THIRD DIVISION
March 20, 2019

No. 1-18-1336

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TERESA MILEWSKI,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 1294
	)	
BEATA DEDEROWSKI and	)	
GENTLE TOUCH DENTISTRY, S.C.,	)	Honorable
	)	Janet A. Brosnahan
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting defendants' motion for judgment notwithstanding the verdict is reversed; the testimony of plaintiff's expert, when viewed in the light most favorable to plaintiff, showed: (1) plaintiff's expert established the standard of care defendants were required to meet when placing plaintiff's implants in 2013, (2) plaintiff's expert was qualified to testify as to the standard of care under the "similar locality" rule, and (3) plaintiff's expert established that defendants' failure to meet the standard of care was the proximate cause of plaintiff's injury.

¶ 2 BACKGROUND

¶ 3 On February 6, 2015, plaintiff, Teresa Milewski, filed a complaint in the circuit court of Cook County against Dr. Beata Dederowski ("defendant"), a dentist practicing in Cook County, Illinois, and Gentle Touch Dentistry (together referred to as "defendants") for medical

malpractice stemming from defendant's placement of dental implants in plaintiff's mouth on April 25, 2013.

¶ 4 Trial on plaintiff's complaint commenced on February 22, 2018 and continued for three days thereafter with defendants' concluding their case on February 27, 2018.

¶ 5 Testimony of Defendant Dr. Beata Dederowski

¶ 6 At trial defendant testified concerning her placement of plaintiff's dental implants. On January 15, 2013, defendant consulted with plaintiff at her office, Gentle Touch Dentistry. The purpose of the consultation was to address crowns located on tooth numbers ten and eleven which were moving and unstable. Both teeth were in the upper aesthetic zone, an area visible upon full smile which includes the teeth, gingival, and lips. After examination and review of x-rays, defendant recommended dental implants to replace the crowns and arrangements were made for defendant to place the implants. On January 23, 2013, defendant took impressions of plaintiff's teeth to make a temporary flipper plaintiff could wear while awaiting a permanent restoration and to make a surgical guide to be used during plaintiff's implant surgery. On February 7, 2013, defendant extracted plaintiff's two teeth numbered ten and eleven and placed a bone graft to preserve the site for implants. On March 16, 2013, defendant took a periapical x-ray of plaintiff's extraction sites. She testified that this x-ray was taken to determine if the bone adequately regenerated and to evaluate the bone for implant placement. Based on both the x-ray and her clinical examination of plaintiff, defendant determined that there was sufficient bone for implant placement. Defendant testified that she complied with the standard of care by using the periapical x-ray in conjunction with her clinical exam of plaintiff in order to place plaintiff's implants in the upper aesthetic zone. On April 25, 2013, while using her surgical guide to direct the trajectory of plaintiff's implants, defendant discovered insufficient bone in the areas she planned to place the implants. At that point, defendant testified she had two options - she could

either abort the procedure and send plaintiff for an extensive bone graft so that the implants could be placed at the desired angles or she could place the implants at the angles in areas with sufficient bone. Defendant testified that plaintiff refused the bone grafting option so she continued to place the implants changing their angle to allow placement in areas with sufficient bone. Defendant testified that she knew she could still restore the implants with customized abutments to address the angles of the implants. Once the implants were in the gums, she placed small cover screws flush with the implants and then sutured the area so that the stitches were the only visible part. At the time of surgery, defendant discussed the angles of the implants. On July 19, 2013, after the gums were cut and the cover screws were removed, healing abutments were placed. On July 26, 2013, plaintiff returned to see Dr. Vasyl Baranovsky, defendant's associate, to make impressions for the fabrication of the restoration. However, Dr. Baranovsky was unable to do so because the soft tissue around the implants was red and swollen which defendant testified was not unusual as it takes two to eight weeks for the tissue to heal after placement of the abutments. Plaintiff returned to get impressions taken on August 28, 2013. Again, no impressions were taken as defendant found a defect she described by stating plaintiff's implants had been placed slightly buccally and the facial gum tissue had receded. Defendant testified there is no way a dentist can predict how the gum tissue and bone will heal following an implant procedure which was noted in the consent form plaintiff signed. Defendant offered to fabricate a restoration with pink porcelain to cover the area of missing tissue, but plaintiff advised that she wanted a second opinion. Plaintiff never returned to defendant for treatment after August 28, 2013. When asked about the cone beam CT scan technology, defendant testified that she obtained a cone beam CT scan in 2015 and prior to that referred patients to an oral surgeon who had cone beam CT scan technology.

¶ 7 Testimony of Plaintiff Teresa Milewski

¶ 8 Plaintiff's trial testimony concerning these events varies from that of defendant in certain circumstances as follows. Plaintiff testified she understood that the process of obtaining a dental implant involved three stages: (1) extraction of tooth ten and eleven; (2) placement of implants also known as posts; and (3) placement of crowns. On April 25, 2013, following the placement of implants, plaintiff questioned defendant about the "weird" angle of the implants because the posts did not appear to be in line with her other teeth. Defendant told her that over time the tissue will heal properly and everything will go back to the correct position in her mouth. Plaintiff followed up on May 2, 2013 and returned to defendant on May 28, 2013 for placement of the abutments. On May 28, 2013, defendant seemed to have difficulty placing the abutments and used a scalpel to cut into plaintiff's gums. Plaintiff had a follow up appointment with defendant on July 19, 2013 to take impressions required for the fabrication of the restoration but her mouth had not healed completely. Plaintiff returned on July 25, 2013 and met with Dr. Baranovsky who attempted for the second time to take impressions; however, he was unable to proceed due to the persistent inflammation in plaintiff's mouth. On August 23, 2013, plaintiff met with defendant for a third attempt to take impressions. At this appointment defendant referred plaintiff to Dr. Nierzwicki, an oral surgeon, for further treatment. On August 29, 2013, plaintiff consulted with Dr. Nierzwicki who advised her that the implants should be removed. Plaintiff scheduled the implant removal surgery with Dr. Nierzwicki and met with various other dental surgeons since 2013 but never followed through with the procedure because she was scared of the associated risks. Plaintiff instead had Dr. William Bennett, a doctor from a different office, place an appliance in her mouth the color of her gums which covered the visible posts and gap in her teeth which she wore during the trial.

¶ 9 Testimony of Dr. Richard Gershenzon, Plaintiff's Expert Witness

¶ 10 Dr. Richard Gershenzon, a general dentist, was submitted as plaintiff's expert witness pursuant to Illinois Supreme Court Rule 213(f)(3) (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2018)). Dr. Gershenzon testified that he attended dental school at the University of Illinois and completed his residency at Michael Reese in Illinois. Dr. Gershenzon has practiced dentistry for 42 years. His office is located downtown at 30 North Michigan Avenue. Prior to starting his own practice, Dr. Gershenzon was employed at Illinois Masonic Hospital for thirteen years. He practices general dentistry with a strong emphasis on implants and some surgical procedures. Dr. Gershenzon has 44 years of surgical contacts and 30 year's experience doing various types of surgeries. He has been restoring dental implants for 35 years. Restoration is the process of placing a crown or bridge on an artificial root or implant placed by another specialist. Fifteen percent of his practice involves restoring dental implants. About twelve years ago, Dr. Gershenzon began placing the implant himself because he was not satisfied with some of the results he was getting from other specialists. Dr. Gershenzon spent a lot of time in four or five formal courses lasting a day or two, with lectures and practical experience, learning to place the implants. Dr. Gershenzon also spent a lot of time observing friends, Dr. Al Rosenfeld, Dr. Rick McCall, and Dr. George Mandelaris, who he describes as some of the finest implantologists in the country. Three to five percent of Dr. Gershenzon's practice involves placing dental implants. Since the beginning of 2010, he has done approximately twenty to twenty-five single implants each year.

¶ 11 In forming his opinion in this matter, Dr. Gershenzon reviewed materials including plaintiff's complaint; plaintiff's discovery responses; defendants' discovery responses; records from Justine Gasior, Major Dental Clinics, Dr. Gregg Wilson, Dr. James Loeser, defendant, Dr. Bennett; North Suburban Center for Oral & Facial Surgery, and pictures received from Alice Borzym; CDs of Justine Gasior's dental x-rays; a CD of Major Dental Clinics' dental photos;

various depositions; and defendant's treatment notes. Dr. Gershenzon also examined plaintiff on March 21, 2014 and August 29, 2016.

¶ 12 Dr. Gershenzon testified as to his opinions concerning defendants' conduct concluding as follows: (1) defendant failed to conduct the necessary preliminary workup of plaintiff to correctly place the implants so they could be restored to functional and aesthetic use; (2) defendant did not take any imaging scans, which he further defined as a cone beam CT scans, to determine if there was sufficient bone structure to place the implants; (3) defendant did not prepare any model or device that would show where the teeth would be when restored; (4) defendant did not determine if there was sufficient bone so the implants could be placed in such a way as to be restored for functional and aesthetic use; (5) through her testimony, defendant acknowledged the above and decided to place the implants in plaintiff's mouth where there was sufficient bone without regard to the primary purpose of the implants which Dr. Gershenzon testified was a violation of the standard of care; (6) simply placing the implants where there is sufficient bone for integration without regard to the primary purpose of the implants which are to be restored to function and aesthetic use is below the standard of care; (7) as a result of defendant's actions the dental implants were placed at the wrong angle, too close together, and thus, not restorable; and (8) the dental implants must be removed and additional bone grafting must be performed if possible since plaintiff will lose more bone as a result of removing the implants.

¶ 13 Dr. Gershenzon's Testimony Regarding Standard of Care

¶ 14 Dr. Gershenzon's testified at length regarding the standard of care. He was first asked about the standard of care required in the Chicagoland area when placing implants and testified as follows:

"Q. * * * Do you know what the standard of care is required for placement of implants in the Chicagoland area?

A. I believe so.

Q. And is this based upon your background, training, your knowledge and experience?

A. Yes."

¶ 15 Dr. Gershenzon testified that the cone beam CT scan gives practitioners the ability to know what the underlying bone and soft gum tissue look like to determine if implants can be placed in a position where they can be restored in a functional, aesthetic, and maintainable fashion. He described a cone beam CT scan as an x-ray that shows the area in a three-dimensional view where a regular dental x-ray, also known as a periapical, is only two dimensional. The cone beam CT scan gives information on bone density as well as the location of certain vital structures such as arteries, nerves, and blood vessels so they can be avoided. He testified that the technology has been available for at least twenty years and that there is a facility he uses with cone beam CT scan technology which has multiple offices and a unit that will go to a patient's home.

¶ 16 Dr. Gershenzon used exhibits to explain how cone beam CT scans work with virtual technology to allow practitioners to place implants given a patient's unique situation to include bone density, location of arteries, and blood vessels which are not visible in periapical x-rays.

¶ 17 Dr. Gershenzon was again asked about the standard of care with respect to the use of cone beam CT scans as follows:

"Q. Does the standard of care require a dentist or any dental professional who is putting in dental implants in the aesthetic zone to take one of these scans?

* * *

A. I believe so."

¶ 18 Dr. Gershenzon testified that upon physical examination of plaintiff in March 2019, he observed that plaintiff's implants were placed in incorrect positions and were unrestorable. The implants need to be removed, grafted, and proper diagnostics need to be done to place new implants. He examined plaintiff on a second occasion on August 29, 2016 and noted that the implants were in unrestorable positions and that the restoration that was ultimately put in plaintiff's mouth by Dr. Bennett was uncleansible and the tissue was inflamed. Dr. Gershenzon elaborated on this point stating that because of where the implants were placed, the dental prosthesis that was attached to it was covering the gum tissue in a way that neither a patient nor a dental hygienist could properly clean it. The only way to clean it would be to drill a hole through the front of both restorations to get to the screws holding the restorations in place. The screws would need to be removed and the appliance taken out. Once cleaned, the appliance would have to be put back in at which point it would be uncleanable again. This would need to be done on a daily basis otherwise food, debris, and bacteria would always be underneath it. Dr. Gershenzon testified that it is his opinion that the inability to clean the restoration will result in chronic bacterial invasion of the implants leading to a situation called peri-implantitis and inflammation of the attachment apparatus where the implant meets the bone causing the implants to loosen and fail resulting in more bone loss. Dr. Gershenzon testified that the restoration was guaranteed to fail although he could not give an exact timeline. Dr. Gershenzon testified that Dr. Bennett, who placed plaintiff's apparatus, was not proud of the restoration but noted that it was the best he could do under the circumstances. Dr. Gershenzon testified that it was his opinion that the implants must be removed and additional bone grafting performed if possible because plaintiff would lose more bone as a result of removing the implants because they are integrated and firmly embedded in the bone which needs to be cut away to remove the implants.

¶ 19 Dr. Gershenzon was questioned about the costs associated with replacing plaintiff's implants and discussed the Simplant surgical guide. He described this as a guide made from information obtained from the cone beam CT scan and virtual placement of the implant using the scan in the exact position desired. Along with the Simplant surgical guide there is an instrument kit that allows for a precise placement of the implant within fractions of a millimeter of the virtual placement made using the cone beam CT scan.

¶ 20 Dr. Gershenzon was asked about the standard of care with respect to the Simplant surgical guide as follows:

> "Q. And, doctor, is this the — is it your opinion to a reasonable degree of medical and oral surgical certainty that this is the standard of care?
>
> A. Yes.
>
> Q. And is it also your opinion that this is the type of procedure that should have been performed on Teresa Milewski when she had implants?
>
> A. Yes."

¶ 21 Dr. Gershenzon was again asked about the standard of care with respect to defendant's actions in placing plaintiff's implants as follows:

> "Q. With respect to the opinions that you gave, Doctor, that Dr. Dederwoski did not take imaging scans before and did not know if there was sufficient bone, it is your belief that that is below the standard of care, correct?
>
> A. Yes.
>
> Q. And failure to do that and to place the implants where there simply was bone, it is your opinion that that was below the standard of care?
>
> A. Yes.

Q. Is it also — Doctor, is it your opinion that placement, the manner in which Dr. Dederowski placed the implants was below the standard of care?

A. Yes.

Q. And is it your opinion, Doctor, that based on where the implants are placed and the appliances now on them, Ms. Milewski has inflammation to her mouth and gum area?

A. Yes.

Q. And that will lead — it is your opinion that that would lead to these implants failing at some point in time?

A. Correct.

Q. Doctor, is it also your opinion that these must be removed?

A. Yes."

¶ 22 On cross-examination, Dr. Gershenzon further testified to the standard of care as follows:

"Q. Now, you agree that Dr. Dederowski is held to the standard of care that applies in the Chicagoland area for dental practitioners; isn't that true?

A. That's true.

Q. And the standard of care is what other reasonably qualified dentists would do under similar circumstances?

A. True.

Q. And you admit, do you not, that in the last ten years, even with the evolution of cone beam CT imaging, that there are dentists in the Chicagoland area, including oral surgeons and other specialists, who use radiographs other than cone beam CT scans in the diagnostic work-up prior to placement of implants?

* * *

A. There are people that don't use cone beam CT.

Q. You are aware that there are practitioners, dental practitioners, that don't use cone beam CTs in the placement of all implants?

A. Not in every case.

Q. And you are aware that there are dental practitioners that do not use cone beam CTs when placing implants in the aesthetic zone?

* * *

A. There is none that I deal with, so I have no knowledge of what is done with some offices."

¶ 23 Dr. Gershenzon further testified on cross-examination regarding the standard of care as follows:

"Q. The opinion that you rendered in this lawsuit was a CT cone beam was required whenever placing implants anywhere in the aesthetic zone? That is your opinion, isn't it?

A. It is my opinion."

¶ 24 In discussing his conclusions, Dr. Gershenzon testified that without a definite study of what the bone looks like, there is no way to know what has to be done during surgery including where the implants can be placed. He agreed that using the state-of-the art technology does not equate to the standard of care.

¶ 25 In further discussing the standard of care, Dr. Gershenzon testified as follows:

"Q. Well, let me ask you this question. What did you mean when it didn't matter what her background is, when you are coming up with [your] opinion that she violated the standard of care when she put the implants in Teresa Milewski's mouth?

A. The result of what I saw was completely substandard regardless of who did it or whatever their background might have been."

¶ 26 Testifying further as to the standard of care, Dr. Gershenzon stated:

"Q. * * * It's your — whether they're using a cone beam CT or not in order to do the initial diagnosis before placing implants in the aesthetic zone, it's your opinion that the standard of care requires this, correct?

A. Yes.

Q. All right. And even if there are doctors that don't do this and they choose not to do the cone beam CT scan, is it still your opinion that that is the standard of care?

* * *

A. I think today it is the standard of care."

¶ 27 Proceedings After Plaintiff Rested

¶ 28 After plaintiff rested, defendants presented a motion for partial directed verdict pursuant to section 2-1202 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1202 (West 2018)) arguing that plaintiff's expert failed to testify as to the applicable standard of care that existed at the time defendant placed plaintiff's implants in 2013. Following argument, the trial court reserved ruling on defendants' motion for partial directed verdict. Thereafter, defendants commenced their case-in-chief. Trial continued and on the next day defendants rested. Defendants' motion for partial directed verdict was again raised. Following argument, the trial court stated that she would continue to reserve ruling and submit the case to the jury. The jury was given issues instructions and two special interrogatories to determine which of plaintiff's theories of negligence they accepted. The two special interrogatories were as follows:

"SPECIAL INTERROGATORY # 1

Did you find that Dr. Dederowski was negligent in failing to perform appropriate diagnostic testing prior to the placement of the implants?

YES: _____ NO: _____

SPECIAL INTERROGATORY # 2

Did you find that Dr. Dederowski was negligent in placing the implants in an incorrect position to be utilized for their proper purpose?

YES: _____ NO: _____"

¶ 29 On February 28, 2018, the jury returned a verdict in favor of plaintiff in the amount of $30,147 along with their responses to the special interrogatories answering in the affirmative to interrogatory one and in the negative to interrogatory two.

¶ 30 On March 9, 2018, defendants filed a motion for judgment notwithstanding the verdict ("JNOV") arguing, as they did in their motion for directed verdict, that plaintiff's expert Dr. Gershenzon did not testify to the proper legal standard of care. Specifically, with respect to plaintiff's negligence in failing to perform appropriate diagnostic testing prior to the placement of plaintiff's implants, the claim on which the jury returned its verdict, plaintiff's expert failed to establish the applicable standard of care namely that which existed at the time defendant placed plaintiff's implants in April 2013. Defendants also argued that plaintiff failed to provide any evidence that defendant's failure to take a cone beam CT scan prior to placement of the implants proximately caused an injury to plaintiff.

¶ 31 On May 22, 2018, the trial court issued its order granting defendants' motion for JNOV. The trial court found that as a matter of law plaintiff failed to prove the standard of care element of her dental malpractice action as to the claim on which the jury entered its verdict. The trial court agreed with defendants that Dr. Gershenzon's testimony did not establish the standard of care applicable at the time defendant placed the implants in April 2013. While not raised by

defendants, the trial court also found that plaintiff's expert failed to provide evidence that he was familiar with the ordinary methods, procedures, and treatments of physicians in the actual or a similar community which is a necessary component of the standard of care. Having found defendants were entitled to judgment notwithstanding the verdict because plaintiff's expert failed to properly establish the standard of care, the trial court did not consider the issue of whether plaintiff established that defendant's failure to take a cone beam CT scan prior to placement of the implants proximately caused an injury to plaintiff.

¶ 32 Plaintiff timely filed her notice of appeal. The sole issue presented is whether the trial court erred in granting defendants' motion for JNOV.

¶ 33 This appeal follows.

¶ 34 ANALYSIS

¶ 35 Standard of Review

¶ 36 Plaintiff contends that the trial court erred in granting defendants' motion for JNOV because plaintiff did establish the standard of care element on the issue of whether defendant was negligent in failing to take a cone bean CT scan as part of her preliminary workup prior to placing plaintiff's dental implants.

¶ 37 "An appellate court reviews *de novo* a trial court's decision to grant a motion for JNOV, but must be careful not to 'usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way.' " *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000), quoting *Maple v. Gustafson,* 151 Ill. 2d 445, 452–53 (1992). A motion for JNOV should only be granted where all of the evidence, when viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could stand. *Jones*, 316 Ill. App. 3d at 1125; *Pedrick v. Peoria & E.R. Co.*, 37 Ill. 2d 494, 510

(1967); *Maple*, 151 Ill. 2d at 453. A reviewing court must reject any unfavorable evidence even if it was offered by the plaintiff. *Guidani v. Cumerlato*, 59 Ill. App. 2d 13, 31 (1965). This is a very difficult standard to meet and the power of the circuit court to reverse a jury verdict is limited to extreme situations only. *People v. ex rel. Department of Transportation v. Smith*, 258 Ill. App. 3d 710, 714, (1994). A trial court cannot reweigh the evidence or set aside the verdict if reasonable minds can differ on the inferences to be drawn or the conclusions to be reached from the facts. *Maple*, 151 Ill. 2d at 452-53. If there was in the record any evidence, which was favorable to plaintiff, and which, with all reasonable inferences that might be drawn therefrom, supported plaintiff's case, the trial court erred in rendering judgment for defendant notwithstanding the verdict for plaintiff. *Ebaloy, Inc. v. Square Deal Plumbing & Heating Supply House, Inc.*, 27 Ill. App. 2d 36, 40 (1960).

¶ 38 Standard of Care

¶ 39 In medical malpractice cases, plaintiff must establish the standard of care the defendant was required to meet, demonstrate a deviation from that standard, and indicate how that deviation was the proximate cause of plaintiff's injuries. *Slezak v. Girzadas*, 167 Ill. App. 3d 1045, 1052 (1988). As noted above, the trial court granted defendants' JNOV on the basis that plaintiff's expert failed to establish the appropriate standard of care at the time defendant administered treatment to plaintiff and further did not have the requisite knowledge of the locality in which defendants practiced. Plaintiff argues that her expert testimony appropriately established the standard of care.

¶ 40 We address each of these arguments as well as defendants' argument in their motion for JNOV that Dr. Gershenzon's expert testimony did not establish that defendant's failure to perform a cone beam CT scan as part of the pre-surgical workup was a proximate cause of plaintiff's injury, an issue not addressed in the trial court's May 22, 2018 judgment.

¶ 41 Evidence of Standard of Care in 2013

¶ 42 Standard of care testimony pertains to the standard of care at the time of the treatment at issue. *Swift v. Schleicher*, 2017 IL App (2d) 170218, ¶ 106.

¶ 43 It is this court's opinion that plaintiff's expert testimony established the appropriate standard of care that existed in 2013 when defendant placed plaintiff's implants. Plaintiff's expert, Dr. Gershenzon, had the requisite experience to opine on the standard of care that was required in 2013. Dr. Gershenzon testified that he had practiced dentistry for 42 years and continued to practice at the time of his testimony. His practice is in general dentistry with a strong emphasis on implants and some surgical procedures. He has 44 years of surgical contacts and 30 year's experience doing various surgeries. He has been restoring implants for 35 years. Beginning in approximately 2006, Dr. Gershenzon began placing the implants himself. He took four or five formal courses lasting a day or two with lectures and practical experience learning to place the implants. He also spent time observing implant placement by three friends who he described as some of the finest implantologists in the country. Three to five percent of his practice involves placement of dental implants and he has placed approximately twenty to twenty-five single implants each year since approximately 2010.

¶ 44 Based on his experience as set forth above, Dr. Gershenzon testified as to the standard of care required in 2013 when defendant placed plaintiff's implants. Dr. Gershenzon gave the following testimony at trial appropriately setting forth the standard of care as it pertains to the timing of defendant's placement of the implants in 2013:

(1) When discussing the Simplant surgical guide that is generated from the cone beam CT scan Dr. Gershenzon testified:

> "Q. And, doctor, is this the — is it your opinion to a reasonable degree of medical and oral surgical certainty that this is the standard of care?

A. Yes.

Q. And is it also your opinion that this is the type of procedure that should have been performed on Teresa Milewski when she had implants?

A. Yes."

(2) When questioned about the standard of care being use of the cone beam CT scans Dr. Gershenzon testified as follows:

"Q. With respect to the opinions that you gave, Doctor, that Dr. Dederwoski did not take imaging scans before and did not know if there was sufficient bone, it is your belief that that is below the standard of care, correct?

A. Yes.

Q. And failure to do that and to place the implants where there simply was bone, it is your opinion that that was below the standard of care?

A. Yes."

Then, on cross-examination Dr. Gershenzon testified as to the standard of care as follows:

"Q. And the standard of care is what other reasonably qualified dentists would do under similar circumstances?

A. True.

* * *

Q. And you are aware that there are dental practitioners that do not use cone beam CTs when placing implants in the aesthetic zone?

* * *

A. There is none that I deal with, so I have no knowledge of what is done with some offices."

(3) In further discussing the standard of care, Dr. Gershenzon testified as follows:

"Q. Well, let me ask you this question. What did you mean when it didn't matter what her background is, when you are coming up with [your] opinion that she violated the standard of care when she put the implants in Teresa Milewski's mouth?

A. The result of what I saw was completely substandard regardless of who did it or whatever their background might have been."

(4) Dr. Gershenzon further testified on cross-examination regarding the standard of care applicable in the context of this lawsuit as follows:

"Q. The opinion that you rendered in this lawsuit was a CT cone beam was required whenever placing implants anywhere in the aesthetic zone? That is your opinion, isn't it?

A. It is my opinion."

¶ 45 In reviewing the evidence in a light most favorable to plaintiff, we find that plaintiff's expert testimony established that employing the use of cone beam CT scans when placing implants in the aesthetic zone was the standard of care applicable at the time defendant treated plaintiff in 2013.

¶ 46 Defendants and the trial court emphasize testimony from defendants' three witnesses that the standard of care did not require defendant to use cone beam CT scans prior to placing plaintiff's implants. However, this testimony is not relevant to our analysis where plaintiff's expert has established the relevant standard of care. As noted above, in reviewing the trial court's JNOV, we are required to reject all unfavorable evidence and avoid usurping the function of the jury, substituting its judgment on questions of fact fairly submitted, tried, and determined from the evidence. See *Guidani*, 59 Ill. App. 2d at 31; see also *Jones*, 316 Ill. App. 3d at 1125.

¶ 47 Issue is also made of Dr. Gershenzon's testimony when asked if he believed the standard of care required a cone beam CT scan even if there are doctors that do not use this technology responding "I think today it is the standard of care." We disagree that this one response invalidates Dr. Gershenzon's other testimony which addressed the standard of care that existed in 2013. Just because something is the standard of care today, does not mean that this was not the standard of care in 2013 nor can the testimony be read to mean that on all other occasions on which Dr. Gershenzon opined on the standard of care he was referring to the standard of care in 2018 as opposed to 2013. Even if the trial court's interpretation of Dr. Gershenzon's statement were accurate, a reviewing court must reject any unfavorable evidence even if it was offered by the plaintiff. *Guidani*, 59 Ill. App. 2d at 31.

¶ 48 We conclude the evidence when viewed in a light most favorable to plaintiff, demonstrates that plaintiff's expert properly established the standard of care applicable at the time defendant treated plaintiff in 2013. Therefore we move to the issue of whether plaintiff's expert properly established that he was qualified to testify as to the applicable standard of care in a similar locality to that in which defendants operated.

¶ 49 "Similar Locality" Rule

¶ 50 Illinois follows the "similar locality" rule which requires physicians to possess and apply the knowledge, skill, and care which a reasonably well-qualified physician in the same or similar community would bring to a similar case. *Slezak*, 167 Ill. App. 3d at 1052. This rule was developed to protect the rural doctor when facilities, educational opportunities, and an ability to travel caused a distinction between the care received in rural communities and urban centers and should not be narrowed any further than is necessary to promote this rationale. *Kobialko v. Lopez*, 216 Ill. App. 3d 340, 346 (1991). The Illinois supreme court has held that the "similar locality" rule is to be read broadly given the relatively uniform standards for education and

licensing of physicians and will be qualified where (1) the expert is familiar with the standards of care applicable to conditions and facilities available to the defendant doctor or (2) there are certain uniform standards applicable despite the locality. *Purtill v. Hess*, 111 Ill. 2d 229, 247 (1986). The physician's conduct must be judged in light of the conditions and facilities with which he must work, thus, if a plaintiff's expert is familiar with the standard of care applicable to the defendant doctor, he is qualified to testify. *Id.*

¶ 51 Dr. Gershezon testified that he attended dental school and completed his residency in Illinois. He has practiced dentistry for 42 years and his office is located in Chicago, Illinois. Prior to that, he was employed at Illinois Masonic Hospital for 13 years. He testified that he has 44 years of surgical contacts and 30 year's experience doing various types of surgeries. He has been restoring implants for 35 years. He testified that he spent a lot of time in formal courses learning to place implants with lectures and practical experience. He also spent a lot of time observing friends placing implants who Dr. Gershenzon described as some of the finest implantologists in the country. Dr. Gershenzon personally does approximately twenty to twenty-five single implants each year since around the beginning of 2010. When asked if he knew the standard of care required for placement of implants in the Chicagoland area, Dr. Gershenzon responded "I believe so" and further stated that this belief was based on is background, training, knowledge, and experience. On cross-examination, Dr. Gershenzon confirmed his understanding that plaintiff is held to the standard of care that applied to the Chicagoland area for dental practitioners and went on to answer questions about his knowledge of specific instances where dentists in the Chicagoland area do not use cone beam CT scans.

¶ 52 When asked if he was aware that there are dental practitioners that do not use cone beam CT scans when placing implants in the aesthetic zone Dr. Gershenzon responded stating "[t]here is none that I deal with, so I have no knowledge of what is done with some offices." The trial

court read this to mean that Dr. Gershenzon had no knowledge of what is done outside the offices he deals with and therefore his standard of care testimony was inadequate. Based on this logic, an expert could be found unqualified unless he has specific knowledge of the practices of any offices in his locality that do not comport with his expressed standard of care. We do not believe such a result was intended by our supreme court who has stated that the "similar locality" rule is to be read broadly. *Purtill*, 111 Ill. 2d at 247. Nor is such an outcome consistent with the litany of cases which have qualified experts who have no specific knowledge of the exact locality in which the defendant practices, instead having knowledge of similar localities or national standards of practice. See *Sadnick v. Doyle*, 157 Ill. App. 3d 279 (1987) (holding plaintiff's expert qualified to testify regarding the standard of care for a tattoo removal despite not being familiar with the local standards in LaSalle County where defendant practiced because plaintiff's expert was familiar with national minimum standards); *Fultz v. Peart*, 144 Ill. App. 3d 364 (1986) (finding that although plaintiff's experts practiced in the metropolitan area of St. Louis and were affiliated with hospitals there, they were generally familiar with the standard of care for a diabetic who is out of control in southern Illinois through contacts with other professionals in Illinois); and *Thompson v. Webb*, 138 Ill. App. 3d 629 (1985) (stating that the trial court had applied an overly narrow interpretation of the "similar locality" rule where there was sufficient evidence that plaintiff's expert who practiced in Toledo, Ohio was familiar with the standard of care in similar communities to provide a sufficient foundation for the standard of care of defendant who practiced in Mahomet, Illinois).

¶ 53 Moreover, such a result does not further the purpose of the "similar locality" rule which is to protect rural doctor who may not have the same access to facilities and educational opportunities as do practitioners in urban centers. *Kobialko*, 216 Ill. App. 3d at 346. This is particularly true where defendant needed no such protections given Dr. Gershenzon testimony

concerning accessibility to a facility with cone beam CT technology to include a team that will go to a patient's home and defendant's testimony that she obtained a cone beam CT scan in 2015 and prior to that referred patients to an oral surgeon who had cone beam CT technology.

¶ 54 Accordingly, we find that Dr. Gershenzon was qualified to testify as to the standard of care under the "similar locality" rule and turn to the issue of whether plaintiff met her *pima facie* burden to establish that defendants' failure to take a cone beam CT scan before placing plaintiff's dental implants in the aesthetic zone proximately caused an injury to plaintiff.

¶ 55 Proximate Cause

¶ 56 Once a plaintiff has established the standard of care, he must then further prove by affirmative evidence that, judged in light of these standards, the doctor was unskillful or negligent, and this want of skill or care caused injury to plaintiff. *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 423 (1975). Proximate cause is established when plaintiff proves that defendant's negligence "more probably than not" caused plaintiff's injury. *Holton v. Memorial Hospital*, 176 Ill. 2d 95 (1997). The burden of proof requirements of a medical malpractice case do not require plaintiff to prove a better result would have been achieved absent the alleged negligence of the doctor. *Borowski*, 60 Ill. 2d at 424. Whether a doctor's conduct in deviating from the standard of care was a proximate cause of plaintiff's injury is a question of fact for the jury. *Id.* at 423. Again, all evidence is to be viewed in a light most favorable to plaintiff. *Pedrick*, 37 Ill. 2d at 510.

¶ 57 Defendants assert that the trial court's JNOV should be affirmed because plaintiff failed to present sufficient evidence establishing that defendant's failure to adhere to the standard of care was unskillful or negligent and caused plaintiff's injuries. We disagree. Plaintiff was required to prove that defendant's failure to use a cone beam CT scan prior to placing plaintiff's

dental implants in the aesthetic zone resulted in plaintiff's injury. The record contains ample evidence to support plaintiff's theory.

¶ 58 Dr. Gershenzon testified to his opinions including that (1) defendant failed to conduct the necessary preliminary workup of plaintiff to correctly place the implants so they could be restored to functional and aesthetic use, (2) defendant did not take any imaging scans, which he further defines as a cone beam CT x-ray, to determine if there was sufficient bone structure to place the implants; (3) defendant did not prepare any model or device that would show where the teeth would be when restored; (4) defendant did not determine if there was sufficient bone so that the implants could be placed in such a way as to be restored for functional and aesthetic use; (7) as a result of defendant's actions the dental implants were placed at the wrong angle, too close together, and thus, not restorable; and (8) the dental implants must be removed and additional bone grafting must be performed if possible since plaintiff will lose more bone as a result of removing the implants.

¶ 59 Dr. Gershenzon's testimony established that a cone beam CT scan should have been taken by defendant prior to her placement of plaintiff's implants in 2013. He explained that the cone beam CT scan gives practitioners the ability to know what the underlying bone and soft gum tissue looks like, including bone density and the location of arteries and blood vessels which are not visible in the two dimensional x-rays such as the periapicals used by defendant. The results of the cone bean CT scan further allows a surgical guide and instrument kit to be created showing the exact implant position desired which allows for a precise placement of the implant within fractions of a millimeter of the virtual placement on the cone beam CT scan. In discussing his conclusions, Dr. Gershenzon testified that without a definite study of what the bone is, it is impossible to know what needs to be done or where the implants should be placed. He testified that defendant did not determine if there was sufficient bone so the implants could be

placed in such a way as to be restored for functional and aesthetic use and that defendant placed the implants where there was sufficient bone without regarding to function or aesthetics.

¶ 60 Dr. Gershenzon testified that plaintiff's implants were unrestorable and needed to be removed, grafted, and placed again using proper diagnostics and discussed the associated costs that plaintiff would incur. He stated that this would be the only way to achieve the results plaintiff originally expected to receive from defendant. He explained that the position of the implants resulted in the placement of the restoration by necessity which was uncleansible and caused inflammation of the tissue. Dr. Gershenzon testified that the implants that were placed and the dental prosthesis that was attached to them was covering the gum tissue in a way that neither plaintiff nor a dental hygienist could properly clean and that this will result in chronic bacterial invasion of the implants leading to a situation called periimplantitis and inflammation of the attachment apparatus where the implant meets the bone causing the implants to loosen and fail resulting in more bone loss. Dr. Gershenzon testified that the restoration was guaranteed to fail at some point. The record contains sufficient evidence of defendants' negligence and that this negligence was a proximate cause of plaintiff's injury.

¶ 61 Under these circumstances, the trial court's granting of defendants' motion for JNOV was inappropriate. The weight to be given to Dr. Gershenzon's testimony was to be determined by the jury. Therefore, we find that the trial court erred in granting defendants' motion for JNOV.

¶ 62 CONCLUSION

¶ 63 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and we reinstate the jury's verdict and award of damages in the amount of $30,147.

¶ 64 Reversed.