

IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00180 COA

JAMES O. RYALS

APPELLANT

v.

DR. J. W. PATCH

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN B. TONEY

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

S. DENNIS JOINER

DAVID T. COBB

ATTORNEYS FOR APPELLEE:

MILDRED M. MORRIS

WALTER T. JOHNSON

NATURE OF THE CASE: PROFESSIONAL MALPRACTICE

TRIAL COURT DISPOSITION: DEFENSE VERDICT

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

A jury rendered a verdict in favor of dentist J. W. Patch, following the trial of a professional malpractice lawsuit brought by James Ryals. This appeal followed in which Ryals argues that the trial court erred in its handling of admissions made by Dr. Patch under Rule 36 of the Mississippi Rules of Civil Procedure, defense experts were not qualified to provide expert testimony, the verdict of the jury is contrary to the overwhelming weight of the evidence, and challenging the quality of the jury's deliberations. We affirm.

FACTS

Over many years, Ryals was an infrequent dental patient of Dr. Patch. During that time Ryals lost most of his teeth due to inadequate dental hygiene. In the early 1970s, Patch diagnosed Ryals with chronic gingivitis and periodontal disease. Ultimately, Ryals required an extraction of the last of his teeth in 1991, concurrently with the installation of dentures. Because of the possibility of infection, Dr. Patch prescribed antibiotics as treatment prior to the extraction procedure. The extractions were made in June 1991, though the precise date is contested.

Some time after the extractions, Ryals became ill. According to his theory of the case, an infection in his mouth had not been entirely abated; the infection was released into Ryals' bloodstream following the extraction. The infection spread, allegedly causing damage to Ryals' liver and heart. Dr. Patch's evidence attempted to refute all those points.

Ryals sued Dr. Patch for negligence in failing to abate the infection prior to the extraction or in extracting the tooth despite the presence of an infection. Ryals also took issue with noncausative aspects of Dr. Patch's practice, such as the quality of his medical record keeping or charting. Following presentation of the case to a jury, a verdict for Dr. Patch was rendered.

DISCUSSION

I. Withdrawing a Rule 36 Admission

During preliminary discovery in this case, Ryals submitted requests for admission to Patch's attorneys. When Patch's attorneys responded to the requests, they "admitted" that Ryals' last teeth were extracted on June 17, 1991. That response was filed on May 26, 1993. On August 18, 1993, Dr. Patch at his deposition stated that the extraction was made on June 27. Trial began on December 2, 1993. We will address the significance of the ten day difference in the extraction dates after first discussing the legal standards for permitting the withdrawal of an admission.

Ryals sought at trial to have the court preclude Dr. Patch from contradicting the admission in its presentation of testimony and other evidence. In response to the trial court's questioning, Ryals' attorney acknowledged that since the deposition of August 18, three and a half months earlier, he was aware of the conflict between the admissions and Dr. Patch's deposition. Dr. Patch's treatment records indicated that the extraction occurred on June 27. The trial court refused to bar testimony that the extraction occurred on June 27 instead of June 17, but did allow the admission answer to be

used to impeach Dr. Patch.

The Mississippi Rules of Civil Procedure provide:

A party may serve upon any other party a written request for the admission . . . of the truth or falsity of any matters within the scope of Rule 26(b) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. *[T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action*

M.R.C.P. 36(a), (b) (emphasis added). In the principal Mississippi case that Ryals cites to us, a trial judge on the hearing date for a summary judgment motion, allowed the withdrawal of a deemed admission, i.e., one compelled by the party's failure to respond timely to a request. *See Skipworth v. Rabun*, 568 So. 2d 289, 290 (Miss. 1990). Two things are instructive. The first is that the supreme court held that an admission could be withdrawn if the record supports the reasons for doing so. The second is that if the record is silent on the basis for the trial court's actions, the supreme court will find an abuse of discretion. *Skipworth*, 568 So. 2d at 291.

Our case is procedurally similar, but not identical. Here the admission was withdrawn during the testimony of the first witness called at trial, while in *Skipworth* the withdrawal was on the day of a hearing on a dispositive motion in the case. The parties disagree as to the appropriate test to be applied once trial has commenced. No Mississippi cases are precisely on point.

Given the similarity of the federal and Mississippi rule, federal authorities are instructive. *See Shell Oil Co. v. Murrah*, 493 So. 2d 1274, 1276 (Miss. 1986). Like the Mississippi rule, the federal version of Rule 36 facilitates conclusive establishment of a matter and is meant to end any dispute. Consequently, the general intent of Rule 36 precludes a party responding to requests for admission from creating a record contradicting those admissions. *See O'Bryant v. Allstate Ins. Co.*, 107 F.R.D. 45, 48 (D. Conn. 1985). However, we must balance this aspect of Rule 36 with its provision allowing withdrawal of admissions. "Although an admission should ordinarily be binding on the party who made it, there must be room in rare cases for a different result, as when . . . through honest error a party has made an improvident admission." 8A Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 2264 (1994). In such cases, in the absence of prejudice to the party seeking to make the admission irrevocably binding, the party that made the improvident admission should at the very least be afforded an opportunity to explain why it was made and withdrawn. *Id.*

The prejudice mentioned in the rule is "the prejudice stemming from reliance on the binding effect of the admission." *Id.* at 577. Ryals argues that this Court should not look at prejudice to him, but instead should apply "a more restrictive standard" by considering whether refusing the withdrawal or amendment of the admission would result in "manifest injustice" to Patch. Some courts have applied that standard when there has been a pretrial order under Rule 16. *See American Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991). Since there was no pretrial order, with the attendant formalities of creating a stipulation focusing the parties on the specific agreed facts and

contested issues, we find that standard inapplicable.

American Automobile Ass'n describes the prejudice required for denying a party the right to withdraw an admission as any "special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission." *Id.* at 1120. In light of the other evidence developed in this case long before trial, the error made by defense counsel in their response to the requests for admission was obvious to Ryals. At the very least, Ryals should have anticipated a dispute concerning the date of the procedure.

It would have been preferable for Dr. Patch to amend his admission before trial. We intimate no conclusion on whether the trial court had to allow Dr. Patch to testify contrary to the admission. Indeed, denying Dr. Patch this right may well also have been within the trial court's discretion. Regardless, due to the lengthy period of time Ryals knew of the discrepancy between the admission and the deposition evidence, there was no special difficulty thrust suddenly and unexpectedly at trial upon a party relying on an admission. Allowing Dr. Patch to present testimony that contradicted his admission was not an abuse of discretion. *Sawyer v. Hannan*, 556 So. 2d 696, 698 (Miss. 1990) (citations omitted).

Alternatively, we also find that the question of the date of extraction was at most a side issue to the allegations of malpractice. Ryals' expert, Dr. Sigurds Krolls, described Dr. Patch as negligent in removing teeth when the patient's gums were swollen, as the swelling indicated the presence of an infection. An antibiotic treatment would be necessary. Dr. Patch administered antibiotics, on June 13 and June 17. The factual question then becomes whether the antibiotics would have had enough time to work if the extraction was on June 17, instead of June 27. Neither Dr. Krolls nor any other witness for Ryals testified that four days was an insufficient time for the antibiotic which Dr. Patch administered to have properly prepared the patient for the extraction. Dr. Krolls also testified:

There are different types of medications that we can use. There are some that can be used just an hour prior to dental work. And there are some others that are more slowly absorbed by the body, and those should be given at least a day ahead of time. . . .

If you have - - if you would have infection that manifests itself in as swelling, then you would try to reduce the swelling before any dental work is done. And this is done by prophylactic antibiotics or antibiotics given.

All that the Plaintiff's expert stated on this issue was that at least a day might be necessary for some antibiotics. Regardless of which extraction date was used, at least four days had passed since Rylas had been treated on June 13. Second, the key to Dr. Krolls' conclusion about malpractice was that the patient told him that his gums were swollen on the day of the extraction. That suggested the infection was still present and the teeth should not have been removed. The jury was never given anything to weigh from the Plaintiff that a four-day delay between starting antibiotics and then removing teeth was too short. They were told by the Plaintiff that regardless of the time that antibiotics were administered, no dental work should have been done until the swelling had abated. Nothing in the discrepancy between extraction dates affected that jury question.

II. Allowing admissions in evidence

Ryals also argues that the trial court should have permitted him to enter the admissions in evidence, rather than restricting him to using them for cross-examination. The admissions were marked only for identification during the impeachment of defense witnesses.

While responses to requests for admissions may generally be admissible, the general rule does not apply when an admission is subject to *de facto* withdrawal. Instead, an analysis of whether the withdrawn admission is admissible must be decided by the rules of evidence governing the use of documents solely for impeachment purposes. The rules provide that extrinsic evidence of a prior inconsistent statement by a witness is admissible in circumstances like those presented here. M.R.E. 613(b). However, the refusal of the court to enter the admissions in evidence was not an abuse of discretion. *See Sawyer*, 556 So. 2d at 698. The jury was fully advised of the fact of the inconsistent admissions. The question is whether the actual inclusion of the document itself in evidence was necessary. The responses to the requests for admission did not note the admission requested. The jury would have had to read the requests for admission and compare those requests to the admissions made. Because of various objections and deletions, the original requests and the responses were severely redacted, and the copies were consequently in less than optimal form. At most, the documents would have been cumulative of the testimony, i.e., the jury could have read the word "admitted" instead of just hearing it read to the witness.

The trial court was well-within its discretion to conclude that copies of the requests and the responses would not aid the jury and that addressing the issue in Patch's examination was sufficient and effective.

III. Qualified Experts

Ryals contends that all three of the experts presented by Patch were unqualified to render the opinions they presented at trial. Ryals challenges two of the experts on the grounds that they were medical doctors without formal dental training and, as such, could not render opinions concerning the standards of care in the dental profession. Ryals also challenges the expert testimony of a dentist concerning the causal relationship between Ryals' dental treatment and a purported heart condition. A witness with specialized knowledge, skill, experience, training or education may be qualified to give expert opinions. M.R.E. 702. "The adjudication of whether a witness is legitimately qualified as an expert is left to the sound discretion of the trial judge." *Couch v. City of D'Iberville*, 656 So. 2d 146, 152 (Miss. 1995) (citations omitted). We conclude that the trial court did not abuse its discretion in permitting the defense experts to give their opinions.

A medical doctor may express opinions concerning the standards of care governing dentists, despite not having a formal dental degree or a license to practice dentistry. *See Harris v. Shields*, 568 So. 2d 269, 272 (Miss. 1990) (citations omitted). Likewise, a dentist may give expert opinions concerning matters with the traditional expertise of medical doctors. "The question is whether the particular witness really is an expert in the field in which he or she is tendered. Formal education is but one route to expertise." *Id.* at 271. The appropriate foundation must be laid to demonstrate that the proffered expert and his opinion will be capable of assisting the trier of fact in deciding the case. M.R.E. 702. That foundation is present for each challenged expert in this case. This is especially so in light of the significant overlap that exists between the medical and dental fields.

One medical doctor testified as an expert in the field of infectious medicine and gave his opinion that the treatment given by Patch was within the standard of care. The doctor was well qualified by virtue of his extensive consultations with dentists to aid in the prevention of infection during dental procedures, his expertise in quelling oral infections, and his significant understanding of whether the action taken by Patch to address infection prior to and following the extractions was effective.

Another medical doctor, while testifying as an expert, rendered no expert opinion concerning anything other than his opinion that Ryals did not suffer from endocarditis—a condition that Ryals attributed to infection from the extractions. This opinion relating to the etiology of a heart condition was within the doctor's expertise as a cardiologist and expert in internal medicine. The doctor did not render an opinion concerning whether Patch's treatment was within the applicable standard of care. He did testify that the American Heart Association has stated that there is no need for a dentist to give prophylactic treatment against infection in cases like that presented by Ryals.

Finally, a dentist who was qualified as an expert in dentistry and oral surgery testified. The dentist gave his opinion that Patch's treatment was within the standard of care. Contrary to Ryals' assertion, the dentist did not testify concerning the causal relationship between Ryals' purported endocarditis and the extractions. The dentist did testify concerning what prophylactic treatment would be necessary to prevent development of an infection that might lead to endocarditis. The testimony was narrowly tailored to the dentist's expertise in performing oral surgery with an eye on preventing infection or other collateral medical risks.

IV. Evidentiary Support for Jury Verdict

Ryals challenges the validity of the jury's verdict and contends that it was contrary to the overwhelming weight of the evidence. We disagree. The evidence presented in this case does not "point overwhelmingly in favor" of Ryals' position at trial. *Burnham v. Tabb*, 508 So. 2d 1072, 1075 (Miss. 1987) (citations omitted). "[T]here is substantial evidence of such quality and weight that reasonable and fair-minded men might reach different conclusions" *Id.* Here, because the verdict was not contrary to the substantial weight of the evidence, the trial judge did not abuse his discretion in denying Ryals' motion for a new trial or *j.n.o.v.* *Id.*

Medical professionals, including dentists, are required as a function of tort law to treat their patients with "such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty" *McCarty v. Mladineo*, 636 So. 2d 377, 380 (Miss. 1994) (citations omitted). Patch's duty to Ryals was to provide "care consistent with the level of expertise [Patch held] himself out as possessing and with the circumstances of the case." *Harris*, 568 So. 2d at 272-73 (citations omitted). These standards are tempered by the understanding that "a dentist is not an insurer of the success of his care and treatment." *Id.* at 273 (citations omitted). In sum, it was Ryals' obligation at trial to "establish the standard of care to which the dentist is held and then show that the dentist's deviance therefrom caused plaintiff's damages." *Id.* (citations omitted).

The question for us is whether Ryals met this obligation with proof of such overwhelming persuasiveness and weight that the jury's verdict cannot be correct. Our review of the record reveals ample evidence both that Patch satisfied the standard of care and that, even assuming that Patch was negligent, Ryals' damages were not proximately caused by that negligence. Accordingly, the jury's

verdict was not contrary to the overwhelming weight of the evidence.

While Ryals presented expert testimony that Patch was negligent and that his negligence resulted in a serious medical condition, contrary proof was provided by the defense. Ryals' witnesses urged the jury to find that Patch pulled teeth in the face of an acute infection without adequately guarding against the spread of that infection to the rest of Ryals' body. Patch's witnesses testified that he exceeded the standard of care in treating what they viewed as a chronic infection that should not have posed an unusually high risk of spreading. In addition, they testified that Ryals either did not suffer from the medical condition he claimed resulted from Patch's treatment or that the condition probably was not a result of the treatment. In view of this conflicting evidence, it was for the jury to evaluate the credibility of the witnesses and weigh the proof. *See Mills v. Nichols*, 467 So. 2d 924, 931-32 (Miss. 1985) (citations omitted). Accordingly, a new trial or *j.n.o.v.* would have been inappropriate and the trial court did not err in refusing to order either.

V. Quality of Jury Deliberations

The jury in this case heard two days of testimony. On the last day of the case, the jury retired for deliberations at 9:22 p.m. and returned its verdict at 11:55 p.m. Ryals contends that allowing the jury to deliberate at such a late hour was error. While Ryals raises the issue before this Court, he failed to do so before the trial court at a moment when the purported risk to fair deliberations could have been effectively addressed. This is an example of an instance in which raising the matter before the trial court is essential. Because it was addressed to the trial court, we are precluded from considering the issue. *T. K. Stanley, Inc. v. Cason*, 614 So. 2d 942, 954 (Miss. 1992) (citations omitted).

THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., AND THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.

BRIDGES, P.J., NOT PARTICIPATING.