurtzman, one of appellee's expert witnesses, stated that a "neuroma" occurs "when a nerve may have been cut in the past where the end of the nerve actually grows in a jumbled way so it's just a ball of nerve that doesn't do anything except cause either a mass or irritation."

his father dissected that tumor, appellee's third possible diagnosis was a recurrent tumor. The doctor decided to obtain a sample of the mass in his surgical suite, using a local anesthetic.

{¶ 5} On May 17, 2002, appellee conducted his exploration of the mass on the left side of Brenda's neck. He found a "multilobular mass appearing similar to parotid tissue, possibly a recurrence of her benign mixed tumor" that appeared to be "inferior and posterior to the ear canal." Dr. Baibak separated the surrounding tissues from the mass and discovered a sensory nerve, which he testified was the great auricular nerve. According to appellee, a superficial, small branch of that nerve went into the tumor; therefore, he excised this nerve branch.

{¶ 6} The facial nerves on each side of the neck exit the skull just below the ear and control all movement of the face through various branches of the nerves, e.g., the orbital branch. Upon noticing that the mass in Brenda's neck extended above the ear canal into the area where the facial nerve is located, Dr. Baibak told Brenda that the removal of the remainder of the mass "would require careful dissection² of the facial nerve and possible injury to that nerve." Consequently, he told his patient that he had decided that the removal of the rest of the mass, which the pathologist determined to be another mixed benign tumor, would have to be performed in the hospital using a general anesthetic. At trial, appellee was asked whether he was aware of the fact that the

²"Dissection" is a medical term meaning: "The cutting apart or separating of tissues in a body or organism for anatomical study. In surgery, dissection separates different structures along natural lines. (From Dorland, 27th ed & Stedman, 25th ed)." Medical-Dictionary@Online-Medical-Dictionary.org

pathology report discussing the nature of the tissues removed on May 17, 2002, mentioned there was a large peripheral nerve adjacent to the mass. The doctor replied that it was the "sensory" nerve, i.e., the great auricular nerve, that he previously discussed.

{¶ 7} During the procedure on May 17, 2002, Brenda Mielke's left eye "popped open." After this surgery, she experienced a full droop/facial paralysis on the left side of her face. That is, she had no control over the muscles in that side of her face. For example, her left eye drooped and she could not close that eye. On June 10, 2002, Dr. Baibak removed the remainder of the parotid tumor at St. Luke's Hospital. According to the doctor's operative note, the tumor encased the orbital³ and buccal⁴ branches of the facial nerve. Therefore, he resected those branches within the tumor and then reapproximated the stumps to the proximal nerve and repaired them. Appellee told Brenda that "it would take a while for the nerves to regenerate." Nonetheless, her left side total facial weakness/paralysis did not abate over the next several months.

{¶ 8} In April 2003, Mielke had a follow up appointment with appellee. She still had a full facial droop and was required to manually close her left eye so that the surface would be moist, thereby preventing the loss of her eyesight. Subsequently, Brenda was referred to the Cleveland Clinic by her eye doctor for the purpose of placing a gold weight in her eyelid. The weight was necessary so that her eye would remain closed

³The orbital branch governs movement of the eyelid and muscles around the eye.

⁴The buccal branch controls muscles around the mouth area.

while she was sleeping. Some of the other problems she experienced as the result of the facial weakness were difficulty in speaking, chewing, drinking, and eating.

{¶ 9} At the clinic, it was suggested that Brenda make an appointment with Dr. Mark Hendrickson, a plastic reconstructive surgeon. She first saw Dr. Hendrickson on August 11, 2003. The surgeon examined Mielke, talked about her history of facial weakness, and how to manage her physical impairment. Dr. Hendrickson also scheduled a left facial nerve exploratory surgery to determine the status of the facial nerve and to repair it.

{¶ 10} On October 16, 2003, Brenda went to the Cleveland Clinic for the surgery. According to Dr. Hendrickson, he was able to find the stump of the facial nerve "that appeared to be bifurcating at this level." The doctor also discovered a remnant of parotid tissue, part of a parotid tumor, extensive scarring, and fibrosis in the area of the previous surgery. Dr. Hendrickson claimed, however, that he could not attempt to repair the nerve because there was no continuity between the trunk and its peripheral branches. In other words, the main trunk of the facial nerve was gone; instead, there was a gap between the trunk and its branches.

{¶ 11} In his testimony at the trial of this matter, Dr. Baibak explained the gap in the facial nerve as follows:

{¶ 12} "All I can think is that we're looking at a third time dissection of the nerve. Each time you dissect the nerve, you devascularize it, you strip off its circulation. You lay it back into a bed of tissue that's been dissected three times that itself has poor

nutrition. So a nerve in that situation is basically like somebody laying in the desert without a canteen. There's nothing for it to survive on. Hopefully, it gets a blood supply in that area to help the nerve survive. If the nerve is injured, that nerve doesn't get enough nutrition. Consequently, the nerve could necrotize and could die, and could conceivably give you what Dr. Hendrickson found."

{¶ 13} Following Brenda's initial surgery at Cleveland Clinic, she went through a series of seven surgeries to "reanimate" the left side of her face, as well as a surgery for another recurrent parotid tumor. Although these procedures alleviated her condition, she still has a noticeable left side facial droop.

{¶ 14} On October 5, 2006, Brenda and her husband filed their medical malpractice action against appellee. At the jury trial of this cause, the Mielkes not only offered the expert testimony of Dr. Hendrickson, but, also, that of Dr. Hubert Weinberg, a plastic surgeon from New York City, New York. Dr. Weinberg testified that the facial nerve passes right through the parotid gland and separates the deep lobe of the gland from the superficial lobe; therefore, the presence of the facial nerve makes the removal of a parotid tumor very difficult. In addition, Dr. Weinberg noted that if the tumor is a recurring tumor, it presents a much more complicated surgery. In his opinion, Dr. Laurence Baibak should have first performed a fine needle aspiration to determine whether or not the parotid tumor was benign or malignant before the surgery on May 17, 2002. Then, according to this specialist, appellee should have determined the size of the tumor by means of an MRI or CT scan and then explained the difficulty of the surgery

and the danger posed to the facial nerve to Brenda. Dr. Weinberg further testified that the first surgery should have been performed in a hospital under a general anesthetic. In Dr. Weinberg's opinion, to a reasonable degree of medical certainty, the peripheral nerve mentioned by the pathologist in his report on the May 17, 2002 surgery was the facial nerve, which should have been repaired at that point in time.

{¶ 15} Appellee's medical experts were Dr. Lawrence Kurtzman, a plastic surgeon, and Dr. Robert M. Witt, a surgeon specializing in head and neck surgery. Both experts reviewed the medical records of all of Brenda's surgeries prior to providing their testimony at trial.

{¶ 16} Dr. Kurtzman found no fault in the manner in which Dr. Laurence Baibak proceeded in this case. He was, therefore, of the opinion that appellee did not deviate from the standard of care. He further testified that in the May 17, 2002 surgery Dr. Baibak worked in the area away from the facial nerve and that it was the great auricular nerve that was discussed in the pathologist's report. When asked what the probable cause of Brenda's continuing/permanent facial weakness after the May 17, 2002 surgery, Dr. Kurtzman opined that due to the scar tissue around the facial nerve, it was "devascularized," that is, there was no blood supply, and the nerve died.

{¶ 17} Dr. Witt went into greater detail before giving his expert opinion. He first noted that when Brenda's parotid tumor was removed in 1979, it included a dissection of the facial nerve, which means that the tumor and the nerve were abutted; therefore, the tumor had to be separated from that nerve. Consequently, the facial nerve was stretched,

thereby causing the partial facial paralysis after this first surgery. The surgeon then explained that the report of her 1992 surgery also stated that the recurrent parotid tumor surrounded Brenda's facial nerve. At this juncture, the doctor pointed out that Brenda was one of those small percentage of people whose parotid tumors reoccur over and over again. According to Dr. Witt, the only way to prevent these reoccurrences would have been to remove the facial nerve in 1992. He added that Brenda was very fortunate that the facial paralysis she suffered after the 1992 surgery was not permanent, stating that her chance of permanent facial paralysis was 40 percent at that time.

{¶ 18} With regard to Dr. Laurence Baibak's exploratory surgery on May 17, 2002, Dr. Witt also testified that it was the appropriate procedure and that Dr. Baibak stopped at the appropriate point in time upon realizing the extent of the tumor. Dr. Witt also indicated that the facial nerve was again stretched during the surgery. He did, however, believe that Dr. Baibak was not in the area of the facial nerve during this surgery. As did Dr. Kurtzman, Dr. Witt was of the opinion that due to the multiple procedures performed in the area of the facial nerve, it was stretched multiple times. In addition, he directed the jury's attention to the following facts: (1) a tumor had infiltrated this nerve; (2) there was a great deal of scar tissue surrounding it; and (3) the nerve had a limited blood supply. Based upon the foregoing, Dr. Witt gave an opinion to a reasonable degree of medical certainty that Dr. Laurence Baibak had not deviated from accepted medical standards of care during the procedures that he performed on Brenda Mielke. Upon further

questioning, Dr. Witt opined that the chance that Dr. Baibak cut the great auricular nerve rather than the facial nerve on May 17, 2002 was "overwhelming."

{¶ 19} The jury returned a verdict in favor of appellee. On September 28, 2007, the common pleas court entered its judgment on the verdict. Appellants appeal that judgment and assert the following assignment of error:

{¶ 20} "The judgment of the trial court, which was entered upon a jury verdict in favor of Defendants Baibak and Arrowhead Plastic Surgeons, Inc., is against the manifest weight of the evidence."

{¶ 21} In their sole assignment of error, appellants contend they offered definitive proof that that Dr. Baibak excised the trunk of Brenda's facial nerve during the May 17, 2002 surgery.

{¶ 22} With regard to civil actions, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, syllabus. When considering whether a civil judgment is against the manifest weight of the evidence, an appellate court is guided by a presumption that the findings of the trier of fact were correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80. The weight of the evidence offered at trial and the credibility of the witnesses is a matter solely within the purview of the trier of fact. *Shull v. Itani*, 11th Dist. No. 2002-L-163, 2004-Ohio-1155 ¶ 34, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "If the evidence is

susceptible to more than one interpretation, we must construe it consistently with the trier of fact's judgment." *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 584.

{¶ 23} The Supreme Court of Ohio set forth the elements of a cause of action for medical negligence in *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, at paragraph one of the syllabus, holding:

{¶ 24} "1. In order to establish medical malpractice, it must be shown by a preponderance of evidence 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, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things. "

{¶ 25} The question of whether a physician or surgeon has proceeded in the treatment of a patient with the standard of care and skill, as well as causation, is typically decided through the testimony of experts. *Rogoff v. King* (1993), 91 Ohio App.3d 438, 445. Therefore, to prove their medical malpractice claim, appellants were required to provide expert testimony regarding the recognized medical standards and whether Dr. Baibak breached those standards. *Id.*

{¶ 26} In the present case, appellants maintain that the following evidence offered at trial conclusively establishes that appellee cut Brenda's facial nerve on May 17, 2002:

(1) Brenda's left eye popped open during the May 17, 2002 surgery, and she immediately had facial droop after that surgery; (2) Dr. Baibak gave conflicting testimony as to how deeply he cut into the skin during the May 17, 2002 operation; (3) Dr. Baibak failed to refute Dr. Hendrickson's testimony stating that during his first operation on Brenda on October 16, 2003 there was no left side nerve continuity and no left side trunk coming out from beneath the mastoid bone; (4) Dr. Baibak's testimony indicating he "removed" one orbital branch and one buccal branch of the facial nerve during the June 10, 2002 surgery conflicts with the pathology report engendered by this surgery in that the report fails to note any nerve cells in the tumor removed on that day; (5) Dr. Baibak did not file an operative note on the June 10, 2002 surgery until 46 days later; and (6) both of appellee's experts relied on Dr. Baibak's operative notes for their opinions on whether he had cut/removed the facial nerve.

{¶ 27} We find that while appellants did offer the testimony of two experts on these issues, the testimony of appellee and his two experts, as set forth *infra*, created a question of fact based upon the credibility of the witnesses as to whether Dr. Baibak severed Brenda Mielke's facial nerve during the May 17, 2002 surgery, thereby causing permanent left side facial weakness/paralysis.

{¶ 28} In particular, all of the experts testified that temporary facial weakness/paralysis of the facial muscles is a side effect of a surgery to remove parotid tumors. Thus, the fact that Brenda's left eye popped open and she suffered facial weakness after the May 17, 2002 surgery does not establish that appellee severed

Mielke's facial nerve. In addition, there was undisputed evidence offered by appellee and his experts that the facial nerve was stretched in previous surgeries, surrounded by scar tissue, and lacked a proper blood supply. This evidence created an issue of fact for the jury to decide as to whether the facial weakness was immediately permanent due to a severed facial nerve or it was temporary, but became permanent, when the facial nerve "died" for the reasons stated by appellee's experts.

{¶ 29} Moreover, as to the second and third pieces of evidence listed by appellants, Dr. Baibak testified that during the May 17, 2002 surgery, he was never in an area that involved the facial nerve. Dr. Baibak's two experts agreed, but Dr. Hendrickson disagreed, testifying that appellee severed the facial nerve on May 17, 2002. However, if appellee and his experts were believed by the trier of fact, how deeply he cut is not relevant to the sole issue in this cause, to wit, was Brenda's facial nerve cut by Dr. Baibak on May 17, 2002.

{¶ 30} The jury also gave greater weight to the testimony of Dr. Baibak, Dr. Kurtzman, and Dr. Witt on the only question in this cause. While Dr. Hendrickson attested that there was no left side facial nerve continuity and no left side trunk, he did not perform his first surgery on Brenda Mielke until October 16, 2003, 17 months after the May 17, 2002 surgery. This fact, when viewed along with the testimony of Dr. Witt and Dr. Kurtzman, who were of the opinion that the facial nerve "died" due to stretching, scar tissue, and the lack of an adequate blood supply, produced another question of fact for the jury, not this appellate court, to decide.

{¶ 31} According to appellants, their fourth and fifth pieces of evidence offered at trial demonstrate the likelihood that Dr. Baibak provided false testimony when he said that he did not cut Brenda's left side facial nerve during the May 17, 2002 surgery. This evidence is (1) a pathology report on the tumor removed on June 10, 2002, that did not mention that any nerve cells were found in that tumor; and (2) the fact that Dr. Baibak did not dictate his operative report on the June 10, 2002 surgery until 46 days after that surgery. Preliminarily, this court notes that the alleged pathology report is attached as an exhibit to their appellate brief. It is not part of the record on appeal. We are required to decide this appeal based upon that record. *Papadelis v. First Am. Sav. Bank* (1996), 112 Ohio App.3d 576, 581. Therefore, we cannot consider the pathology report in reaching our decision.

{¶ 32} With regard to the fifth piece of evidence, the Mielkes maintain, in essence, that Dr. Baibak delayed entering his operative notes because he realized, after seeing Brenda two times after the June 10, 2002 surgery, that the left side facial weakness/paralysis that occurred after the May 17, 2002 surgery was permanent. Therefore, the surgeon falsely stated in that report that he was required to sacrifice two branches of the facial nerve because they were embedded in the tumor. This second argument made by appellant is based wholly on speculation, not fact. Moreover, and, assuming *arguendo*, that we would consider both of the foregoing types of "evidence," appellants themselves recognize that in arguing that Dr. Baibak lied, they are challenging

the credibility of this witness which is, as previously stated, a matter for the jury, not this court, to decide.

{¶ 33} Finally, appellants assert that the testimony of Dr. Kurtzman and Dr. Witt was based wholly on Dr. Baibak's testimony swearing that he did not cut Brenda's facial nerve during the May 17, 2002 surgery. Thus, the Mielkes argue that when these experts averred that Dr. Baibak did not breach the standard of care they were simply "bootstrapping" their opinions. Once again, this argument goes to the credibility of the witnesses and the weight to be given to that evidence; both are matters strictly within the purview of the trier of fact. Accordingly, we find that some competent, credible evidence was offered to support the jury's decision, and appellants' sole assignment of error is found not well-taken

{¶ 34} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

JUDGMENT AFFIRMED.

Mielke v. Baibak
L-07-1356

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.