IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

HAIDI SUN, Plaintiff, v. ANITA PIK-LUI HO, et al., Defendants.	:	Civil No. 323091

JUDGE'S RULING

Rockville, Maryland March 10, 2011

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WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE RONALD B. RUBIN, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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P R O C E E D I N G S

THE COURT: All right. Thank you. Please be seated. All right.

All right. This is my ruling. Thank you.

JUDGE'S RULING

This dental malpractice case was tried to the Court on March 7, 8, and 9 in terms of the testimony. We had oral argument on March 10.

Obviously, this is a well-prepared case on both sides; hard, hard fought on both sides; and I don't usually say this because, for better or for worse, I'm not one to hand out compliments lightly, this was one of the most well-tried cases that I have seen as a Circuit Court judge. All counsel are to be commended for the, clearly, the preparation that went into it for all parties, and their courtroom skills and demeanor were of the highest caliber of the profession.

The plaintiff in this case obviously bears the burden of proving her claims by a preponderance of the evidence.

The claims are informed consent and negligence.

As the fact finder I may believe or disbelieve, accredit or disregard, any evidence that is introduced. This same standard applies to fact and to expert witnesses. In the case of any witness, the finder of fact properly may assign no weight and no credibility to a particular witness's testimony.

In a bench trial, the judge is not only the judge of

a witness's credibility but is also the judge of the weight to be attached to the evidence. And in a bench trial, the Court makes credibility determinations and demeanor-based determinations under the standard set forth by Judge Moylan in cases such as State v. Brooks, 148 Md.App. 374.

The evidence in a case of this nature and in this case in particular is extensive and quite exquisite in its detail. I cannot obviously discuss each and every line of trial testimony, each and every exhibit.

I will, however, comply with Maryland Rule 2-522(a), which says that in a contested court trial, which this is, the judge, before or at the time of judgement is entered, shall either prepare and file or dictate into the record, which is what I'm doing right now, a statement of reasons for the decision and the basis of determining damages, if any.

I have listened very carefully to the trial testimony, I've taken notes, and I have considered all of the documents that were admitted into evidence, and some of the other exhibits which are not documents -- they're films, they're molds, et cetera -- in reaching my conclusions, consistently with the standards in my judgement set out in Flanagan, 181 Md.App. 492; the Adventist Health Care case, 149 Md.App. 431; and Green v. Taylor.

In large measure, this case was a battle of experts. I've heard experts on both sides. Obviously, expert witnesses

are those who have special training or experience in a particular field. They were permitted to give their opinions because of such training and experience, and they testified in order to assist me in reaching a decision.

The testimony of the experts in this case is in stark conflict. They disagree. It is, I am not saying that I am more medically learned than any of the experts in this case, but at the end of the day, I am the sole finder of fact, so I have to resolve the differences as they have been presented, and therefore I must resolve conflicts between the experts and I do so to a large degree in the same way that I decide other factual questions and in the same way as I decide whether or not to believe ordinary witnesses -- and when I mean "ordinary," I mean civilian witnesses as opposed to experts. It's not a comment on the specialness of any witness.

I consider with experts also, however, their specific training and experience, and in their factual testimony I consider the soundness of each expert's opinion, the reasons for the opinion, and the motive of the expert, if any, for testifying.

In medical cases, I am particularly interested in the cogency of the expert's reasoning and the degree of specificity, if any, which they can explain to a non-doctor or a non-medical professional, are the basis, or bases, for their opinions.

I am not typically persuaded by the "because I said so" opinions. I like to understand, and if I can't understand it, it suggests to me that there has been some defect in either the reasoning or the explanation. It is not because I wasn't paying attention or didn't want to know; it was simply that I was not adequately educated on one point or another.

I must say that I, to be my usual bluntness, I am totally unpersuaded and unmoved by the testimony of Dr. Zahler, and I'm not basing it on, how you say, courtroom performance or charisma, or anything of that nature -- I don't really care about that. I'm not a jury and, frankly, I've either been the sponsor of more experts than he's probably ever seen in his life or the cross-examiner, but I must tell you that I simply do not believe what he told me.

He, it wasn't simply that he was glib. It's okay to be glib if you know what you're talking about. He was seriously unfamiliar with the case records, he was seriously unfamiliar and was unable to point to a single literature reference -- and, look, I know the appellate courts in Maryland have said many, many times, "Oh, an expert doesn't have to point to the literature." True. And under Radman, anybody with a medical degree in Maryland can get on the stand and talk about anything medical.

But Dr. Zahler was simply unfamiliar, in my judgement, with the relevant science of this case. To him, a

crown is a crown is a crown is a crown. That's not true, and he knows it -- or it, maybe he doesn't know it. I have no idea what he knows.

He was unfamiliar, in my judgement, not only with the literature but with the pertinent science. He was unfamiliar with the standards and practices of experts in the field in which he professed to give an expert opinion.

He was totally unpersuasive, not credible, and on the matters in issue, I don't believe a damn thing he said, to be blunt, so his testimony was totally unpersuasive in my view.

I do find highly persuasive and, as a consequence, credit the expert opinion testimony given in this case by Dr. Judith Penski. She was not the most polished of expert witnesses that I've ever seen, and whether or not she would or wouldn't play well with a jury, it's not for me to say.

But her audience wasn't a jury; her audience was me. And I look beyond the performance, if you will, the theatrics in the courtroom, I listen to what they have to say.

I find her credible for a number of reasons.

First of all, I find it important in this case that she examined the plaintiff not once but twice. She actually looked, saw, and touched, and it is my view -- and I believe the cases, and the science, and the literature supports the notion that physicians and medical care providers who actually see, feel, and touch the patient, have hands-on experience, are

typically in a better position to know something than an equally smart doctor who just reads paper.

I'm also persuaded that she throughly and completely not only reviewed but studied the medical records in this case. It is obvious to me that she took this case very seriously and treated it with the appropriate amount of seriousness and scholarship that, unfortunately, is in short supply among some experts who testify, if not for a living because they're not violating the 20 percent rule, who I see a lot.

She also, in my view, thoroughly and thoughtfully reviewed all of the available x-rays, radiographs, and models; and, as I said, she's not a professional witness and, for me, that is a compliment. It's not a tart remark. She was very thoughtful.

She, I credit her opinions that the defendant failed to adequately assess the patient and particularly the occlusion, occlusive issues.

I credit her opinion that the defendant did not fully, completely, or adequately, in my judgement, explore alternatives and risks.

Based on the evidence that was presented in this case, the scope and magnitude of the medical procedure here was of great moment. This was not a "routine," quote unquote -- and I'm not saying any medical procedure is routine, but there are some that are more routine than others -- this was not a

routine medical procedure. This was properly characterized as effectively a whole-mouth reconstruction, and I find it unbelievable that this was undertaken by the defendant in the mann er before me.

The lack of appropriate studies, testing, models, photographs, notes in the chart, is important to me. This procedure, based on the evidence that was presented in this case, is not like changing a spark plug. And I know the defendant knows this, because she is smart. There's no question about it.

But, respectfully, these are trite comparisons, but the defendant was either in way over her head or in the deep end of the pool, and she ought not to have been in either place, and I am not saying that the defendant did what she did because she's a bad person, a mean person, or an awful person; but while, as a technical matter, she may have been permitted by the fact of her licensure to do it, at the relevant time, anyway -- and that's all I'm speaking to is the relevant time; I couldn't possibly address matters today, I have no idea -- she, to be blunt, was not qualified to do what she did, and she did not perform the procedures at any phase that is germane to me within the relevant standard of care.

The procedure here, although they were all internal, were in the nature of a facial reconstruction, and to simply go about it, respectfully, in such a willy-nilly fashion, there's

no cause -- there's no occasion for that. There was no emergency here that said, "We got to do A, B, and C right now," or, "The patient is in terrible pain, we're going to lose somebody."

I have never seen such a rush to do something in my entire career as either a judge or as a lawyer, and, folks, I have defended probably the indefensible and most complex medical cases and products cases, so I, I'm resistively confident that I have a good sense of things that are germane.

She did not, in my judgement, and I find, did not adequately discuss the risks of the procedures with the patients. I'm not sure she appreciated at that time herself the risks involved.

It's not taking out 20 spark plugs and slapping in 20 spark plugs. It is highly complex science that is involved in matters of these natures.

It is a combination of geometry, art, material science, biology, chemistry, and the defendant's inability on the stand in this case to display the adequate level of knowledge, or at least she was not able to convey it to me -- to me is important -- on any of these things, the notion that an entire subset of materials and science should be either brushed aside, not explored because some doctor had one patient one time where it didn't work out, that's not good science.

There was no effort, in my judgement, made by the

defendant to seek to become further educated in such matters. I'm not saying that she should have done a particular procedure without more if she had one bad experience, but, as she knows because she's a scientist, one experience is an anecdote, maybe it's a case study. That's it.

Nobody would publish a paper in a peer-reviewed journal, saying, "Do A or don't do A because of one occurrence." Nobody. If scientists did that, we wouldn't have penicillin, we wouldn't have all the things we have now.

So I am not persuaded by her explanation that, "Well, I had one bad experience, or one unfavorable outcome, and that was scientifically adequate." Balderdash.

She did not, in my judgement, perform the appropriate pre- or post-operative occlusive studies. She really had no -- it was a stab in the dark unfortunately, and when you stab in the dark, typically you miss, and that's what happened here.

I find that at the end of the procedure performed by the defendant, the plaintiff did not have functional occlusions, and I understand the concept that, well, the defendant says, "Well, she never told me it was a problem." Okay. With respect, a medical professional operating under the appropriate standard of care would know by looking, and while you do rely on patients for important information and feedback, patients neither are required nor obligated to self-diagnose that which is largely within the purview of the medical

professional.

I'm not saying that if a patient lies to the doctor or repeatedly fails to provide answers to important questions that the doctor is on the hook. I'm not saying that.

But the notion that was advanced is, "Well, she didn't tell me there was a problem," is not a concept which I can accept. Maybe others can, I simply find it is not legally sound.

I do find in addition that, and I don't think I need to resolve to the millimeter how many millimeters it was, but I do credit testimony, both of Dr. Gritz and Dr. Penski, that the teeth in this case were over-prepared to an excessive degree, which was not within the standard of care and which is not medically acceptable, in my opinion, and that's a first-level finding by a preponderance of the credible evidence.

I am not persuaded by the attempt at a demonstration to bring out a ruler and have me assess the numbers of millimeters between or among the replicas of teeth on a model. That is, respectfully, not sound science and nobody would, in a non-emergency situation, perform surgery or another procedure by taking out a ruler and saying, "See, it's three millimeters."

At least -- maybe you're on the battlefield, but there was no rush here.

I do find that the defendant breached the standard of

care by failing to properly plan this case, by failing to conduct the necessary assessments of the patient, and regrettably, but respectfully, I do find that she failed to provide the requisite degree of informed consent.

In my opinion, showing a patient a movie is interesting, it's a good first step so the patient has a, conceptually, an idea of what the procedure is about, but I find that the plaintiff was not advised of the material risks, both on an immediate basis and on a going-forward basis, of the type of extensive medical procedures that the defendant undertook.

Patients simply are entitled to know so they can decide that, "If I do procedure A, you are at an increased risk of the following, however many it is, material risks." I'm not saying that one doctor or another has to take the patient to medical school with them, I'm not saying that; but I do credit the plaintiff's testimony that she was not advised of the material risks of this procedure, including the risks of the need for root canals; the risk of, on a going-forward basis, structural failure of the remaining tooth structure; of the risks of crown replacements, they don't last forever; of the risk of breakage; of the risks of the potential need, in the event of structural failure, of implants; and the consequences of having those.

If such risks are properly disclosed and the patient

is allowed sufficient information to undergo, from a layman's point of view, a risk-utility analysis, I guess unless Congress or the legislature passes a law against being foolish, people get to be foolish, although if I were writing on a clean slate, I'm not sure I would subscribe to that view, because I do not believe that a physician is either obligated or, in fact, may do something just because a patient wants it.

I don't think that's the law. Frankly, I don't think it's sound science or sound medicine. Civilians, you know, have all kinds of goofy ideas and want their doctors to do all kinds of interesting things, and part of the job of a physician is to say something like, "No."

Doctors are not obligated to do everything somebody wants, even if they think they want it. They're obligated to educate, they're obligated to disclose; and here I find the patient was not adequately educated as to alternatives, and not adequately educated as to the risks of these particular procedures, and the important factors were not adequately disclosed.

I don't read minds. I don't have a crystal ball. I can't sit here and say, "If A, but B"; but I do know for sure that there was not informed consent in this case.

While not a separate cause of action in this case, I do find there were material deficiencies in the record keeping of the defendant which made it more difficult for the Court, as

a fact finder, to figure out what happened. I'm not saying it is itself a breach of the standard of care, but it is a factor which I take into account that, in my judgement, material information was not timely recorded in the records. I'm not saying the records were falsified, I'm not saying they're phoney; I'm simply saying they are, in my judgement, incomplete, and had the information been provided it could have been revealing.

I make the same similar finding with respect to the radiograph and the model, which are missing. They would have provided helpful and material information, but they were not produced and the party, the defendant was the last person who had custody of these items. And she had them at a time when she knew, if not a suit was coming, that there was great unhappiness by a patient, because when a patient doesn't return even though the case hasn't been closed and the procedures have not been completed, the doctor knows they've gone somewhere else and they're not happy.

When somebody leaves with two temps in their mouth and won't come back, it doesn't take a rocket scientist to figure out, "Houston, we have a problem." So you, the first thing you do is preserve all of the important materials, even if it's not for a lawsuit, to explain to doctor number two, to explain to Dr. Pinsky, to explain to the Dental Board, to explain to the patient; but, frankly, most importantly, to show

doctor number two, "Look, whether you like it or not, this is what I did. Here it is. Make use of it in your analysis of the patient's condition."

I find that the injuries to the plaintiff's native dentition were dramatic and traumatic. And my finding is not based simply because I saw a picture that showed teeth that had been shaved or rotored. I know what they look like. I've seen it in other cases and I saw it here, so it's not simply the civilian's reaction to a picture from the pathologist. It's not the, "Oh, my God," okay? I, it's based on an analysis and a synthesis of the medical and scientific evidence. In other words, it's not shock value.

I find that the defendant failed to recommend alternatives, which were clearly available, as demonstrated by the evidence in this case, including orthadonture. While this, respectfully, this defendant was not qualified to reject orthadonture as a therapeutic modality, the fact that she personally was undergoing Invisalign treatment as a patient does not make her an expert. And just because a patient either says or seems to be in a hurry to get it done, that -- the doctor still has an obligation to present in cogent terms the alternatives, and I find that orthadontic modalities were not presented here in cogent terms, nor were whitening therapies really other than crowns.

There was a rush to crowns. There was no discussion

with the patient, and it's certainly not borne out by the charts, a discussion of bonding and the various resin techniques that were available in 2005. Neither the defendant nor the defense experts seemed to be aware of such matters. Maybe they do, maybe they don't, but they were not able to tell me.

As I mentioned, the notion of veneers was dismissed out of hand, but based on what I heard in this case, there was no thoughtful or serious consideration to that alternative, which all of the experts agreed requires less damage to the native structure, which, number one, is a good thing on day one and permits, on a going-forward basis, as the patient ages, a lessening, I find, of the need for and requirements for root canals and the preservation of sufficient true structure so that, as the person ages, and as their mouth structure, well, not changes, but as there is bone loss, it leaves options open; but they were all taken off the table once you shave everything down, for someone who is in their mid-40s, to crowns. It doesn't leave much room for options in the future as we get older, as we all do.

I am not persuaded by the defendant's expert's discussion of veneers. I find that they're just frankly not knowledgeable on the subject matter, at least as they were able to attempt to tell me about it in this courtroom. They seemed, A, not interested; and, B, if they knew about it, they sure

weren't telling me.

And I gave each of them ample opportunities to tell me about the material science of veneers. I mean, I had one doctor say, "Well, porcelain, ceramic, it's all the same to me," and I'm thinking, "Okay, then you're not going to be able to help me understand things."

My guess is he knows damn well it's not all the same, but maybe he doesn't.

Okay. I also find that the crowns that were prepared and placed by the defendant were not properly seated, did not allow proper occlusion for the plaintiff, did not permit appropriate bite, and I am persuaded that a reasonable medical professional in the defendant's position would have known and knew that once you started down the road of crowning the upper teeth, that based on how she structured the case, she left her patient with really no option except to crown them all. And she knew it.

I'm not saying she did it because of avarice, or because she was trying to hurt her patient, or that she had some evil intent; nevertheless, the precipitous rush to crowns in this case demonstrates to me a serious lack of medical judgement, and that's all it takes. You don't need bad motive or bad intent, but it was negligent in my opinion, leading to, I find, a host of other problems the plaintiff suffered, including pain in the temporomandibular joints, caused by the

defendant's conduct, difficulties with posterior and anterior occlusions.

The notion that somebody in their mid-40s would just coincidentally end up needing 12 root canals is not a proposition which I can credit or accept.

The evidence that I find persuasive is that the trauma to the native dentition from the hands of the defendant was the cause of the need for the subsequent root canals -- not 12 and 7, but the ones that came after it. There is no evidence before me which I credit or that I find to be cogent of any underlying medical condition, trauma, history of genetic defects, or other matters which can understandably make one patient or another more susceptible to the need for root canals. The evidence here is that the plaintiff, at all relevant times, practiced an appropriate level of dental hygiene, so it's not somebody who neglected their mouth.

So I do not credit any notion that the plaintiff caused her own need for root canals.

I also credit the testimony of Dr. Hokama and his assessment of the plaintiff's condition when he undertook his medical care and as well his assessment of the defendant's work. He, his opinion is important to me because he had hands-on with the patient. He was actually in her mouth and saw with his own eyes, if you will, what there is to see, and I do not find that he just unnecessarily decided to do a, to have a do-

over.

I find that he performed the procedures that he did because, in his judgement, and I credit his judgement, that it was medically necessary. He didn't do it just because he had something, didn't have something better to do or wanted to make a few dollars. He didn't do it for that reason. He did it because, in his judgement, it was so non-functional or dysfunctional that, rather than tinker with a defective product, he said, "Look, the only way I can guarantee you it will work is I will do it, and I will do it my way," and he did.

And he cogently described for me the removal process, and I forget -- I think it was Dr. Pollowitz who speculated or opined that Dr. Hokama necessarily must have injured the native tooth -- no, he didn't, and no he didn't. Apparently, Dr. Pollowitz was not listening carefully to the methods utilized by Dr. Hokama, which did not involve touching at all the native tooth, the underlying tooth.

He described what he did. I understood it. While, in a layman's sense, the drill came near the teeth, from a professional's point of view, the drill didn't come near the tooth. So I find Dr. Pollowitz's assessment that, "Well, additional damage must have been caused by Dr. Hokama," is off base and not correct, in my opinion.

Dr. Hokama correctly, in my judgement, opined that

veneers is a more conservative modality because, among other reasons, as he noted, more tooth structure is preserved now and for the future. I credit his testimony that when he saw the plaintiff, she was experiencing muscle pain, tooth pain, sensitivity, clenching, and other serious oral problems caused by the work done by the defendant.

And he did mention, and I credit it disturbingly, that the left mandibular joint was not functioning, which is a very serious matter. It is -- and I credit his description of the degree and amount pain that such dysfunction caused the plaintiff in this case. He noted that the plaintiff could not bite.

A more difficult scientific question is the notion that all or most of the plaintiff's crowned teeth will, at some point in the future, need root canals, and I'm going to come back to that.

I also find that the defendant mis-diagnosed and mis-classified the plaintiff's bite, and that the crowns were fabricated so that, number one, they did not preserve the original bite; and, number two, they did not -- and sometimes that's okay, because doctors can design appropriately a new bite, but a new bite was not appropriately designed and planned for. It can be done, but it wasn't done. It sort of didn't work out, which is not appropriate, in my judgement.

I find also that the bite was misaligned based on the

work of the defendant, and the placement of the crowns did not promote the requisite functionality that is needed for a normal bite.

I also credit Dr. Hokama's assessment of the tooth preparation in the, on the idea, or the concept of the planes. I credit his analysis that there was a, to a large measure, grinding to a single plane instead of the more traditional three-plane methodology, which is -- and I credit his testimony -- medically accepted.

The, one area where I am not persuaded that the plaintiff has met her burden of proof, production, and persuasion is on the contention that the defendant's failure to use a rubber dam in connection with the root canal is causally related to further problems with that tooth. While I do find that the standard of care necessitated the use of the dam, I do not find that its, that the defendant's failure to use the dam caused the subsequent harm.

So it's on the issue of causation where I conclude the plaintiff has not met her burden of proof, production, and persuasion.

I think I mentioned I do credit Dr. Gritz's assessment is that the, the teeth were overly prepared for the crowning. In certain cases, there was too close approximation to the pulp chambers and injury down to the gingival margin.

I also credit his assessment in the concept of there

was no overall treatment plan. If you're going to do a full-mouth case, as I believe he testified, you may not do it all at once, but you plan it all at once. You don't do a little here, a little there; it's, there's a lot more science involved. And that type of thought was not, in my judgement, put into this case.

I do credit the testimony of the plaintiff and her husband that the effects of the crowning procedure done by the defendant has had a substantial and a dramatic impact on her life. I also find as a fact that the funds advanced by Dr. Smith were loans; they were not gifts, and they were not advanced for any nefarious or improper purpose. Loans to a friend. There's no evidence before me there was anything untoward about anything. I find they're loans.

And one of the reasons is based on his testimony, although I didn't get into his net worth and he didn't tell me the number, based on the testimony of Dr. Smith and his work with Celera and Venter, and the others, this was not real money to him, and he won't miss a meal, and he was easily able to loan this kind of money to a friend. Lots of people can, and there's nothing wrong with it.

You know, the fact that an expert geneticist is not an expert in the dental arts doesn't surprise me. His focus is at the molecular level. He doesn't see things as big as teeth. His focus is in nanotechnology. He, that's not where they

look. They're not, it's apples and oranges. It's like asking a, it's like asking a computer scientist to tune up a Volkswagen. They'll ask you where's the engine. It's not that they're not smart. They're very smart. That's not what they do. They have a different, see the world in a different way. All ways are fine; they just look at it differently.

So the fact that he didn't say, "Hey," is of no moment to me. That's not the kind of scientist he is.

Dr. Pollowitz, respectfully, Dr. Pollowitz is more qualified than Dr. Zahler, who, to be blunt, he's welcome in this courtroom any time, but I'm not sure he'd be qualified as an expert on the next go-around. I will listen with a more attentive ear to Dr. Zahler should I happen to come across him in a case, which I may or may not. Who knows.

My difficulty in part with Dr. Pollowitz's testimony is that he, in my judgement, assumed for most of his opinions the accuracy of the reporting of the defendant, which, when you're given a hypothetical but certain of the factual predicates turn out not to be true, then the validity or persuasiveness of the expert opinion falls away. And that's, in large measure, why Dr. Pollowitz's opinion, in my view, are not persuasive. He assumed the truth completely of what the defendant said happened, but, respectfully, my findings in material respects do not support her factual contentions, particularly with respect to informed consent.

I credit the views of Dr. Hokama and the other plaintiff's experts on the issue of whether the teeth were properly prepared more than Dr. Pollowitz. He did look at some x-rays and some models, but I am more persuaded by the practitioners who actually looked in her mouth with their own two eyes and had the opportunity to see what there was to see and weren't interpreting things.

If all you can do is interpret, fine. They saw, and they testified credibly, in my judgement.

On the issue of the useful life of a crown, the evidence in this case is, from some of the experts, is between five to seven, Dr. Pollowitz said about 10, neither side really presented any, what I would call, hard science on that question, which I would be shocked if it didn't exist. I'm sure it's out there, but I can only go by what I have.

I am persuaded that the plaintiff's use of the seven-year useful life average is reasonable. The plaintiff only needs to show that it is more likely so than not so. The plaintiff is not required to prove it to an absolute certainty, but I do find it is more probable than not, all things considered, that the use, average useful life is seven years.

I'm not saying that in any particular case it could be more, it could be less; but none of the experts gave me that kind of detail. Had they given it to me, I would have worked with it. Had they brought in the studies, we would have read

them together. Had we gone through the footnotes, we could have done all of that; but I have what I have.

In one regard, I am persuaded by Dr. Pollowitz that the average cost of a crown replacement, and I wrote this down, is $1,600, not $2,000; and I think it's appropriate to use that because Dr. Pollowitz comes from the Washington, D.C. metropolitan region, where things are not less expensive. I believe that's an appropriate number. I'm sure there are doctors who charge more, I'm sure there's doctors who charge less. Probably, if you looked at the relevant studies, the cost is really not driven by the materials, the cost is driven by how much the particular practitioner charges.

It's like plastic surgeons. The piece of aluminum oxide, which is different, costs about the same, but it's -- the skill is in the hands of the practitioner. Just like in plastic surgery, everybody could read it, all the books say what they say, but the ability, or lack thereof, in the hands of the surgeon is what drives the cost of procedures. The folks that make the smiles of the Hollywood actors and actresses probably get more money per tooth than whoever works on me. Okay. Supply and demand. So it's a market-driven system.

But I credit his $1,600 per crown average, but I credit the plaintiff's useful life of seven years.

The issue of future root canals and loss of native

tooth structure and need for potentially implants, bone grafts, sinus grafts, possibly on the maxillary cavity, et cetera, I didn't hear a lot about sinus grafts, but abutments, implant crowns, is a closer question, but I am persuaded, given the fact that the plaintiff has had 12 root canals, makes it more likely so than not so that on a going-forward basis the teeth in issue will require root canals and ultimately implant surgery.

I am not saying that I can on this record predict which tooth, at what time, when, or that anybody can, but the cumulative effect of the evidence persuades me that it is more likely so or not so. I hope I'm wrong, actually, and I bet the plaintiff hopes I'm wrong.

But on the record that I have, based on all of the medical evidence that I've been listening to, the charts, the radiographs, the reports, and particularly, because I really do believe, based on my assessment of her testimony and her demeanor, that it -- my assessment is Dr. Penski is a very conservative practitioner of the dental arts, and I find her assessment to be the most persuasive and the most compelling of any of the assessments. Not only the cogency of her reasoning, but the amount of study and care, and the depth of her research into the records, including two times visually inspecting the plaintiff's mouth, gives, puts her in a, the best position, in my judgement, of any of the experts to opine cogently on these

matters, so I credit her assessment of likelihood of future harm.

With respect to dollars, the -- I'm going to ask counsel to do the arithmetic for me, because I invariably will get it wrong. But I do accept in terms of past meds, past medical expenses, the plaintiff's -- tell them that light went out -- the plaintiff's --

MS. STEINER: I thought the whole power was going to go out.

THE COURT: Did the power go out? Are we still up?

MR. GOLDBERG: Your Honor, I'm still (unintelligible), Your Honor. That's what I was going to ask you.

MS. STEINER: I'm not sure if we're, it sounds like --

THE COURT: Are we on the record?

THE CLERK: Yes, Your Honor.

MS. STEINER: The power did go out.

THE COURT: I lost my train of thought. I'm sorry.

The plaintiff's past medical expenses of $79,281.85, I'm going to ask the, counsel to do the arithmetic for me on future medical expenses based on my findings.

MS. STEINER: Your Honor, could you repeat the past number, because there's been some back and forth about that this morning?

THE COURT: I'm sorry. My calculation, but I'll listen to counsel if my calculation is incorrect in their view, 79,281.85, I believe, and my understanding is that includes deducting the $5,000 co-payment expense and the other matters that we have discussed. But if I'm incorrect, somebody will let me know. I don't, I'm happy to have my arithmetic corrected.

That leaves one matter of damages, which is probably the most difficult matter of damages in any case, and that is the matter of non-economic damages.

This is a case where the plaintiff has suffered bodily injury. Non-economic damages are awardable for pain, suffering, inconvenience, disfigurement, and other non-pecuniary injury. Those are all non-economic damages.

They are probably the hardest element of damages to quantify. There's no formula. There's really no set of rules, but I approach non-economic damages in a bench trial from a couple of vantage points.

Number one, I have the ability to assess the credibility, the sincerity, the cogency, the reliability of the testimony of the plaintiff and her other fact witnesses who testified as to various items of the plaintiff's non-economic damages.

In addition, I have the vantage point of a trial judge, who would be looking at a damage award in the event of a

motion for remittitur.

So I have the benefit -- at least in my judgement it's a benefit -- of having seen, I can't tell you the number because it's too big, of personal injury damage awards all over the country. Federal court, state court, I was at least for 10 years, maybe longer, I can't remember, but at least for 10 years, national counsel to the world's largest pharmaceutical corporation, and, in that capacity, either personally tried or had tried under my direction thousands of tort cases, substances, devices -- if we made it, we got sued for it, sometimes more appropriately than others.

But I do, I believe, have a sense, not only nationally but in the region, of non-economic damages.

This is an item of damages where there is no possible way that I will make everybody happy, which is fine because it's not my job to make people happy; it's my job to make my decision.

But I must tell you that given the nature of the insults on the plaintiff and her person, this is a case which, in my judgement, warrants a substantial award of non-economic damages, and then the next question is, okay, well, how much do you think is substantial, because everybody's view of an expensive car is different. I understand that.

But based on my experience in this case, in other cases that I've had as a member of the Circuit Court, and in my

prior life, which I really think informs my decision, I have decided to award the plaintiff non-economic damages of $150,000. I think that is a fair award.

The plaintiff suffered pain and injury not only for the three-month period until Dr. Hokama, as best as he could, corrected the problems, but this is -- the plaintiff suffers permanent injury to the vast number of otherwise healthy native teeth.

This never should have happened, folks. This was totally avoidable.

And the problem is that while the plaintiff's condition has been, quote unquote, "fixed for now," it will break. It will go wrong. Things will fracture. Stuff will come off probably at the least opportune time, and probably when nobody is available for an emergency repair.

And that's going to be the way it is for the remainder of her life. It's permanent, and that informs my judgement, so it's not simply for three months of inconvenience and aggravation, which is substantial. There's no question about it. But this is, this is a matter the plaintiff is going to live with for the remainder of her days.

So some people will think it's too high, some people will think it's too low; I understand that and I appreciate that, but for all of the above reasons, judgement on the claims of professional malpractice and lack of informed consent shall

be entered in favor of the plaintiff and against the defendant.

I will ask counsel to, if they haven't already done it, submit to my chambers a form of order or judgement with the arithmetic. I can't do the arithmetic right now. I don't want to make a mistake, and, as I said, I have to go to Howard County.

So if you could tender that tomorrow, I will sign it.

Thank you.

THE BAILIFF: All rise.

(End of requested portion of proceeding.)

√ Digitally signed by Nicholas Brozowski

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC. hereby certifies that the foregoing pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

Civil No. 323091

HAIDI SUN

v.

ANITA PIK-LUI HO, et al.

By:

Nicholas Brozowski

Nicholas Brozowski
Transcriber