

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-287

JANUARY TERM, 2005

	}	APPEALED FROM:
	}	
Daryl Wisch and Herbert Wisch	}	Rutland Superior Court
	}	
v.	}	DOCKET NO. 285-5-02 Rdcv
	}	
Peter A. Lakatos, D.M.D.	}	Trial Judge: Richard W. Norton
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Plaintiff in this medical malpractice action appeals from a judgment, based on a jury verdict, in her favor and against defendant Peter A. Lakatos, D.M.D. Plaintiff contends the court erred in: (1) excluding evidence relating to defendant's alleged malpractice in four other unrelated cases; and (2) refusing to instruct the jury on punitive damages. We affirm.

In May 2002, plaintiff Daryl Wisch filed this malpractice action against defendant, alleging that defendant had negligently performed a root canal and other work on one of her teeth, inserting a " post" through the root of the tooth and into the gum.* Plaintiff alleged that defendant later discovered the mistake through x-rays, but failed to inform her of the problem and improperly placed a bridge over the mistreated area. As a result, plaintiff alleged that she suffered pain and discomfort and was forced to seek treatment elsewhere, incurring additional costs. She sought both compensatory and punitive damages.

Shortly before trial, plaintiff filed two memoranda with the court, one arguing for the admission of evidence relating to defendant's allegedly similar malpractice against four other patients, and the other arguing that the evidence at trial would support an instruction on punitive damages. At a pre-trial conference, the court ruled that any probative value offered by the unrelated malpractice cases was substantially outweighed by the danger of unfair prejudice, confusion, and delay. The court also ruled that the evidence on which plaintiff intended to rely at trial was insufficient to support an award of punitive damages. Also at the conference, defense counsel indicated that he intended to concede that defendant's treatment fell below the appropriate standard of care, but argued that it was not the proximate cause of plaintiff's alleged injuries. Following a jury trial, the jury returned a special verdict in favor of plaintiff, finding that defendant's conduct had proximately caused plaintiff's injuries, and awarding compensatory damages of \$2,000 for pain and suffering, and \$14,415 for past and future dental expenses, for a total award of \$16,415. This appeal by plaintiff followed.

Although framed as one issue on appeal, plaintiff's claim appears to be a two-fold one. First, she contends the trial court erred in excluding evidence relating to the four other patients whom defendant allegedly mistreated. She argues that the other cases were sufficiently similar to plaintiff's to be admissible as prior bad acts showing motive, knowledge, or absence of mistake under V.R.E. 404(b), in order to establish the requisite element of " malice" for punitive damages. See Brueckner v. Norwich Univ., 169 Vt. 118, 129 (1999) (plaintiff must demonstrate " malice," defined as intentional and reprehensible misconduct, to recover punitive damages). The trial court was well within its discretion, however, in ruling that any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and delay under V.R.E. 403. See Quirion v. Forcier, 161 Vt. 15, 21 (1993) (trial court has broad discretion in ruling on 403 questions and the burden of demonstrating abuse of discretion is a heavy one). The court reasonably found that the proffered evidence could require a time-consuming and potentially confusing mini-trial on each of the four unrelated

cases to determine its facts, similarity, and relevance to the case at bar, and would be unfairly prejudicial to defendant. See Lai v. Sagle, 818 A.2d 237, 248-49 (Md. 2003) (admission of evidence of prior malpractice actions against defendant physician is unduly and highly prejudicial and should be admitted only in very rare instances). Plaintiff has not demonstrated that the trial court abused its discretion in excluding the evidence.

Plaintiff also appears to contend the court erred in declining to submit the issue of punitive damages to the jury. Because we have determined that the trial court properly excluded evidence concerning defendant's four other patients, the question is whether the remaining evidence supported a punitive damage instruction. The difficulty for plaintiff here is that she has not provided us with the trial transcript; she has provided only the transcript of the pre-trial conference in which her attorney argued that the jury could reasonably infer malice from the other evidence, which would show that defendant took x-rays confirming that he had pierced the end of the root of plaintiff's tooth but failed to inform plaintiff of that fact, electing instead to administer pain medication and complete the bridge work, allegedly with the intent of hiding his negligence.

The trial court did not rule that this evidence was otherwise irrelevant or inadmissible to prove plaintiff's negligence; it merely ruled that the evidence would not support an inference of malice as we have defined it for purposes of punitive damages. As noted, the case proceeded to trial, and the jury returned a special verdict for plaintiff, finding that defendant's conduct proximately caused plaintiff's injuries, and awarded compensatory damages. Without the trial transcript, however, we cannot specifically determine whether plaintiff actually adduced the evidence proffered at the pre-trial conference. We note, however, that defendant represents in his brief that "all the evidence that appellants contend support their claim for punitive damages was admitted." Accordingly, although we have no means of independently confirming it, we will assume -- for the sake of decision -- that the evidence was admitted. But cf. Lorrain v. Ryan, 160 Vt. 202, 207 n.1 (1993) (appellant bears burden of producing adequate record to support points on appeal).

The absence of a trial record is nevertheless fatal to plaintiff's claim because it deprives the Court of any basis to determine whether the alleged instructional error was preserved for review on appeal. "A party may appeal the trial court's decision not to give an instruction to the jury only where, before the jury retired to consider the verdict, that party objected to the failure to charge, stating with particularity the matter of objection and its grounds. V.R.C.P. 51(b). The purpose of this rule is to allow the trial judge a final opportunity to correct the charge, before the jury retires with the case." Schaad v. Bell Atlantic Nynex Mobile, Inc., 173 Vt. 629, 630-31 (2002) (mem.). Although plaintiff raised the issue in her pretrial memorandum, arguing that "punitive damages is an issue for the jury in this case," we cannot determine whether she renewed the claim after the instructions were given to the jury, as is required to preserve the claim. See State v. Tehair, 172 Vt. 101, 104-105 (2001) (mem.) (alleged instructional error not preserved for review where, "[a]lthough defense counsel objected to the instruction at the charge conference, he failed to renew his objection after the instruction was delivered to the jury"). Accordingly, there is no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned

Footnote

* The complaint also sought damages for loss of consortium on behalf of plaintiffs husband Herbert Wisch, but the jury declined to award him damages and he has not appealed from that verdict.