

No. 1-15-3537

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELANA ZAIKA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 12 L 10670
)	
INNA S. ANSSARI, DDS,)	Honorable
)	Daniel Joseph Lynch,
Defendant-Appellee.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not abuse its discretion in granting defendant's motion *in limine* to bar causation testimony from plaintiff's independent expert witness, a ruling that necessitated the later entry of summary judgment in defendant's favor.

¶ 2 Plaintiff, Elana Zaika, appeals an order granting summary judgment to defendant, Dr. Inna S. Anssari, in Zaika's dental malpractice case. Zaika sought damages for Dr. Anssari's alleged negligence in connection with the placement of dental implants in Zaika's upper jaw. Before trial, the circuit court granted Dr. Anssari's motion *in limine* barring Zaika's disclosed independent expert – a periodontist who treated Zaika after the implants failed – from testifying

that Dr. Anssari's negligence was the cause of the failure of the implants because that opinion was based on speculation. Given that Zaika had not disclosed any other expert on the issue of causation, the ruling on Dr. Anssari's motion *in limine* meant that Zaika could not prove an essential element of her case and the court, therefore, granted summary judgment in favor of Dr. Anssari. We agree that the court properly barred Zaika's independent expert from offering causation testimony and affirm.

¶ 3

BACKGROUND

¶ 4

Zaika became a patient of Dr. Anssari, a general dentist, on November 7, 2006. Dr. Anssari is trained and credentialed in oral implantology and became an associate fellow of the American Academy of Implant Dentistry in 2001. In addition to general dentists, periodontists and oral surgeons also place and restore dental implants and general dentists lacking training and experience in dental implants usually refer their patients to those specialists for treatment. Any dental practitioner performing dental implant procedures is held to the same standard of care.

¶ 5

Before performing an implant procedure the standard of care requires assessment of the patient's bone volume and bone density. Bone volume refers to the amount of bone visible on an x-ray; bone density refers to the hardness of the bone. Bone density can be assessed using panoramic or periapical x-rays, which measure how radiopaque the bone is compared with other structures. A CT scan can also be used to assess bone density and provides more accurate information than an x-ray. Particularly if a patient has already had an extraction that has healed, a CT scan is used to assess bone density. If tooth extractions are necessary immediately prior to implants, the practitioner can also assess bone density using the tactile sensation of the twist drill used to prepare the bone for the implant.

¶ 6 Prior to becoming Dr. Anssari's patient, Zaika had been told that she was at risk of losing her teeth and sought advice from Dr. Anssari about dental implants. The options for treatment at that time were removal of all of Zaika's upper teeth with a full denture or to save several teeth temporarily and place implants around those teeth. Zaika, who was then 55 years old, was not interested in a denture, so implants were her only option. Dr. Anssari reviewed Zaika's x-rays prior to recommending implants. Dr. Anssari did not refer Zaika for a CT scan before the implant procedure as it would not have yielded any additional useful information about Zaika's bone volume or density. Dr. Anssari's notes do not indicate any particular findings she made with respect to Zaika's bone volume or density, which it was not Dr. Anssari's practice to record. Rather, the fact that Dr. Anssari determined that Zaika was a good candidate for implants meant that Dr. Anssari had assessed Zaika's bone density and volume and found them sufficient to support the implants.

¶ 7 Dr. Anssari's plan for Zaika's treatment entailed the placement of a number of initial implants, a sinus graft, and the placement of additional implants in the sinus area, which, when completed, would allow Zaika to have non-removable prosthetic teeth. In the interim, following the original implant procedure, Zaika would require a removable prosthesis over the implants.

¶ 8 Ultimately, Dr. Anssari placed five implants in Zaika's upper jaw on July 12, 2007. Prior to 2007, Dr. Anssari had performed five or more implant procedures at a time on patients on countless occasions. After the teeth were extracted, Dr. Anssari assessed Zaika's bone density and volume at each site and found them sufficient to support the implants.

¶ 9 Zaika's post-operative healing was uneventful. Defense counsel represented that Dr. Anssari saw Zaika for follow-up exams 18 times over the next 13 months, beginning on July 14, 2007. In accordance with the treatment plan, following the first procedure, on October 11, 2007,

Dr. Anssari performed a sinus graft in anticipation of placing the additional implants. In February of 2008, Dr. Anssari referred Zaika to a periodontist for an infection in one of her lower teeth. As of July 23, 2008, Zaika reported no complaints and Dr. Anssari noted no clinical observations of any problems with the implants. Although Zaika inquired at that visit whether she could avoid more implants, when Dr. Anssari told her that without the additional implants she would require a removable denture, Zaika elected to proceed with the original treatment plan.

¶ 10 Zaika was scheduled to have the additional implants in the sinus area on August 7, 2008. As part of that procedure, Dr. Anssari retracted the gum overlaying the original implants and discovered that four out of five of the implants were unstable and that there was insufficient bone to support any additional implants. There was soft bone around the original implants and Dr. Anssari removed four of them. She was unable to remove the fifth. In the 13 months following the original procedure, Zaika had lost both bone volume and bone density. Prior to her experience with Zaika, Dr. Anssari had never had a patient with five failed implants and could not say why they failed. (She did not see any evidence of an infection.) The number of implants does not increase the risk of failure; each implant has the same chance of success or failure.

¶ 11 Zaika commenced this lawsuit on June 19, 2009. Zaika voluntarily dismissed her complaint on September 20, 2011, and refiled it on September 19, 2012. In her refiled complaint, Zaika alleged that Dr. Anssari was negligent in connection with the implant procedure and, in particular, that Dr. Anssari failed to (i) obtain pre-operative CT scans to determine whether Zaika's bone density was sufficient to support the implants, (ii) ascertain whether Zaika was an appropriate candidate for implants and (iii) obtain Zaika's informed consent for the procedure.

¶ 12 During discovery, Zaika disclosed Dr. Edward Segal, a periodontist, as an independent expert, pursuant to Illinois Supreme Court Rule 213(f)(2) (eff. Jan. 1, 2007). Zaika had been treated by Dr. Segal since August 14, 2008, shortly after Dr. Anssari discovered the failed implants. Zaika's disclosure related to Dr. Segal recited:

"It is anticipated that Dr. Segal will testify with regard to his treatment of Elana Zaika consistent with the notations made by him in [her] medical record. It is anticipated that Dr. Segal will testify consistent with his opinions which will be disclosed in his deposition testimony."

Zaika made no further disclosures of the substance of any opinion that Dr. Segal was expected to render and she disclosed no other expert who would testify to causation.

¶ 13 Dr. Segal was deposed twice prior to trial: on February 18, 2011, prior to the voluntary dismissal, and on June 3, 2013, after Zaika refiled her complaint. Dr. Segal reviewed Zaika's records from defendant, but never reviewed either Zaika's or Dr. Anssari's deposition. Dr. Segal testified that during his initial examination of Zaika on August 14, 2008, he noticed an abscess under her denture, indicative of an infection. He could not state with particularity when the infection originated, but did testify that it "was not just starting." Dr. Segal further observed that Zaika's gum tissue was "red, swollen, [and] bleeding," and she was suffering from horizontal and vertical bone loss.

¶ 14 Dr. Segal diagnosed Zaika as having a failed implant at tooth number 6, ridge atrophy (loss of bone), and an endo-perio lesion on tooth number 24. Dr. Segal questioned whether these diagnoses had an iatrogenic (or physician-caused) etiology, stating that the procedure on Zaika's maxillary arch "possibly" contributed to her bone loss. Specifically, Dr. Segal testified that his review of the radiography Anssari performed revealed that the implants were not evenly spaced

and that there was progressive bone loss in the area of the implants prior to their removal on August 7. According to Dr. Segal, if implants are too close together, the soft tissue may not adequately heal, leaving an open wound that allows bacteria to enter and destroy the bone. Infection may also result if an implant is not properly surrounded in bone and does not integrate. Dr. Segal concluded that if Anssari's initial placement of the implants was appropriate, it was more likely than not that Zaika's healing would have been uneventful, but he did not testify that Anssari failed to properly surround the implants in bone. Dr. Segal also noted possible other causes he labeled "genetic," "plaque," and "calculus."

¶ 15 With regard to Dr. Anssari's decision not to perform a CT scan or other 3-dimensional imaging prior to performing Zaika's "full arch reconstruction," Dr. Segal opined that this was a departure from the standard of care. However, he did not testify that this contributed to Zaika's injuries.

¶ 16 Dr. Anssari's motion *in limine* relating to Dr. Segal's testimony was filed on July 20, 2015. In her motion, Dr. Anssari acknowledged that Dr. Segal "offered testimony on causation," but argued that because his testimony was speculative, he should be barred from testifying regarding causation at trial. The court granted the motion on July 22, 2015, finding that Dr. Segal characterized his opinions in general terms and did not link the Dr. Anssari's failure to order a CT scan or the Dr. Anssari's inappropriate placement of the implants to Zaika's subsequent infection. Following the court's ruling on the motion *in limine*, Dr. Anssari moved for a directed finding, which was also granted.

¶ 17 Zaika moved to reconsider the court's order granting the motion *in limine* on September 15, 2015, and Dr. Anssari (over Zaika's objection) filed a motion for summary judgment on September 23, 2015. Following briefing, the court heard argument on both motions in

November 2015, denied Zaika's motion to reconsider, and granted Dr. Anssari's motion for summary judgment. This appeal follows.

¶ 18

ANALYSIS

¶ 19

The dispositive issue on appeal is whether the court properly granted Dr. Anssari's motion *in limine* to bar Dr. Segal from testifying to the cause of Zaika's infection. Initially, the parties dispute the standard of review. Dr. Anssari urges us to apply an abuse of discretion standard, while Zaika contends *de novo* review is appropriate. Typically, we review a trial court's ruling on a motion *in limine* for an abuse of discretion (*Citibank, N.A. v. McGaldrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13), but Zaika argues that the ruling on the motion was tantamount to granting summary judgment in favor of Dr. Anssari, which we review *de novo* (see *Hanna v. Creative Designers, Inc.*, 2016 IL App (1st) 143727, ¶ 18).¹

¶ 20

While the *effect* of the court's ruling on Dr. Anssari's motion *in limine* was to entitle Dr. Anssari to judgment in her favor as a matter of law, the motion itself asked the court only to determine the admissibility of evidence. And it is well settled that the decision to admit or exclude evidence is in the trial court's "inherent power" and will not be disturbed absent an abuse of discretion. *Agnew v. Shaw*, 355 Ill. App. 3d 981, 990 (2005). An abuse of discretion occurs where the trial court acts arbitrarily without conscientious judgment, exceeds the bounds of reason, and ignores recognized principles of law. *Alm v. Loyola Medical Center*, 373 Ill. App. 3d at 4 (quoting *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006)).

¹ Zaika's belief that the motion *in limine* was a "disguised" motion for summary judgment also forms the basis for her argument that the motion should have been denied for failure to conform to Cook County Local Rule 2.1(f), requiring motions for summary judgment to be filed 45 days prior to trial, except with leave of court and for good cause. But we have never determined that a motion *in limine* to bar certain testimony was a *de facto* motion for summary judgment, even when the effect of the motion was to remove any issue of material fact. See *e.g.*, *Alm v. Loyola Medical Center*, 373 Ill. App. 3d 1, 4-7 (2007); *Reed v. Jackson Park Hospital Foundation*, 325 Ill. App. 3d 835, 841-42 (2001).

¶ 21 Here, we cannot conclude that the trial court's decision to bar Dr. Segal's testimony on causation was made "without conscientious judgment." A trial court has the authority to bar testimony from a medical expert that is premised on guess, conjecture, or speculation. *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 495 (2008) (quoting *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2000)). In other words, "an expert's opinion is only as valid as the bases and reasons for the opinion." *Soto*, 313 Ill. App. 3d at 146. While the court's decision rested on its finding that Dr. Segal did not render an opinion as to causation, we believe it is more accurate to say that Dr. Segal's causation testimony was couched in general terms and based on speculation. See *Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 22 (reviewing court may affirm on any basis in the record).

¶ 22 Dr. Segal did not link Zaika's infection with the lapses he identified in Dr. Anssari's care, specifically, the improper positioning of the implants. While Zaika points to several exchanges in which Dr. Segal appears to tie Dr. Anssari's breach of the standard of care to Zaika's poor outcome, the testimony as a whole reveals that this opinion has no basis in the facts of the case. For example, when Dr. Segal explained how inappropriate placement of implants could cause an infection, he noted "if an implant is *** not completely surrounded in bone and it does not integrate, an infection likely ensues and an infectious process will destroy bone around the implant until the implant is shed from the body." But Dr. Segal did not testify that Dr. Anssari did not completely surround the implant in bone; he said only that the implants were too close together. And while Dr. Segal did note the presence of an infection on August 14, he could not state when it originated and thus could not trace it back to the implant procedure.

¶ 23 Later, when Dr. Segal was questioned regarding how the placement caused the failure of the implants, he again made statements couched in possibilities, not probabilities: "If the

implants are too close together, the soft tissue – can – may not – has the potential to not adequately heal so it leaves an open wound. And that can create bacteria to seep down and destroy both active bone and bone graft and interfere with the healing of the bone into the implant." Again, Dr. Segal did not testify that these implants in fact left an open wound into which bacteria could enter. In essence, he described the likelihood that certain outcomes would result from the improper positioning of implants, but did not testify that these outcomes occurred in Zaika's case.

¶ 24 This is perhaps most evident in Dr. Segal's reply to the following direct question posed by defense counsel:

"Q: So again, to break this down to the extent that lay persons may ever have to wrap their mind around this, it was the improper positioning that caused or contributed to the infection which spread and led to the decay of her bone structure which ultimately led to the failure of the implants?

A: When placing implants, there has to be adequate bone three-dimensionally to provide adequate initial stability for the implants that are placed and for enough bone around the implants to maintain the implants after healing an integration. If there is not enough bone to adequately stabilize those implants, then – let me rephrase that. Adding bone around an implant at the time of placement does not increase its stability. It only will – if done and right – right indications help grown bone, but it does not provide stability or cement or anything for that implant to take. The only way you can get stability of an implant is from the native bone that's there."

Dr. Segal failed to answer the question with specific information about Zaika's case, but instead resorted to generalities regarding the typical outcome from the improper placement of implants. This is an insufficient basis for an expert to render an opinion on causation, and therefore, it was properly barred. See *Reed*, 325 Ill App. 3d at 844 ("Experts cannot base opinions on what may have occurred or what the expert believed might have happened in a particular case.").

¶ 25 Zaika makes much of the fact that Dr. Segal was an independent expert pursuant to Illinois Supreme Court Rule 213(f)(2) (eff. Jan 1, 2007), and as such, did not have to disclose the bases for his opinions. But the court's ruling did not rest on a finding that Zaika's Rule 213(f)(2) disclosure with regard to Dr. Segal's testimony was inadequate; rather, the court examined the admissibility of that testimony at trial, which is a separate inquiry.

¶ 26 Having determined that the trial court did not err in barring Dr. Segal from testifying regarding causation, it necessarily follows that the trial court properly granted summary judgment in favor of Dr. Anssari. Because proof that Zaika's injury was proximately caused by Dr. Anssari's alleged deviation from the standard of care was an essential element of Zaika's claim (*Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112 (2004 (quoting *Purtell v. Hess*, 211 Ill. 2d 229, 241-42 (1986))), the order barring Dr. Segal from testifying to causation meant that Zaika could not establish a *prima facie* case. Thus, summary judgment in favor of Dr. Anssari was appropriate. See *Reed*, 325 Ill. App. 3d at 847.

¶ 27 Affirmed.