

BROWN v. RAINBOW DENTAL CENTERS No. A-10-1194.

CHERYL E. BROWN AND STEVEN BROWN, HUSBAND AND WIFE, APPELLEES, v. RAINBOW DENTAL CENTERS AND GREGORY R. DAVIS, D.D.S., APPELLANTS.

Court of Appeals of Nebraska.

Filed: November 22, 2011.

Jerry W. Katskee and Melvin R. Katskee, of Katskee, Henatsch & Suing, for appellants.

John M. French, of Law Offices of John M. French, and Joseph J. Hrvol, P.C., for appellees.

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

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MEMORANDUM OPINION AND JUDGMENT ON APPEAL

SIEVERS, Judge.

This is a dental malpractice case in which the plaintiffs, Cheryl E. Brown and her husband, Steven Brown, allege that Rainbow Dental Centers (Rainbow Dental) and Gregory R. Davis, D.D.S., negligently caused Cheryl to swallow impression material in the course of a procedure to secure dental impressions for dentures. Surgery was required to remove the material from Cheryl's small intestine, after which the surgical site became infected. After a jury trial in the district court for Douglas County, judgment was entered in favor of Cheryl and Steven on the dental malpractice claim in the amount of \$150,000. After our review, we affirm. Pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

FACTUAL BACKGROUND

Cheryl is a 59-year-old woman living in Omaha. She went to Rainbow Dental on the evening of January 26, 2008, and was told that her dentist, Dr. Davis, would be late. She was placed in a sloped dental chair and a dental assistant took care of her by sloping her backward with her head hanging back to do impressions. Cheryl was fitted for an impression tray and observed the material in the tray to be a "pinkish purple" color. After taking three impressions of the bottom ridge, the dental assistant picked out a tray for the top impression. Cheryl testified that she neither saw Dr. Davis nor heard a male voice as the dental assistant proceeded with the impression process. The dental assistant filled the upper tray with impression material, held it in place with her thumbs, and pushed it upward. Cheryl testified that while this was being done, the impression material oozed down the back of her throat, she gagged, and she swallowed the material. Cheryl did not know that swallowing the impression material was a potential problem,

and no one so advised her. The dental assistant has no memory of the procedure, and apparently, she can shed no light on the circumstances.

On January 31, 2008, Cheryl awoke with severe abdominal pain and her husband, Steven, took her to a hospital emergency room. A CAT scan was recommended and performed. She was informed that she had an object in her lower intestine that was very dense. Surgery was performed that evening by Dr. Patrick Ahrens, who informed Cheryl following the surgery that they had removed some very dense—"denser than bone"—material from her small intestine. He described the mass as a foreign body, meaning something not normally found in the body. He described it to her as having an appearance like hardened bubble gum, but that it was not an adhesion, tumor, cancer, or hernia. The size of the mass was such that it would not go through the valve between the small and large intestines. The doctor did not think it was bubble gum, and Cheryl testified that she does not chew gum, nor did she ingest any similar material. Dr. Ahrens testified at trial and described the object as spherical and 3.2 centimeters in diameter. He described the color as light pink, consistent with the description of the dental impression material reported in Cheryl's history by her husband, Steven. Dr. Ahrens said he could think of no more likely explanation for the object other than dental impression material, given her history and his observations.

The hospital did not retain the object that was removed from Cheryl's body. Dr. Ahrens testified that a CAT scan can measure density, which is useful in identifying substances in the human body as well as foreign objects, and that CAT scans are regularly used in medicine for such purpose.

While recovering from her surgery, Cheryl developed an infection at her wound site requiring further hospitalization and treatment. Her total medical expenses were \$58,702.83, and she lost wages of approximately \$1,100.

PROCEDURAL BACKGROUND

On August 21, 2008, Cheryl and Steven filed a complaint for dental malpractice against Rainbow Dental and Dr. Davis. In her complaint, Cheryl alleged that Rainbow Dental and Dr. Davis were negligent and that their lack of ordinary care and skill caused her to ingest impression material resulting in injuries to her.

On September 21, 2010, Rainbow Dental and Dr. Davis filed a motion in limine to exclude the testimony of James F. Smith, M.D. (Smith M.D.), and that of his father, James F. Smith, D.D.S. (Smith D.D.S.), on the grounds that (1) their testimony would not assist the trier of fact in understanding the evidence or determining the facts in issue affecting Rainbow Dental and Dr. Davis; (2) their opinions and testimony do not meet the standards set forth by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Daubert/Schafersman*); or (3) that under Neb. Rev. Stat. § 27-403 (Reissue 2008), the probative value of such opinions and conclusions is substantially outweighed by the danger of prejudice. The main thrust of the motion was that Smith M.D. was not qualified to render his opinion as to the makeup of the substance found in Cheryl's body.

In its order filed on October 7, 2010, the district court overruled the motion in limine, finding fundamentally that CAT scans routinely take density readings of substances in the normal course of their operation and that the methodology of comparing the density reading on a CAT scan with a known substance of "Penta," a dental impression material, with the density reading of the substance removed from Cheryl's body was properly admissible. The district court found that Smith M.D., a radiologist, was qualified to read and interpret the CAT scan and that he could testify as a medical expert. The district court found also that Smith D.D.S., a dentist and prosthodontist, was qualified to provide expert testimony within his field of expertise.

A jury trial was held on October 12 through 14, 2010. At trial, Smith D.D.S. testified concerning the standard of care and his opinion of various breaches of such by Rainbow Dental and Dr. Davis. Smith D.D.S. provided several samples of Penta dental impression material to Smith M.D. to be subjected to a CAT scan to compare their density with the density reading from the CAT scans of the foreign body removed from Cheryl. CAT scans measure density, which density measurements are used every day by radiologists, and evidence of such usage would be "all over the literature" according to Smith M.D. He determined that the density of the foreign body found in Cheryl, as determined by her CAT scans, when compared to the density reading of the CAT scans of the samples of Penta provided to him by Smith D.D.S. revealed that the object was most likely dental impression material. Smith M.D. testified that the density readings of the object from Cheryl's body and of Penta material were very close. Based on Cheryl's history and his CAT scan test results, Smith M.D. opined that the substances were the same.

Smith D.D.S. and Smith M.D., as well as Dr. Ahrens, all agreed that Cheryl had most likely swallowed dental material resulting in her intestinal blockage. Smith D.D.S. testified that there were numerous breaches of the standard of care, including allowing a dental assistant to take a final impression, failing to use a barrier technique to prevent material from going down the patient's throat, and failing to properly position the patient for the impression procedure.

At the conclusion of trial, the jury returned a verdict in favor of Cheryl in the amount of \$150,000. The court accepted the jury's verdict and entered judgment thereon. Rainbow Dental and Dr. Davis filed a motion to alter or amend judgment or for new trial, which motion was overruled. Rainbow Dental and Dr. Davis now appeal.

ASSIGNMENTS OF ERROR

Rainbow Dental and Dr. Davis' first four assignments of error can be combined and summarized as follows: whether the trial court properly overruled their motion in limine to prevent the testimony of both Smith M.D. and Smith D.D.S. and whether the trial court properly performed its gatekeeping function under *Daubert/Schafersman*. They also allege that the trial court erred in overruling their motion to alter or amend or for new trial.

STANDARD OF REVIEW

A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). A judicial abuse of discretion exists when a judge,

within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

ANALYSIS

Did Trial Court Abdicate Its Gatekeeping Function?

Rainbow Dental and Dr. Davis allege that the trial court improperly overruled their pretrial motion in limine regarding the expert testimony of Smith M.D. and Smith D.D.S., and abused its discretion by allowing such to be admitted at trial. They claim that the methodology employed by Smith M.D., upon which Smith D.D.S. based his opinion that the material in Cheryl's body was probably Penta, was unreliable and had no basis in any scientific literature. Their brief recites that Smith M.D.'s "'methodology', if it can be dignified by such an appellation, was wholly based on guess, conjecture and speculation." Brief for appellant at 17.

Neb. Rev. Stat. § 27-702 (Reissue 2008) provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." As stated in *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 585-86, 694 N.W.2d 610, 619 (2005):

An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. . . . When the opinion involves scientific or specialized knowledge, this court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that we will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993). Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. . . . This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue. . . . In addition, the trial court must determine if the witness has applied the methodology in a reliable manner.

In the trial court's order overruling Rainbow Dental and Dr. Davis' motion in limine, the court made various findings bearing on the issue of the reliability of the expert testimony of Smith M.D. and Smith D.D.S. The court found that Smith M.D. and Smith D.D.S. were both properly qualified as experts in their respective fields. The court found that Smith M.D., a radiologist, is trained to read and interpret CAT scans and that in fact, he has read and interpreted thousands of CAT scans. The court found that his impressions are relied upon by other medical experts in followup treatment, care, and surgical procedures. The order provides that identification of something abnormal on a CAT scan is based in part on density measurements, called Hounsfield units, which all radiologists use as an everyday tool to measure density. The order notes that Smith M.D. testified in his deposition that based on Hounsfield units, a radiologist can attempt to identify what is seen on an x ray—whether it is, for example, a tumor or fluid collection.

With respect to the *Daubert/Schafersman* challenge, which was only made with respect to Smith M.D.'s testimony, the court's order recites:

Having read Smith M.D.'s deposition, it is the court's understanding that a radiologist cannot read a CAT scan and always make a definitive identification of the type of mass that was seen However, because of certain known densities of such things as tumors, hernias, adhesions, blockages, bone calcification, etc., identification can be made with reasonable probability. In this case, Smith M.D. obtained samples of dental impression material ("phantom material") from his father and then was able to compare densities of that phantom material against the density of the mass on the CAT scan and made certain conclusions based on that known density methodology. The court cannot find that the methodology was not valid or that the methodology was not applied in a reliable manner.

We agree with the trial court. The methodology employed by Smith M.D., upon which Smith D.D.S. based his opinion that the foreign body in Cheryl's small intestine was likely Penta, clearly does not amount to "junk science" that might unduly influence the jury." See *State v. Casillas*, 279 Neb. 820, 834, 782 N.W.2d 882, 896 (2010).

Smith M.D., a well-qualified and experienced radiologist, testified that CAT scans provide data of density of objects scanned and found within the body, such as cysts, tumors, bullets, and other foreign objects. Obviously, even though Smith M.D. did not have the actual object removed from Cheryl, he had similar Penta dental impression material that he subjected to a CAT scan and then compared that density reading with the density reading of the object that the CAT scans revealed to be lodged in Cheryl's small intestine. This seems to be a straightforward and logical application of a well-established capability of CAT scans that is in virtually universal use at this point. We find no merit to Rainbow Dental and Dr. Davis' argument that the trial court abdicated its gatekeeping function by allowing the admission of this evidence.

Was Motion to Alter or Amend or for New Trial Properly Overruled?

Rainbow Dental and Dr. Davis assert in their brief that the trial court's overruling of their motion to alter or amend judgment or for new trial, which motion was based on the failure of the court to exclude Smith M.D.'s testimony, deprived them of a substantial right and a just result. Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). As we established in the preceding section, the trial court did not abuse its discretion by admitting the expert testimony of Smith M.D. and Smith D.D.S. As such, the court also did not abuse its discretion by overruling Rainbow Dental and Dr. Davis' motion to alter or amend judgment or for new trial. This claim is clearly without merit, and thus, we affirm the trial court's judgment in all respects.

AFFIRMED.