NO. 72949-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JEANNE HAWKINS AND JULIE WILSON,

Appellants,

v.

EMPRES HEALTHCARE MANAGEMENT, LLC (F.K.A. EVERGREEN HEALTH CARE MANAGEMENT LLC); AND EVERGREEN AT TALBOT ROAD, LLC D/B/A TALBOT CENTER FOR REHABILITATION AND HEALTHCARE

Respondents.

APPELLANT'S REPLY BRIEF

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COMES NOW the Appellants Jeanne Hawkins and Julie Wilson and respectfully reply to the arguments of Respondents herein. Appellants incorporate the argument and authorities included in their Brief by reference as though fully set forth herein.

1. THIS CASE IS DISTINGUISHED BY ITS FACTS FROM THE AUTHORITY CITED BY TALBOT IN ITS RESPONSE

The Response by Evergreen Health Care Management LLC and Talbot Center for Rehabilitation and Healthcare ("Talbot") fails to recognize or address the fact that the Talbot staff created two different sets of medical records for Appellant Jeanne Hawkins ("Hawkins"). The set intended for Hawkins' use changed the physician's instructions from Dr. Chen, while the other set contained his true instructions for Hawkins' care at Talbot and was maintained by them as the genuine medical record. Talbot's statement that "At or near the time of her discharge, a copy of Ms. Hawkins medical records was provided to her daughter, Julie Wilson" is typical. In fact, Talbot provided Ms. Wilson with a copy of the altered records after Hawkins had been discharged from Talbot. Whether or not Talbot "vigorously denies" that it falsified the Hawkins medical records, the court must accept Hawkins allegations about the false records as true for purposes of reviewing this CR 12(b) motion.

Unlike the authority so heavily relied on by Talbot, and unlike Dresden v. Detroit Macomb Hosp. Corp., 218 Mich. App. 292, 294-95, 553 N.W.2d 387, 389 (1996) (Hospital stated it was unable to locate a relevant x-ray), this is not a case where a defendant simply withheld or concealed relevant records or information in response to discovery. Nor did Talbot simply alter the entries in Hawkins' medical records. Here, Talbot kept two different sets of medical records for Hawkins; one which was altered to include false physician's instructions but which tended to exonerate Talbot and one which contained Dr. Chen's actual instructions. The false set was provided to Ms. Wilson, while the unaltered set was maintained by Talbot and kept by it as Hawkins' true medical record.

The "gravamen" of Hawkins' initial lawsuit against Talbot was not "that the alleged over-administration of antibiotics resulted from Talbot's failure to communicate with plaintiff's infectious disease specialist, Dr. Hori" and that Talbot "administered the antibiotic for longer than prescribed or recommended." Indeed, that one of the issues with Talbot's care for Hawkins, but the core of the claims against Talbot was its failure to properly address grossly abnormal laboratory findings that demonstrated Hawkins was in renal failure. Dr. Chen's apparently handwritten notes were totally different in the two sets. The Talbot medical records provided to Hawkins included a note from Dr. Chen that

the abnormal findings were "OK." However, the medical records provided in subsequent litigation against Dr. Chen and maintained by Talbot in their facility showed different instructions from Dr. Chen noted on the lab report. His actual instructions, and the record maintained by Talbot, were to discontinue the antibiotics, which Talbot did not do. Then, importantly, Talbot swore under oath that the false set of records given to Hawkins was the true set of records. The altered set of records provided by Talbot was utilized by Hawkins and her counsel in the negligence litigation against Talbot. In response to specific interrogatories and requests for production of complete and accurate Hawkins medical records, Talbot answered that the Hawkins medical chart had already been provided to Ms. Wilson, without disclosing that part of the record had been altered to conceal Talbot's failure to follow Dr. Chen's instructions. "A party may rely on unambiguous interrogatory answers. *Kurtz* and *Praytor* stand for the principle that a party need not "look behind" its opponent's objective factual assertions. *Praytor,* 69 Wn.2d at 640, 419 P.2d 797 (citing *Kurtz,* 63 Wn.2d 871, 389 P.2d 659)." Jones v. City of Seattle, 179 Wn. 2d 322, 361-62, 314 P.3d 380, 399-400 (2013), as corrected (Feb. 5, 2014) (citing Kurtz v. Fels, 63 Wn.2d 871, 389 P.2d 659 (1964), and Praytor v. King County, 69 Wn.2d 637, 419 P.2d 797 (1966))

In addition, the claims against Talbot in the first litigation had no fact pattern, claim or cause of action which involved dishonesty, misrepresentation or fraud by Talbot. While the parties were adversarial, as are all parties involved in litigation, there was no prior indication that Talbot would engage in such conduct as falsifying records, submit a false sworn statement, or negotiate settlement in bad faith reliance on its wrongful conduct. In King County mandatory alternative dispute resolution, the rule requires that the "attorney in charge of each party's case shall personally attend all alternative resolution proceedings and shall come prepared to discuss in detail and in good faith the following: (i) All liability issues; (ii) All items of special damages or property damage; (iii) The degree, nature and duration of any claimed disability; (iv) General damages; (v) Explanation of position on settlement." KCLCR 16(b)(2)(A) (Emphasis added). Hawkins had every right to rely on Talbot's discovery answers in negotiation and settlement of her claims.

These facts distinguish this case from both Dresden v Detroit Macomb Hosp. Corp. and Kobatake v. E.I. DuPont de Nemours & Co.

2. HAWKINS HAS NOT WAIVED OR ABANDONED ANY CLAIMS WITH RESPECT TO THIS APPEAL.

Hawkins' first assignment of error states that the trial court erred by ruling "that the release language of the settlement agreement...bars Hawkins claims in this litigation." Hawkins did not list each and every separate claim, such as rescission, individually as a different assignment of error since they were all "claims in this litigation." Hawkins can only appeal the order that was actually made by the trial court, not orders that the trial court could have made or should have made and included in its decision. The trial court decision was limited to the scope of the release and the "reliance" element of the fraud claim. The trial court made no specific ruling on Hawkins' rescission claim, but the finding rejecting fraud effectively foreclosed that claim. While an appellate court generally does not address issues that a party neither raises appropriately nor discusses meaningfully with citations to authority; where a party's brief makes perfectly clear what part of the decision below is being challenged, however, the appellate court will overlook the party's failure to specifically assign error to it. CalPortland Co. v. LevelOne Concrete LLC, 180 Wn.App. 379, 321 P.3d 1261 (2014).

To the extent that this Court may consider that Hawkins' assignment of error is technically inadequate, Hawkins would respectfully request that this Court either consider the statement of error to include the claim for rescission or to amend the statement of error number one to add

"..., including the claim for rescission." The Court of Appeals would overlook appellant's technical failure to comply with rule requiring his opening brief to include assignments of error, as appellant appealed only one order of the trial court and the nature of his appeal was clear from his identification of issues and his argument, such that his technical noncompliance with rule was not an impediment to a decision on the merits. Eller v. East Sprague Motors & R.V.'s, Inc., 159 Wn.App. 180, 244 P.3d 447 (2010). To the extent necessary, Hawkins respectfully requests the Court to overlook any technical failure regarding assignments of error in her pleadings.

3. HAWKINS DID NOT ENDORSE DR. CHEN AS HER EXPERT WITNESS IN THE ORIGINAL LITIGATION

Talbot argues that Hawkins' listing of Dr. Chen in her trial court Disclosure of Primary Witnesses is an endorsement of him as "her" expert witness for purposes of the proceeding. The implication is that Hawkins would therefore have known about his true instructions for her care, or been able to determine that the instructions in the altered set of medical records were false.

This position is not supported by the King County Superior Court rules regarding disclosure of "primary witnesses." That rule requires that

"each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial." KCLCR 26(k)(1) Hawkins was required to list "all persons with relevant factual or expert knowledge" and not to list witnesses who would be called at trial. For experts, the rule requires a summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications. KCLCR 26(k)(3)(C). There is no reasonable implication to be drawn from the rule that Dr. Chen was a co-operative, favorable expert witness for Hawkins and that she did not use due diligence in preparing her case.

4. THE RESTRICTED SCOPE OF THE HAWKINS RELEASE DISTINGUISHES IT FROM AUTHORITY RELIED ON BY TALBOT.

Talbot's reliance on authority regarding the scope of a general release is not applicable here. A "general release" is defined as a "broad release of legal claims that is not limited to a particular claim or set of claims, such as those at issue in a pending or contemplated lawsuit, but instead covers any actual or potential claim by the releasing party against the released party based on any transaction or occurrence before the

release." Black's Law Dictionary (10th ed. 2014). The language of the release in this case is a limited release, which is a release of legal claims that is "limited by its terms to a particular claim or set of claims", usually the claim or claims that are the subject of a civil action. Black's Law Dictionary (10th ed. 2014)

The *Kobatake* case is an example of general release language:

> "[Plaintiff] hereby now and fully, finally and forever, releases and discharges DuPont, [and] its ... attorneys from any and all liability, claims, demands, damages or rights of action (hereinafter referred to as "claims") of any kind or character and of any nature whatsoever, whether known or unknown, fixed or contingent, arising from the beginning of time to the present, including but not limited to (1) any and all claims arising from or allegedly arising from or in any way related to [plaintiff's] use of Benlate or any Benomyl-containing fungicide; (2) any and all claims arising from or allegedly arising from or in any way related to Benlate or any Benomyl-containing fungicide or any constituents thereof, and (3) any and all claims which might have been alleged, or which were alleged, in the Civil Action."

Kobatake v. E.I. DuPont De Nemours & Co., 162 F.3d 619, 623 (11th Cir. 1998

The Hawkins/Talbot agreement contained the following language for Hawkins' release of claims against Talbot (emphasis added):

"...from all claims and causes of action, which may ever be asserted by the undersigned, her executors, administrators, successors, assigns or others, whether such claims or causes of action are presently known or unknown, which in any way arise out of the facts stated in the Amended Complaint in King County Superior Court, Cause No. 08-2-324559, or which in any way involve the diagnoses, care and treatment of Jeanne Hawkins during her stay at Talbot Center for Rehabilitation and Healthcare from July 9, 2007 to July 30, 2007." CP 17

"This release is intended to cover any and all future injuries, damages or losses not known to the parties to this agreement, but which may later develop, or be discovered in connection with the above referenced diagnoses, care and treatment, or failure to diagnose or treat." CP 17

"The undersigned acknowledges that she has accepted the above-referenced consideration as full compensation for any and all injuries, damages and losses (past, present and future, known or unknown), which were or ever could be claimed in connection with the above referenced diagnosis, care and treatment, or failure to diagnose or treat." CP 18

The agreement also contained the following, limited, non-reliance clause:

"The undersigned warrants that no promise or inducement has been offered except as herein set forth and that this release is executed without reliance upon any statement or representation by the Parties Released or their representatives concerning the nature and extent of the injuries, and/or damages, and/or legal liability therefor." CP 18

This action is for acts and omissions which occurred after Jeanne's discharge from Talbot Center. Also, the false set of records could not be "involved" in Jeanne's diagnosis, care or treatment since an additional, complete and unaltered set of records was maintained by the Talbots and produced as the Hawkins medical record on demand by other parties.

5. HAWKINS RELIANCE WAS REASONABLE UNDER THE CIRCUMSTANCES OF THIS CASE

The "no reliance" clause in the *Kwiatkowski* case is very different from the language of the Hawkins settlement agreement. In Kwaitkowski, the agreement read that "Each party acknowledges that it has had the opportunity to conduct an investigation into the facts and evidence relating to the Released Claims and that it has made an independent decision to enter this AGREEMENT, without relying on representations of any other party. Each party assumes the risk that the facts or evidence may turn out to be different than it now understands them to be and agrees to be bound

by this AGREEMENT notwithstanding the discovery of new or different facts or evidence." Kwiatkowski v. Drews, 142 Wn. App. 463, 473-74, 176 P.3d 510, 515 (2008) The Court held that according to this provision, the parties: (1) had the opportunity to conduct an investigation; (2) had made an independent decision to enter into the settlement agreement *without* relying on representations from any other party; (3) each assumed the risk that the facts and/or evidence could differ from what they understood at the time they entered into the settlement agreement; and (4) were bound by the settlement agreement, "notwithstanding the discovery of new or different facts or evidence." Id.

This is quite different from the no-reliance language of the Hawkins' agreement which stated that she did not rely "upon any statement or representation concerning [Talbot's] legal liability." The scope of this clause is specifically limited to statements concerning Hawkins injuries, her damages, and any legal liability therefore.

The Talbot discovery answers about the Hawkins medical records have nothing to say regarding her injuries, her damages, or their legal liability for the claims in that litigation. The false statements in the altered record related to Dr. Chen's legal liability. Hawkins did not assume any risk that the facts or evidence could differ from what she understood at the

time; she did not agree to be bound by the agreement notwithstanding the discovery of new or different facts or evidence.

6. THERE IS NO IDENTITY OF CLAIMS BETWEEN THIS LITIGATION AND THE PRIOR NEGLIGENCE CLAIMS.

For res judicata to preclude a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). The party asserting res judicata bears the burden of proof. *Hisle,* at 865, 93 P.3d 108. Res judicata applies to every point that properly belonged to the subject of the litigation, "and [that] the parties, exercising reasonable diligence, might have brought forward at the time." Zweber v. State Farm Mut. Auto. Ins. Co., 39 F. Supp. 3d 1161, 1165-66 (W.D. Wash. 2014)

Here, Hawkins exercised reasonable diligence in pursuing her claims, submitted specific interrogatories and requests for production to Talbot to investigate the circumstances of her treatment.

Regarding the second element of this four-part res judicata test, to determine whether two causes of action are the same, the Court should

consider whether (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts. Richert v. Tacoma Power Util., 179 Wn. App. 694, 704-05, 319 P.3d 882, 888 review denied sub nom. Richert v. City of Tacoma, 337 P.3d 326 (Wn. 2014)

Talbot's recitation of similarities between the initial complaint for negligence and this action does not carry its burden. It is obvious that the background facts would be the same. However, the evidence in this fraud action would not be "substantially the same" as the claims for physical injury resulting from medical negligence. There were no factual allegations in the initial action regarding falsifying the medical records or fraud in supplying them to Hawkins and the evidence regarding these events would not have been a part of the action. Likewise, there is no common "nucleus of facts" between the negligence claims and the fraud claim. The required elements of each claim are different and would depend upon entirely different facts. Indeed, Talbot admits in its footnote #7 that "Jeanne Hawkins is not claiming (nor could she claim) that her physical injuries were caused by Talbot's alleged fraud. Her injuries were caused by the over-administration of antibiotics." Therefore, there is no

identity of the subject matter of the claims or the causes of action and res judicata does not apply.

For all of the above reasons, the Court should grant Hawkins' appeal.

Submitted this 24 day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that I mailed, or caused to be mailed, a copy of the foregoing brief postage prepaid, via US Mail and e-mail at mestok@lindsayhart.com on the 26th day of August, 2015 to the following counsel of record at the following address:

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