

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GABRIEL G. ATAMIAN, :  
 :  
 Plaintiff, : CIVIL ACTION  
 :  
 v. : No. 00-CV-3182  
 :  
 MOHAMMADREZA ASSADZADEH and :  
 CAMPUS DENTAL CENTER, INC., :  
 :  
 Defendants. :

MEMORANDUM

BUCKWALTER, J.

April 9, 2002

**I. FACTS**

Campus Dental Center, Inc. ("CDC") provided dental care and treatment to Gabriel G. Atamian ("Plaintiff" or "Atamian") through Dr. Mohammadreza Assadzadeh ("Dr. Assadzadeh"), a dentist licensed to practice dentistry in Pennsylvania. Dr. Assadzadeh performed osseous surgery on the right and left upper quadrants of Plaintiff's mouth. Osseous surgery is a procedure by which changes in the bone that surround and support the teeth can be accomplished to rid it of deformities induced by the periodontal disease process or other related factors. The surgery performed by Dr. Assadzadeh also involved crown lengthening, a surgical procedure designed to increase the amount of tooth structure projecting into the mouth.

## **II. STANDARD**

A motion for summary judgment shall be granted if the Court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources . . . must be viewed in the light most favorable to the party opposing the motion." Id.

## **III. DISCUSSION**

### **A. Battery**

Plaintiff alleges that the periodontal surgical procedures performed on him by Dr. Assadzadeh were unnecessary and that as a result of these unnecessary, invasive surgical procedures, Plaintiff was injured. According to Count I of Plaintiff's complaint, this constitutes battery due to unnecessary surgery.

The Restatement (Second) of Torts specifies:

- (1) An actor is subject to liability to another for battery if
  - (a) he acts intending to cause a harmful or offensive contact with the person of the

- other or a third person, or an imminent apprehension of such a contact, and  
(b) an offensive contact with the person of the other directly results.

Restatement (Second) of Torts § 18(1)(a), (b) (1965).

Plaintiff's battery claim appears to be a medical malpractice informed consent cause of action grounded in battery. See Montgomery v. Bazaz-Sehgal, 742 A.2d 1125 (Pa. Super. Ct. 1999). Plaintiff complains that Dr. Assadzadeh made misleading and deceptive representations to him, which lead him to believe that osseous surgery and crown lengthening were unavoidable treatments for Plaintiff's condition, when, according to Plaintiff, they were unnecessary and invasive.

The primary issue of Plaintiff's medical battery claim is whether Dr. Assadzadeh's performance of osseous surgery and crown lengthening on Plaintiff's body constituted an unpermitted, intentional contact. The unpermitted touching itself gives rise to a civil battery action. Stover v. Association of Thoracic & Cardiovascular Surgeons, 635 A.2d 1047, 1052 (Pa. Super. Ct. 1993). There is no need to show actual physical injury, but only unpermitted and therefore offensive contact, in order to establish liability for battery. Montgomery, 742 A.2d at 1131. Consent to being so touched is a defense. Id. at 1130.

There is no dispute that Dr. Assadzadeh performed the periodontal surgical procedures in question on Plaintiff, thereby touching him. There is no evidence, however, that Dr. Assadzadeh

did so without Plaintiff's permission. Plaintiff's complaint centers on his belief that Dr. Assadzadeh mistreated him, giving rise to unnecessary surgery. For example, Plaintiff asks of Dr. Assadzadeh:

On 5-21-98, you recommended for regenerative therapy for class II furcation of teeth #'s 2, 3, 14. Yet on 7-27-98, you did perform osseous surgery on teeth #2, 3, and also, osseous surgery on teeth #14, 15, on 7-6-98. Please give in detail the reason why you did not follow your treatment plan?

Crown lengthening procedure does require that an x-ray be taken before undertaking the surgery . . . do you agree[?]

In my case, the crown-to-root ratio presurgical is 1:1, and postsurgical is worse than 1:1, also, with localized advance periodontitis. Accordingly, crown lengthening is contra-indicated for tooth #13. Do you agree[?]

The fact that the surgery Dr. Assadzadeh's performed on Plaintiff may have been contra-indicated or that Dr. Assadzadeh may not have taken required x-rays before proceeding with surgery does not give rise to an inference that Plaintiff did not consensually undergo the surgery at the time it was performed on him. It is irrelevant to a medical battery claim whether the surgery was performed perfectly or imperfectly, or whether or not it benefitted the patient. See Montgomery, 742 A.2d at 1131.

Plaintiff was referred to Dr. Assadzadeh by his treating dentist, Dr. Bahar. Plaintiff saw Dr. Bahar approximately 26 times over a period of one year. Plaintiff

appeared to be dissatisfied with Dr. Bahar's ability to remedy his dental problems. Nonetheless, Plaintiff continued to seek treatment from this dentist. Plaintiff admits that on July 2, 1998, Dr. Bahar sent Plaintiff to a periodontist, Dr. Assadzadeh, for crown lengthening. Despite Plaintiff's after-the-fact protestations that he did not need crown lengthening on tooth #13, Plaintiff was aware of the reason for Dr. Bahar's referral and voluntarily appeared before Dr. Assadzadeh to undergo the recommended surgery. There is nothing before the Court which indicates that Plaintiff was subjected to any surgical procedures for which Plaintiff did not consent.

Accordingly, because the record only suggests that Dr. Assadzadeh's performance of the periodontal surgical procedures did nothing to improve Plaintiff's periodontitis and does not reveal that the surgical procedures were performed on Plaintiff without his knowledge or consent, Plaintiff's battery claim is dismissed with prejudice.

To the extent that Plaintiff's claims allege medical malpractice instead of or in addition to battery, Plaintiff must establish the following five elements: (1) the physician owed a duty to the patient; (2) the physician breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) the damages suffered by the patient were a direct result of

that harm. Moreover, the patient must offer an expert witness who will testify to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. Wolloch v. Aiken, 756 A.2d 5, 14-15 (Pa. Super. Ct. 2000). Cf. Hightower-Warren v. Silk, 698 A.2d 52, 54 n.1 (Pa. 1997) (expert medical testimony is not required if a matter is so simple or the lack of skill or care is so obvious as to be within a lay person's range of experience and comprehension).

Plaintiff has failed to produce expert medical opinion that Dr. Assadzadeh deviated from the applicable medical standard and that such deviation was the proximate cause of the alleged injuries suffered by Plaintiff. Therefore, Plaintiff cannot make out a claim for medical malpractice.

**B. Informed Consent**

Plaintiff alleges that Dr. Assadzadeh never executed an informed consent with Plaintiff before undertaking the two invasive periodontal surgical procedures. There is no written or signed consent form in the record.

In order to establish a prima facie case of lack of informed consent, a plaintiff must present evidence that, if accepted as true, would establish that the "physician or surgeon . . . fail[ed] to advise [a plaintiff] . . . of material facts,

risks, complication[s], and alternatives to surgery which a reasonable man in the plaintiff's [patient's] position would have considered significant in deciding whether to have the operation . . . ." Gouse v. Cassel, 615 A.2d 331, 333 (Pa. 1992). The plaintiff must present expert testimony establishing the nature of the risk of harm to the patient and the probability of such harm occurring. Jozsa v. Hottenstein, 528 A.2d 606, 608 (Pa. 1987). See Gouse, supra; Bearfield v. Hauch, 595 A.2d 1320 (Pa. Super. Ct. 1991). This expert testimony must provide "the trier of fact . . . with expert information as to the nature of the harm which may result and the probability of this occurrence." Jozsa, 528 A.2d at 608; Bearfield, 595 A.2d 1320 at 1321; Festa v. Greenberg, 511 A.2d 1371, 1376 (1986), Neal v. Lu, 530 A.2d 103 (Pa. Super. Ct. 1987). Effective informed consent may be given orally or in writing.

Plaintiff has failed to produce expert testimony as to the nature of the harm which could have resulted from the periodontal surgical procedures described and the probability of this occurrence. It is apparently Plaintiff's theory that Dr. Assadzadeh should serve as his expert in establishing the following:

[O]n July 6, 1998, before performing osseous surgery of crown lengthening of tooth #13, please explain in detail, what you would have explained the plaintiff, in your informed consent, about the following:

- A. The nature and purpose of the operation;
- B. The alternative methods of treatment;
- C. The risk involved, the possible consequences and complications

On July 27, 1998, before performing osseous surgery of teeth #6, 5, 3,2, please explain in detail, what you would have explained the plaintiff, in your informed consent, about the following:

- A. The nature and purpose of the operation;
- B. The alternative methods of treatment;
- C. The risk involved, the possible consequences and complications.

Plaintiff has made extraordinary efforts to obtain Dr. Assadzadeh's responses to the above questions, (efforts which came after the discovery deadline in this case). Nonetheless, because Dr. Assadzadeh is the Defendant in this case, it would be highly unusual for him also to serve as Plaintiff's expert, and is not required to do so. Accordingly, because Plaintiff has failed in all other respects to produce expert testimony as to the nature of the harm which may result from the periodontal surgical procedures and the probability of this occurrence, Plaintiff cannot make out a prima facie case of lack of informed consent and such claim is dismissed with prejudice.

**C. Conspiracy**

Plaintiff alleges Dr. Assadzadeh conspired with the referring dentist, Dr. Bahar, to perform an unnecessary invasive surgical procedure on him. To prove a civil conspiracy, it must be shown that two or more persons combined or agreed with intent

to do an unlawful act or do an otherwise lawful act by unlawful means. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466 (Pa. 1979).

To establish his claim of conspiracy, Plaintiff points to the long history of unfortunate circumstances that Plaintiff alleges was brought upon by Jewish physicians who have taken Plaintiff for an Arab. According to Plaintiff, it started in 1965 when Dr. Naftalin, a psychologist at the medical school attended by Plaintiff and an individual who survived the German concentration camps, noted Plaintiff's "bizarre behavior, emotionality and need of psychotherapy."

In 1969, Plaintiff's brother was killed while fixing a flat tire when "a jew from NYC" hit his parked car. In 1971, Jewish physicians misdiagnosed Plaintiff with "Lou Gueric Disease," a diagnosis he had to live with for seven and a half years before it was corrected. In June, 1979, 1980-81 and 1985 Plaintiff was ordered to take mental examinations by the state boards of medicine of Arizona, District of Columbia and Virginia upon application by Plaintiff to obtain his medical license in those states. According to Plaintiff, it was clear that the orders of mental examinations were orchestrated by the Jewish physicians from Manhattan State Hospital, by forwarding to the state boards untruthful records about Plaintiff. From 1981 to 1995, Plaintiff saw, Dr. DuPont, a specialist in behavioral

modification medicine, who attempted to "forc[e] [P]laintiff to accept the diagnosis of paranoia." According to Plaintiff, because of "the conspiracy against him by the [J]ewish physician from [N]ew [Y]ork [C]ity" he has been unable to earn an income since he left New York City in 1979. On June 1, 1987, Plaintiff alleges that his mother was murdered at Washington Adventist Hospital by a Jewish physician who prescribed medications with dosages which were fatal. On October 13, 1995, Dr. Robert A. Gorkin, a Jewish physician, diagnosed Plaintiff a psychopath or sociopath after spending two minutes with him while Plaintiff was hospitalized for acute stomach ulcer bleeding.

With respect to his dental care, Plaintiff alleges that since he has left New York City in June, 1979, "the New York Jewish Physician have [sic] interferred [sic] in the fabrication of plaintiff's bridge# 3,4,5." Subsequent to his treatment with Dr. Assadzadeh Plaintiff claims that:

On May 24, 1999, Delaware State Dental Society and Dr. Ralston, DDS, have refused to do a Peer Review regarding the dental work done by Dr. Bahar.

On July 27, 1999, Dr. Bond, DDS, after examining plaintiff's oral cavity and mouth, Dr. Bond refused to put in writing the dental findings.

On July 28, 1999, Dr. Mazoch, DDS, refused to write the report about the diagnostic impression taken on plaintiff's mouth.

On December 27, 2000, Dr. Chialastri, DMD, informed plaintiff that she will not treat plaintiff for teeth cleaning which was scheduled by her on January 10, 2001, at 12:00 pm.

On November 28, 2000, Dr. Webster, DDS, refused to do a simple cleaning, scaling and root planning, of plaintiff's teeth. When, plaintiff arrived at Dr. Webster's office, Dr. Webster told that: "He (Dr. Webster) is not going to render any kind of treatment to plaintiff."

On March 5, 2001, at 12:00 pm, plaintiff had an appointment with Dr. Jester, DDS, for oral examination and teeth cleaning. Plaintiff arrived half an hour earlier than his appointment scheduled. After, having to wait one hour in Dr. Jester's office, Dr. Jester at 1:00 o'clock, told plaintiff that: "He (Dr. Jester) is not going to perform a preliminary examination on plaintiff's mouth, and, also, that he is not going to perform a simple cleaning of plaintiff's mouth and teeth."

On April 6, 2001, Patricia M. Duca, of the Nemours Health clinic, informed in writing, that the clinic will not render dental treatment to plaintiff.

Even if each of Plaintiff's allegations is true, Plaintiff fails to demonstrate a conspiracy between Dr. Bahar and Dr. Assadzadeh against Plaintiff. Certainly, if Dr. Bahar and Dr. Assadzadeh combined with the sole intent of subjecting Plaintiff to unnecessary surgery, then Plaintiff's conspiracy claim would be cognizable. However, the Court fails to see how Plaintiff's detailed Appendix containing "the Conspiracy event" in any way demonstrates this fictional scenario. Dr. Bahar's referred Plaintiff to Dr. Assadzadeh for periodontal surgery after a year of intensive treatment, treatment with which Plaintiff was not satisfied. The alleged facts that Jewish psychiatrists misdiagnosed Plaintiff with mental disorders; Jewish physicians misdiagnosed Plaintiff with Lou Gehrig's

disease; a Jewish individual struck Plaintiff's brother with his car; and a Jewish Physician misprescribed medications to Plaintiff's mother causing her death do not lead to an inference that Dr. Bahar and Dr. Assadzadeh agreed to intentionally perform unnecessary surgery on Plaintiff.

Accordingly, Plaintiff's conspiracy claim is dismissed with prejudice.

**D. Intentional Infliction of Emotional Distress**

Plaintiff alleges Dr. Assadzadeh knew that the unnecessary surgical procedures would cause Plaintiff emotional distress and that as a direct and proximate result of the surgery, Plaintiff was injured. Although the Pennsylvania Supreme Court has never expressly recognized the tort of intentional infliction of emotional distress, the Pennsylvania Superior Court has held that a claim for such a tort will lie where "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . ." Hunger v. Grand Cent. Sanitation, 670 A.2d 173, 177 (Pa. Super. Ct. 1996) (quoting Restatement (Second) of Torts § 46). A plaintiff must also establish physical injury or harm. Johnson v. Caparelli, 625 A.2d 668, 671 (Pa. Super. Ct. 1993).

In determining conduct that is "extreme and outrageous" the Restatement tells us that what is prohibited is conduct that is so outrageous in character, and so extreme in degree, as to go

beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" Kazatsky v. King David Mem'l Park, 527 A.2d 988, 994 (Pa. 1987).

According to Plaintiff, it does not make any sense to remove supporting bone from Plaintiff's teeth when his x-ray revealed that there was already approximately 50% reduction of supporting bone. Therefore, Plaintiff argues, the periodontal surgery performed by Dr. Assadzadeh constitutes extreme and outrageous conduct for purposes of liability under the Pennsylvania standard of intentional infliction of emotional distress.

The Court has already determined that no battery occurred. The surgery performed by Dr. Assadzadeh was an attempt to improve Plaintiff's periodontitis. The fact that, according to Plaintiff, the surgery did not accomplish this intended goal, was contra-indicated or was performed without taking necessary x-rays at the most suggests negligence, and does not constitute "conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community." Accordingly, Plaintiff's claim of intentional infliction of emotional distress is dismissed with prejudice.

Neither does Plaintiff make out a case for negligent infliction of emotional distress. See Zernhelt v. Lehigh County Office of Children & Youth Servs., 659 A.2d 89 (Pa. Commw. Ct. 1995) (treating a count titled negligent infliction of emotional distress as a claim for intentional infliction of emotional distress).

To recover for negligent infliction of emotional distress, a plaintiff must prove at least one of the following four elements: (1) that the Defendant had a contractual or fiduciary duty toward him; (2) that Plaintiff suffered a physical impact; (3) that Plaintiff was in a "zone of danger" and at risk of an immediate physical injury; or (4) that Plaintiff had a contemporaneous perception of tortious injury to a close relative. Doe v. Philadelphia Community Health Alternatives AIDS Task Force, 745 A.2d 25, 27 (Pa. Super. Ct. 2000). A plaintiff must also establish the elements of a negligence claim, "i.e., that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff, and the plaintiff suffered an actual loss or damage." Brown v. Philadelphia College of Osteopathic Med., 760 A.2d 863, 868 (Pa. Super. Ct. 2000) (citation omitted). As mentioned above, Plaintiff has failed to produce expert medical

opinion that Dr. Assadzadeh deviated from the applicable medical standard and that such deviation was the proximate cause of the alleged injuries suffered by Plaintiff. Therefore, Plaintiff cannot make out a negligence claim grounded in medical malpractice. Accordingly, Plaintiff cannot demonstrate a case of negligent infliction of emotional distress.

#### **IV. CONCLUSION**

For the reasons stated above, Defendants CDC and Dr. Assadzadeh's motions for summary judgement are granted and Plaintiff's claims are dismissed with prejudice.

An order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GABRIEL G. ATAMIAN, :  
 :  
 Plaintiff, : CIVIL ACTION  
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 v. : No. 00-CV-3182  
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 MOHAMMADREZA ASSADZADEH and :  
 CAMPUS DENTAL CENTER, INC., :  
 :  
 Defendants. :

ORDER

AND NOW, this 9<sup>th</sup> day of April, 2002, upon consideration of Defendant Campus Dental Center's Motion for Summary Judgment (Docket No. 84), Plaintiff's response thereto (Docket No. 86) and Defendant's reply (Docket No. 87) it is hereby **ORDERED** that Defendant Campus Dental Center's Motion is **GRANTED**.

Judgment is entered in favor of Defendant Campus Dental Center and against Plaintiff Gabriel Atamian.

Upon consideration of Defendant Mohammadreza Assadzadeh's Motion for Summary Judgment (Docket No. 94) and Plaintiff's response thereto (Docket No. 97) it is hereby **ORDERED** that Defendant Mohammadreza Assadzadeh's Motion is **GRANTED**.

Judgment is entered in favor of Defendant Mohammadreza Assadzadeh and against Plaintiff Gabriel Atamian.

This case is marked CLOSED.

BY THE COURT:

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RONALD L. BUCKWALTER, J.