97613-9

No. 78494-3

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CHRISTINE CONNER, an individual

Appellant,

v.

JEREMY MEADOWS, D.C.,

Respondent.

PETITION FOR REVIEW

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IDENTITY OF PETITIONER

The Petitioner is Chris Conner, who was the plaintiff below and the Appellant in the Court of Appeals.

COURT OF APPEALS DECISION FROM WHICH REVIEW IS SOUGHT

Review is sought of the attached Opinion filed by the Court of Appeals on August 5th, 2019, No. 78494-3-I. There was no motion for reconsideration.

ISSUES PRESENTED FOR REVIEW

1) In medical malpractice cases, must "proof that injury resulted from the failure of the healthcare provider to follow the accepted standard of care" be done in a particular "format" or "script?"

2) Must "proof" of a standard of care violation be entirely by expert testimony, or may lay testimony be considered as well?

3) Whether a health care provider's own testimony, that shoulder injury is "not a recognized risk" of the chiropractic maneuver he performed upon his patient, supports a finding that such an injury was the result of a "breach of the standard of care"?

4) Whether such testimony----that shoulder injury is "not a recognized risk" of the maneuver---would support, for purposes of the application of *res ipsa loquitor,* a finding that such injury "does not ordinarily occur in the absence of negligence"?

STATEMENT OF THE CASE

Petitioner Chris Conner ("Conner") began seeing Respondent Jeromy Meadows, D.C. ("Meadows") for chiropractic care in August of 2011. On January 3, 2013, after many visits, he injured her right shoulder during a manipulation. CP 55.

Though Meadows' contemporaneous records make no mention of any problem that day (CP 190), he recalled and admitted to the incident at his deposition four and one-half years later, acknowledging that Conner had exclaimed "Ow, this hurts". CP 152. In fact, immediately following the injury, Meadows actually <u>treated</u> the shoulder:

> A. Following the adjustment, I used a percussor to reduce muscle spasm in the shoulder and asked ''Does that feel better?' She said it did.
> Q. Did you use that specifically because of her complaint of the pain during the maneuver?
> A. Correct.
>
> CP 154.

Meadows was asked "point blank," whether he believed he'd injured Conner, and gave this testimony:

> Q. I'll just put it as straightforward as I can; do you believe that her shoulder was injured during your adjustment?
> A. <u>Not as severely as what comes out</u>.
> Q. Tell me what you mean by that, please.
> A. A torn biceps tendon, labral tear and supraspinatus tear, from the mechanics of the positioning <u>doesn't appear likely</u>---
> Q. Okay.
> A. –biomechanically.

> Q. Do you make room for the possibility that there was some sort of injury she felt? Is that what you're intending to indicate?
> A. Yes.
> Mr. Sheldon: Object to the form, belatedly.
> Q. What sort of injury do you believe she may have suffered to her shoulder in the course of this maneuver that you performed, the supine thoracic maneuver?
> A. I was never able to examine it. When I checked her after that adjustment, there was some tightness, muscle spasm in the shoulder, which simply seemed like an exacerbation of an injury that she came to me with in the right shoulder. So sort of like a mild pulled muscle from a muscle that had been injured before.

CP 151.

As previously indicated, Meadows made no contemporaneous record of the injury, examination, findings or treatment that he testified to at his deposition four and one-half years later.

A few days after the injury, Conner presented to Dr. Thomas Degan, an orthopedist who was seeing her for other issues. Dr. Degan did make a contemporaneous noted, from which he testified at deposition:

> "So she had right shoulder pain. The possibilities would be strain of the joint or capsule, strain of the muscle about the shoulder, the muscles about the shoulder. The have tendons which assert on the humerus as the bone of the arm bone of the shoulder and so any strain in the muscle or at the tendon. So she could have had a tendon strain or a tendon tear, those would all be possibilities.
>
> "Anything from a muscle strain or tendon tear would be possibilities in terms of—that's essentially muscles covering the bone of the shoulder. And above that would be the bursa which is a layer between the bone at the top of the shoulder blade and the muscles that cover the bone. That bursa layer is a layer of lubricating tissue. That can become inflamed after an injury and swell and become irritable and produce shoulder pain. And then in the joint itself there could be other issues. There is kind of a suction ring around the socket which could be torn or can wear

out. That could be an issue an issue of injury to the articular or cartilage surfaces.

"All those things can be a possibility. Most common things would be a bursitis or a tendonitis or a muscle strain, but certainly the rotator cuff pathology either being caused or lit up would certainly be significant in the differential." (emphasis added)

CP 171.

Conner's sworn interrogatory responses documented the myriad of issues triggered by the manipulation:

> "After the injury, I had extreme pain going from my dominant right shoulder down to my hand. It felt like fire inside my arm and there was no position that could relieve the pain. It was worse when I lay supine to try to sleep. I had significant restriction to range of motion (ROM) which made the simplest of tasks difficult, such as showering, dressing and feeding myself, accomplishing common household tasks, driving, and much more. I had marked reduction in strength, and lifting only my arm was very painful. I was unable to actively move my right arm across the front of my body until after surgical repair and recovery."
>
> CP 57.

Ultimately, she saw another orthopedist, Dr. Santoro, who performed surgery on March 24th, 2015. CP 61, CP 103.

Before giving his deposition, Dr. Degan had reviewed various materials, including Dr. Santoro's operative note. CP 169. In response to Defense Counsel's direct and unambiguous question, he gave the following testimony:

> Q. Let me ask you this way first, and then we can go back through the things. Do you have an opinion based upon a reasonable degree of medical certainty as to whether Dr. Meadows caused permanent injury to Ms. Conner's shoulder with his chiropractor adjustment on January 3, 2013?
> A. I think the manipulation that caused the shoulder pain and lit up the shoulder. Whether or not the - if it was an injury which

> occurred at that time or at aggravation or as termed lighting up of a previous condition, I can't say, but I think that the manipulation caused injury to the shoulder and caused the pain that she had at the time I saw her. And from what I've been able to garner from my conversations with her **and from the review I've done**, it sounds as though that pain persistent and required treatment. (emphasis added)
> CP 171.

At his deposition, Meadows was specifically asked, and specifically testified that the maneuver he performed (or intended to perform) does not carry any "recognized risk of shoulder injury". CP 149. Indeed, he claimed that he has never injured any other patient with this maneuver, "even people who have had rotator cuff surgery and who are up for rotator cuff surgery". CP 150.

Ultimately, the case was placed into Mandatory Arbitration. CP 9-10. Plaintiff's Pre-Hearing Statement of Proof identified no "retained expert." CP 93-98. The PHSP made clear that Plaintiff intended to rely upon Meadows' admissions. CP 96. Meadows sought and received a continuous of the arbitration, claiming Plaintiff "doesn't have an expert." CP 121. Meadows moved for Summary Judgment on those grounds. CP 14-34. The trial court granted the Motion. CP 204-205. The Court of Appeals affirmed.

ARGUMENT

Respectfully, the Court of Appeals' unpublished opinion is in conflict with the sum of this State's jurisprudence concerns the most fundamental rule governing summary judgment, i.e., that the evidence must be evaluated in the light most favorable to the non-moving party. Here, Conner presented evidence, including her own testimony and that of her expert Dr. Degan, that she suffered a **serious** injury from Meadow's manipulation, which Meadows himself testified would not be a recognized risk of the maneuver.

Whatever **other** interpretation there might be of this admission, the interpretation most favorable to Conner was that, when performed within the standard of care, the maneuver does NOT result in injury.

Further and again: Whatever **other** interpretation there might be of this admission, when cast in the light most favorable to Conner, it was a clear acknowledgement that such injury does not occur in the absence of negligence.

No case holds that proof of medical negligence must come in the form of "magic words", or some "script". It is respectfully requested that this Court accept review to specifically adopt the following language from White v. Kent Medical Center, Inc., P.S., 61 Wn. App. 163, 172, 810 P.2d 4 (1991), in which Division I held that "To require experts to testify in a

particular format would elevate form over substance." The appropriate rule would be whether the sum of the "standard of care" evidence would support a finding of negligence, not whether the correct "script" was dutifully recited.

Further, it is respectfully requested that this Court accept review to specifically adopt the following language from Douglas v. Bussabarger, 73 Wn.2d 476, 478, 438 P.2d 829 (1968):

> In the absence of negligence so obvious that a layman can recognize it, SOME medical testimony is necessary to support a finding that the doctor departed from the standard of reasonable care. Often this requirement becomes a difficult, almost insurmountable obstacle for plaintiffs in malpractice suits when they encounter what has been termed the 'conspiracy of silence'. But none of the cases go so far as to require that malpractice be established exclusively by the testimony of doctors. If the rule is to have any rational justification at all, it should be limited to the requirement that, in those cases in which negligence is not apparent, some medical testimony is necessary to establish the proper standard of care. See Note, Malpractice and Medical Testimony, 77 Harv. L. Rev. 333, 334-36 (1963). This would satisfy the avowed rationale of the rule in that it would prevent laymen from speculating as to what is the standard of reasonable care in a highly technical profession. But certainly it is putting a heavy burden or impediment upon the victim of medical negligence to require him to show the specific acts of negligence (as well as all the other elements of his cause of action if the trial court's words are to be taken literally) exclusively by the testimony of doctors when, frequently, as here, the only doctor who witnessed the allegedly negligent acts was the defendant." (emphasis added)

The Court went on to say, at 73 Wn.2d 481:

> "The jury should have been instructed that the need for expert medical testimony is limited to establishing the proper standard of care that defendant Dr. Bussabarger should have followed. Furthermore, the jury should have been instructed to

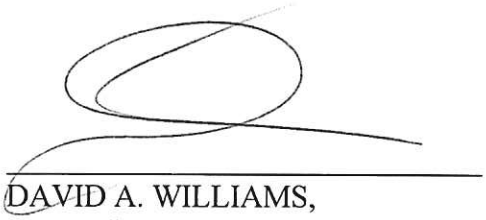
> consider all the evidence in determining whether the defendant failed to meet that standard of care. (emphasis added)

Conner's testimony that Meadow's maneuver on the day in question differed significantly from previous sessions is compelling. Such lay evidence should be admissible.

CONCLUSION

Conner seeks review and reversal, that the case may be decided on its merits.

DATED this 3 day of September, 2019.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTINE CONNER, an individual,

Appellant,

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JEREMY MEADOWS, D.C.,

Respondent.

No. 78494-3-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: August 5, 2019

LEACH, J. — Christine Conner appeals the summary judgment dismissal of her negligence claim against her chiropractor, Dr. Jeremy Meadows. Because Conner did not produce expert testimony establishing that Dr. Meadows breached the standard of care, the trial court properly granted summary judgment. We affirm.

FACTS

Conner regularly visited Dr. Meadows's chiropractic clinic for treatment of shoulder pain. At each visit, Dr. Meadows performed a procedure called a "supine thoracic adjustment," in which he adjusted Conner's shoulder while she was lying on her back. According to Conner, she typically did not feel any discomfort during this procedure. But when Dr. Meadows performed the adjustment on January 3, 2013, Conner heard a popping sound and immediately

felt pain. She attributed this to the fact that her body was not in the correct position when Dr. Meadows performed the adjustment. Conner continued to experience restricted range of motion and pain when lifting heavy objects.

Conner sued Dr. Meadows, alleging that Dr. Meadows negligently injured her shoulder during the adjustment.[1] The parties stipulated to arbitration and submitted prehearing statements of proof. Conner did not identify an expert to testify about the appropriate standard of care for a chiropractor. Instead, Conner stated that "[p]resumably, Dr. Meadows himself will establish [what] the applicable standard of care is to perform the maneuver he performed without injury to the plaintiffs shoulder."

At Dr. Meadows's request, the arbitrator continued the arbitration hearing, and Dr. Meadows moved for summary judgment. He argued that Conner did not have any expert testimony that he breached the standard of care or that his failure to comply with the standard of care caused her injuries. The trial court granted Dr. Meadows's motion. Conner appeals.

ANALYSIS

We review an order granting summary judgment de novo, considering all facts and reasonable inferences in the light most favorable to the nonmoving party.[2] Although the evidence is viewed in the light most favorable to the

[1] Conner also alleged that Dr. Meadows failed to obtain her informed consent for the procedure. Conner does not challenge the summary judgment dismissal of this claim.

[2] Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

nonmoving party, if that party is the plaintiff and she fails to make a factual showing sufficient to establish an essential element of her claim, summary judgment is warranted.[3] Once the moving party shows there are no genuine issues of material fact, the nonmoving party must present evidence to rebut the moving party's contentions.[4] Mere allegations or conclusory statements of fact unsupported by evidence are not sufficient to establish a genuine issue of fact.[5]

Chapter 7.70 RCW governs actions for medical malpractice. The plaintiff has the burden to prove by a preponderance of the evidence the following elements: (1) that the health care provider failed to exercise the standard of care expected of a reasonably prudent health care provider and (2) that such failure was a proximate cause of the plaintiff's injury.[6]

Generally, the plaintiff must establish negligence through the testimony of experts who practice or have expertise in the relevant specialty.[7] These experts must establish that the alleged injury-producing event "probably" or "more likely than not" caused the harm based on a reasonable degree of medical certainty.[8] An exception exists when the negligence is self-evident and describable without

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[3] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[4] Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 169, 273 P.3d 965 (2012).

[5] CR 56(e); Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

[6] RCW 7.70.030; RCW 7.70.040.

[7] Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); McKee v. Am. Home Prods. Corp., 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989).

[8] Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn. App. 155, 163, 194 P.3d 274 (2008) (quoting Merriman v. Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973)).

medical training. "Where the determination of negligence does not require technical medical expertise, such as the negligence of amputating the wrong limb or poking a patient in the eye while stitching a wound on the face, the cases also do not require testimony by a physician."[9]

Conner argues that the trial court erred in granting summary judgment because Dr. Meadows's own deposition testimony provided expert testimony about the standard of care and the proximate cause of her injury. The record does not support Conner's claim.

In response to the summary judgment motion, Conner submitted Dr. Meadows's deposition testimony. Dr. Meadows explained that a supine thoracic adjustment is a "standard chiropractic maneuver" that he had performed many times on Conner. Dr. Meadows testified that on January 3, Conner said, "Ow, that hurt my shoulder." He examined her shoulder and noted, "[T]here was some tightness, muscle spasm in the shoulder, which simply seemed like an exacerbation of an injury that she came to me with in the right shoulder. So sort of like a mild pulled muscle from a muscle that had been injured before." According to Dr. Meadows, Conner had occasionally complained of similar pain when he had performed the same adjustment. In response to Conner's complaint of pain, Dr. Meadows used a percussor—a vibrating device that reduces muscle spasm—on Conner's shoulder. Dr. Meadows asked Conner if she felt better, and she said that she did.

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[9] Young, 112 Wn.2d at 228.

Dr. Meadows testified that the supine thoracic adjustment does not "carry with it any recognized risk of shoulder injury." He also denied that the adjustment could have caused Conner's injury.

> Q: If in fact she did suffer some sort of shoulder injury during the supine thoracic maneuver, would that in your opinion be a breach of the standard of care for reasonably prudent chiropractic care?
>
> . . . .
>
> Q: My question is whether if a supine thoracic maneuver of the type that you were performing in fact occasioned some injury to the shoulder, would you consider that to be a failure of technique or reasonable prudence?
>
> A: I don't think it would be a failure of technique.
>
> Q: Explain that answer for me, please.
>
> A: I've been doing this for 17 years. I adjust thousands of people a year. I've never had somebody with an injured shoulder, even people who have had rotator cuff surgery and who are up for rotator cuff surgery be injured by that type of an adjustment.
>
> . . . .
>
> Q: Fully understanding you do not believe that your maneuver occasioned any injury to her shoulder, if we were to assume that a chiropractor did in fact somehow injure the shoulder during the supine thoracic maneuver, would that be a failure of reasonably prudent chiropractic care?
>
> A: No.
>
> Q: Help me understand that, please.
>
> A: If there is weakened tissue, then I think that's a failure of the biomechanics.

Dr. Meadows also provided the declaration of Dr. Murray Smith, a chiropractor licensed in Washington. Dr. Smith reviewed Conner's medical records and stated, "to a reasonable degree of medical certainty," that Dr. Meadows complied with the appropriate standard of care. Dr. Smith also stated that because "[n]early every patient seeks chiropractic treatment to treat pain," adjustments can result in acute pain but that this pain "does not indicate that the practitioner was negligent."

Here, Conner identifies no genuine issue of material fact about the standard of care. Dr. Smith stated that Dr. Meadows met the appropriate standard of care for a supine thoracic adjustment.[10] And Dr. Meadows denied that the adjustment could have caused Conner's injuries. Though Conner believed she was in the wrong position, expert medical testimony is required to establish the appropriate body position for a chiropractic adjustment. Conner's unsupported speculation is insufficient to establish a genuine issue of material fact. Accordingly, the trial court did not err in granting summary judgment to Dr. Meadows.

Relying on Dr. Meadows's testimony that there is no risk of injury from a supine thoracic adjustment, Conner argues that the injury must necessarily have resulted from Dr. Meadows's negligence. She contends that expert testimony

[10] Conner also offered the deposition testimony of Dr. Thomas Degan, an orthopedic surgeon who subsequently treated her for unrelated injuries. But Dr. Degan testified he had no chiropractic training and no experience in performing chiropractic adjustments. He acknowledged he was unable to testify as to the proper amount of force used in a thoracic adjustment and could not offer any opinion as to the standard of care.

was not necessary because the doctrine of res ipsa loquitur established a prima facie claim for negligence. This argument also fails.

A plaintiff may establish negligence by res ipsa loquitur if the evidence shows that (1) the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injury was caused by something within the exclusive control of the defendant, and (3) the injury is not due to any voluntary action or contribution on the part of the plaintiff.[11] The first element may be satisfied in one of three ways:

> When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, *i.e.,* leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.[12]

If any of these three elements is missing, a presumption of negligence is not warranted. Res ipsa loquitur is ordinarily sparingly applied, "'in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'"[13] Whether the doctrine of res ipsa loquitur applies to a particular case is a question of law that we review de novo.[14]

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[11] Reyes v. Yakima Health Dist., 191 Wn.2d 79, 89-90, 419 P.3d 819 (2018) (quoting Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)).

[12] Horner v. N. Pac. Beneficial Ass'n Hosps., Inc., 62 Wn.2d 351, 360, 382 P.2d 518 (1963).

[13] Ripley v. Lanzer, 152 Wn. App. 296, 308, 215 P.3d 1020 (2009) (internal quotation marks omitted) (quoting Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 792, 929 P.2d 1209 (1997).

[14] Pacheco, 149 Wn.2d at 436.

Here, Conner fails to establish that her shoulder pain could only have resulted from Dr. Meadows's negligence. A chiropractic procedure followed by shoulder pain is not so palpably negligent that it may be inferred as a matter of law. Nor could a layperson's general experience and observation show that it is negligent. Only expert testimony could have established that Dr. Meadows performed the adjustment in the wrong position or in an otherwise negligent manner. Conner presented no such testimony. The doctrine of res ipsa loquitur did not relieve Conner of her burden to present expert testimony.

Affirmed.

Leach, J.

WE CONCUR:

Chun, J.

Appelwick, C.J.

LAW OFFICE OF DAVID A. WILLIAMS

September 04, 2019 - 7:57 AM

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