

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 BRIEF

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I. APPELLANT’S STATEMENT OF THE CASE

A. Introduction

The core of this appeal is the extent to which the “right to rely” element of a fraud claim and “reasonable reliance” apply in the context of settlement of a healthcare personal injury case which was settled but where the respondent nursing home Talbot falsified medical records which minimized its liability. False laboratory reports for appellant Hawkins were created using a “cut and paste” technique to fix blame on the attending physician, then provided to appellant as part of her medical records. In the course of litigation, the respondent nursing home gave sworn testimony in answering interrogatories that the false records provided to appellant were true and correct.

Appellant relied on the false records in reaching a mediated settlement of her personal injury claims. The settlement agreement included release language, but the scope of the release was limited by its terms to personal injury claims stated in the complaint or related to Hawkins diagnosis, care and treatment.

In subsequent litigation against Hawkins’ attending physician, the discrepancy between the false Talbot records given to Hawkins and the actual medical chart record kept by Talbot was discovered. Hawkins

obtained a declaration from the physician establishing that the records in question were incorrect, retained a documents expert to confirm the “cut and paste” technique used to alter the reports, and also personally reviewed her original medical record on the Talbot site.

Following the investigation, Hawkins filed her action in the trial court to set aside the settlement agreement and vacate the related order for dismissal. In addition, Hawkins included a request for a declaratory judgment that, if the trial court did not set aside the settlement, she could pursue independent actions against Talbot based on the falsity of the medical record. Talbot brought a CR (12)(b) motion to dismiss before answering the Hawkins petition.

The trial court ignored the limiting language of the settlement agreement and held that it barred Hawkins’ claims in this action. The trial court held that Hawkins declaratory judgment was barred by res judicata and also found that it was “questionable, as a matter of law, whether Plaintiff (Hawkins) had the right to rely on the alleged falsifications and misrepresentations.”

The trial court should not have condoned Talbot’s perjury and falsification of medical records. This Court should reverse and remand.

B. Assignment of Error

1. The trial court erred in ruling that the release language of the settlement agreement in Hawkins personal injury case against Talbot bars Hawkins claims in this litigation.

2. The trial court erred in ruling that the Hawkins petition for declaratory judgment was barred by the doctrine of res judicata.

3. The trial court erred by ruling that, as a matter of law, it is questionable whether, as a matter of law, Hawkins had the right to rely on the alleged falsifications and misrepresentations, citing to Kwiatkowski v. Drews, 142 Wn. App. 463, ¶¶ 30-35, *review denied*, 164 Wn.2d 1005 (2008).

C. Issues Presented

1. Did the trial court err in disregarding the standards of CR 12(b) to dismiss Hawkins' claims herein?

2. Did the trial court err in disregarding the specific, limiting language of the release provision of the settlement agreement and apply it as a general release to dismiss Hawkins' claims?

3. Did the trial court err in sua sponte deciding the question of fact as to whether or not the Hawkins' current claims were "related to" her

diagnosis, treatment and care at Talbot, denying Hawkins an evidentiary hearing on the issue?

4. Did the trial court err in ruling that Hawkins claims, including her action for declaratory judgment in this action were barred by the doctrine of res judicata?

5. Did the trial court err in ruling, as a matter of law, that Hawkins would not be able to establish a right to rely upon the falsified documents and perjured discovery provided by Talbot, pursuant to the authority of Kwiatkowski v. Drews, 142 Wn.App. 463, 176 P.3d 510 (2008)?

6. Is reversal and remand required, where the trial court has erroneously dismissed an action in response to a CR 12(b) motion?

D. Statement of the Facts

(For purposes of convenience in this statement, Plaintiffs are referred to as “Hawkins” and “Wilson”; Defendants collectively are referred to as “Talbot”. No disrespect is intended to any party.)

The Defendants EmPres Healthcare Management LLC (f.k.a. Evergreen Healthcare Management LLC), and Evergreen at Talbot Road, LLC , (“Talbot”) own, manage, operate or otherwise control a skilled nursing facility known as Talbot Center for Rehabilitation and Healthcare at 4430 Talbot Road South, Renton, WA. (“Talbot Center”) CP 2

In approximately mid-June of 2007, Hawkins underwent surgery at Valley Medical Center. Shortly after her surgery, Hawkins developed an infection which required further hospitalization at Valley Medical Center. CP 3 On July 9, 2007, Hawkins was discharged from Valley Medical Center directly to the Talbot Center with a diagnosis of MRSA infection due to spinal fusion. Hawkins was to be given a combination of the prescription antibiotics Gentamycin and Vancomycin to combat her infection. CP 3

Hawkins' attending physician at Talbot Center was John Chen, M.D. CP24 All medical charts and patient care records for Dr. Chen's patients at Talbot were maintained by the Talbot staff. CP 24 He did not maintain any separate charts or notes. CP 24

On July 13, 2007, Hawkins' lab work reported to Talbot revealed "Vancomycin trough critically high at 18.7. Called MD." The next day on the 14th, the Gentamycin peak showed a high result at 15.2. Also on the 14th, Hawkins creatinine results were 2.3 (normal being considered 0.4 – 1.5). Despite these critically high lab results, Talbot continued to administer Gentamycin and Vancomycin to Hawkins at the apparent direction of Dr. Chen. CP 3

On July 29, Hawkins expressed a desire to go to the hospital but was told that she would have to wait until Talbot Center could speak with

a physician. Dr. Chen approved the transfer to Valley Medical Center and Hawkins was transported to Valley on the following day. CP 4; CP38 Hawkins' daughter, Wilson, was not informed that her mother had been transferred to Valley Medical Center until she arrived at Talbot Center for a visit that evening. CP 4 At that time, Wilson requested a complete copy of Hawkins medical record from the Talbot staff, which was provided after a lengthy wait directly to her husband, Greg Wilson, by employees or agents of Talbot Center. CP 4

From that date, Wilson maintained possession of the record until it was given to Hawkins attorney, Thomas Burke. CP 4 No changes or additions were made to Ms. Hawkins' medical record while in the possession of Ms. Wilson CP 4

On July 30, 2007, Hawkins was examined by emergency room physicians at Valley Medical Center who diagnosed her with acute renal failure due to gentamicin and/or vancomycin nephrotoxicity and acute tubulonecrosis. Hawkins would spend approximately the next year and a half treating symptoms that her doctors attributed to the overdose of antibiotics and the resulting kidney failure. CP 4

1. Procedural History

These circumstances gave rise to litigation filed against Talbot in the King County Superior Court, Cause No. 08-2-32455-9 KNT. CP 4

The statement of facts in that complaint related solely to Hawkins treatment with Gentamycin and Vancomycin. There are no facts alleged regarding alteration or substitution of medical records, no allegations of dishonesty, fraud or misrepresentation. CP 62-64

In that case, Hawkins and Wilson brought the following claims:

- a. General Negligence CP 64
- b. Statutory Negligence Violations of Federal Law CP 65
- c. Statutory Negligence Violations of Ch. 74.34 RCW CP 66
- d. Statutory Negligence Violations of Ch. 72.42 RCW and WAC 388-97 CP 67
- e. Statutory Negligence Violations of Ch. 70.129 RCW CP 67
- f. Medical Negligence CP 68
- g. Informed Consent CP 68
- h. Corporate Negligence CP 68
- i. Respondeat Superior CP68
- j. Consumer Protection Act CP68

There were no claims for failure to keep accurate records, falsifying medical records, dishonesty, fraud or misrepresentation. CP 64-68

In that litigation, Plaintiffs submitted interrogatories and requests for production to Talbot Center for a complete copy of Ms. Hawkins medical records and charts along with other documents. CP5 Talbot Center responded under oath that all medical records had been provided to Ms. Hawkins directly by Talbot Center. CP5 Throughout the litigation, Hawkins and Wilson relied upon the representation of Talbot Center and its attorney that the medical records provided to her by Talbot were complete and accurate. CP5

That case was settled by the parties on July 29, 2010 by a written settlement agreement. CP4 That agreement contained the following language for Hawkins' release of claims against Talbot:

“...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 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

The document further provided that the Release and Settlement Agreement “shall be construed and interpreted according to the laws of the State of Washington.” CP 20

One of the factors considered by Hawkins in negotiating and accepting the settlement involving Talbot was the comparative negligence of Talbot and the negligence of her attending physician, Dr. Chen. CP5 The records originally provided by Talbot concerning Hawkins care indicated that Dr. Chen had failed to monitor laboratory test results and failed to discontinue highly toxic medication that she was receiving. CP5

One of the defenses that Talbot was asserting was that Talbot staff was simply following Dr. Chen's physician's orders. CP5

After the lawsuit with Talbot had settled, Hawkins filed a lawsuit against Dr. Chen. That action was filed in the King County Superior Court, Cause No. 10-2-25255-0 KNT. CP5 As part of discovery in that litigation, Dr. Chen's defense attorney requested and obtained copies of the Hawkins medical records from Talbot Center. CP 5

At that point, Ms. Hawkins did not obtain additional copies of her medical records as she still had possession of her chart from the Talbot litigation. CP5

At the mandatory mediation on November 11, 2011, it was discovered that the records obtained by Wilson, directly from the Talbot Rehabilitation Center in August of 2007 were not identical to the records provided to Dr. Chen's attorney by Talbot in discovery. CP 5 Moreover, there were material differences between the two sets of records which significantly affected the facts relied on in Hawkins' settlement with Talbot. CP 6

On July 25, 2012, Dr. Chen executed a declaration stating that the copy of the medical records provided to Hawkins was not accurate and did not contain the information and orders that he had actually provided to Talbot. CP 6 These Hawkins documents included a lab report dated July

24, 2007 reporting “HIGH” Creatinine which bears a handwritten note “O.K. John Chen” CP36 The copy of that lab report, but dated July 23, 2007 provided to Dr. Chen’s attorney by Talbot has a handwritten note directing Talbot to stop administering the antibiotics, push fluids and recheck Hawkins’ blood levels in 3 days. CP 34 A physician’s order of July 23 repeated his instruction to stop administering the antibiotics. CP28

Dr. Chen denied making the note on the July 24 report, because Hawkins blood level was not normal or “O.K.” CP 25 He did not know how or why that document was created or became a part of Hawkins medical record. CP28

After confirmation of the discrepancies between the two sets of medical records by Dr. Chen, Wilson reviewed her mother’s original medical records on site at Talbot in October 2012. She confirmed that the records sent to Dr. Chen’s attorney were different than the records she received. CP 6 Specifically, the records provided to Dr. Chen indicated that on July 23, 2007, Dr. Chen had ordered the stop of IV Vancomycin and Gentamycin and to push fluids in response to abnormal lab results. CP 6 In contrast, the July 24 record Wilson was provided by Talbot indicated that Dr. Chen simply wrote “ok” in response to the same lab results. CP6

Portions of Dr. Chen's true record had either been omitted or was purposefully altered when Wilson was provided a copy of her mother's medical records on August 2, 2007 at Talbot Center. CP6 When examined the "O.K. John Chen" entries on each of the documents, it was found that the slight deviations that exist in the natural variation of writing are not present in the "O.K. John Chen" entries. CP 99

There are significant similarities duplicated in the entries in the records. The writing and the background noise can be overlaid and are in alignment. It was determined that the entries share a common source and were mechanically or electronically cut from a source document and pasted onto the intended documents. CP99

Although this particular Dr. Chen record was present upon Wilson's request to look at Hawkins' records on October 18, 2012 – well after the lawsuit with Talbot had already been settled, an altered page had been substituted and provided to her in 2007. CP6 The records given to Ms. Hawkins were willfully and intentionally changed, altered or falsified to make it appear that Dr. Chen was primarily negligent in the case, when in fact it was the staff at Talbot who did not follow his instructions for Ms. Hawkins care. CP6

Ms. Hawkins' attorney drafted a letter to Talbot on December 20, 2012 outlining the discrepancies within the records and requesting a new

mediation process. CP 7 Talbot's response dated January 29, 2013 did not deny that there were discrepancies. Instead, their response indicated that the discrepancies were "innocent and immaterial". CP 7

Because of Talbot's refusal to mediate these claims, Hawkins filed this lawsuit. Hawkins brought claims for fraud and misrepresentation based on the falsified records that were provided by Talbot and which were relied on by Hawkins. CP 7, 8. Based on Talbot's fraud or misrepresentation, Hawkins also brought claims to cancel the settlement agreement and vacate the order of dismissal. CP 8,9

In addition and in the alternative, should the trial court not cancel the settlement, Hawkins's petition included a declaratory judgment action to establish that the settlement agreement did not apply to independent causes of action based solely upon the falsified records. CP 9 These claims included action for breach of federal and state laws, including many of the same statutes and regulations from the first Hawkins/Talbot litigation. CP 10

Before answering the petition, Talbot brought a motion to dismiss under CR 12(b). CP 43 In the motion, Talbot alleged that Hawkins was merely "seeking to re-litigate the same personal injury claim..." CP 43 The motion argued that Hawkins' fraud claim must be dismissed because

she had no “right to rely” as a matter of law on the truthfulness of Talbot’s interrogatory answers. CP 47

The motion relied heavily on Kwiatkowski v. Drews, 142 Wn.App. 463, 176 P.3d 510 (2008) as authority for the proposition that Hawkins was barred as a matter of law from asserting that she had a “right to rely” on Talbot’s representations. CP 48, 49 The motion further argued that the settlement agreement released any and all causes of action against Talbot, including any based on the falsified records. CP 53, 54

Hawkins responded to the motion by alleging that the Kwiatkowski case was distinguished from this case on its facts and the law. CP 89, 90 Hawkins also argued that the motion should be denied because the settlement agreement was not a general release, was limited in its scope and did not apply to the facts and claims in this case. CP 95, 96

After hearing argument on the motion on December 19, 2014, the trial court granted the Talbot motion and dismissed the entire Hawkins’ case with prejudice. CP 112 The trial court ignored the limiting language of the settlement agreement and held that it barred Hawkins’ claims in this action. The trial court held that Hawkins’ declaratory judgment was barred by res judicata and also found that it was “questionable, as a matter of law, whether Plaintiff (Hawkins) had the right to rely on the alleged

falsifications and misrepresentations.” CP 112 Hawkins filed a timely appeal of this order.

II. ARGUMENT

A. Standard for Review

This Court applies a de novo review to a dismissal under CR 12(b)(6) for failure to state a claim upon which relief can be granted. Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc. 123 Wn.App. 863, 866-867, 99 P.3d 1256, 1258 (2004); Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

This Court also reviews questions of law, including the interpretation of contract provisions, de novo. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The Court will apply fundamental contract construction rules when interpreting a contract and to the extent it interprets contract provisions, the de novo standard of review applies. Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc., 166 Wn.2d 475, 487, 209 P.3d 863 (2009); Kim v. Moffett, 156 Wn.App. 689, 697, 234 P.3d 279 (2010).

B. Standard for Resolution of CR 12(b)(6) Motions to Dismiss

Washington law is clear that courts should “dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery.” Cutler v. Phillips Petroleum Co. 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Under this rule, a Hawkins's allegations are presumed to be true, and “a court may consider hypothetical facts not part of the formal record.” *Id.* CR 12(b)(6) motions should be granted “sparingly and with care” *Id.* (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). Such motions should generally be granted “only in the unusual case in which the Hawkins's allegations show on the face of the complaint an insuperable bar to relief.” San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

“Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the Hawkins cannot prove ‘any set of facts which would justify recovery.’ ” Kinney v. Cook, 159 Wash.2d 837, 842, 154 P.3d 206 (2007) (quoting Tenore, 136 Wash.2d at 330, 962 P.2d 104). All facts alleged in the complaint are taken as true, and the Court may consider hypothetical facts supporting the Hawkins's claim. *Id.* “Therefore, a complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery.” Hoffer v. State, 110 Wash.2d 415, 420, 755 P.2d 781 (1988) (citing Lawson v. State, 107 Wash.2d 444, 448, 730 P.2d

1308 (1986); Bowman v. John Doe Two, 104 Wash.2d 181, 183, 704 P.2d 140 (1985)).” FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc. 180 Wn.2d 954, 962-963, 331 P.3d 29, 34 (2014)

In determining whether a complaint fails to state a claim for relief under CR 12(b), Washington courts apply a less exacting factual requirement than the federal courts. While federal courts require facts demonstrating the “facial plausibility” of a claim, Aschcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), a complaint is factually sufficient in Washington if facts could be established to support the allegations in the complaint. McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 101, 233 P.3d 861 (2010). In reviewing and determining the questions of fact, the Court considers the facts and inferences, both real and hypothetical, in the light most favorable to the Hawkins. Davenport v. Washington Educ. Ass'n, 147 Wn.App. 704, 715, 197 P.3d 686, 692 (2008)

The fact that the medical records were falsified is established by the declaration of Brett M.D. Bishop, an expert documents examiner. It is undisputed that Hawkins did rely on those false records.

Therefore, a CR 12(b)(6) motion is determined by a consideration of all possible facts that could be established and is not limited to a review of facts stated in the Petition or whether they are admissible at trial. All

facts in the Petition are deemed to be true for purposes of this motion, as are all other hypothetical facts which could be established, without consideration of a burden of proof or ultimate admissibility at trial.

The scope of the settlement agreement is specific and narrow. The release terms only apply to claims based on the facts stated in the complaint or related to the diagnosis, treatment and care of Hawkins while a patient at Talbot Care. There was no argument in the trial court that any facts in the complaint applied to these claims. Therefore, a question of fact would remain as to whether or not the false records were related to the diagnosis, treatment and care provided to Ms. Hawkins at Talbot Care. Hawkins asserts that they did not as: (1) they were false and not used to provide treatment or care; (2) Talbot maintained its regular medical record for Hawkins which were used for treatment and care; and (3) Hawkins had already been discharged from Talbot to Valley Medical when the false records were provided to Wilson. Therefore, there are possible facts that could be established to support Hawkins claims herein and the trial court erred in granting the motion.

C. Hawkins' claims are not released by the terms of the settlement agreement

The Talbot argument on this issue completely ignores the fact that the Agreement was induced by fraud and that the terms and conditions it

contains are not enforceable. Talbot argues without authority that medical records falsified after the patient was discharged from care are in some way related to diagnosis, care and treatment provided to that patient, even when a second set of accurate set of records is maintained and kept by the health care provider.

Here, the plain language of the Agreement negates the Talbot argument. The settlement agreement releases any claims or causes of action, known or unknown, which “in any way involved the diagnoses, care and treatment of Jeanne Hawkins during her stay at Talbot Center.” (Emphasis added) This action is for acts and omissions which occurred after Jeanne’s discharge from Talbot Center. Also, the false set of records was not “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 record on demand by other parties. It is clear that this action is not subject to the release language in the Agreement.

The Eleventh Circuit authority relied on by Talbot is easily distinguished from this case. In Kobatake v. E.I. Dupont de Nemours & Co., 162 F.3d 619, 623 (11th Cir. 1998), the trial court held that these claims were barred by the general release. The Eleventh Circuit affirmed, holding that if Plaintiffs affirmed the settlement, their fraud-based claims were barred:

When “[a] contract provides plainly that it was the intent of the parties to settle and effect a resolution of all claims and disputes of every kind and nature among them...; that it is the entire agreement of the parties; and that they released and waived all claims against each other of any kind whether known or unknown,...no grounds at law or in the contract itself exist to open [it]...” (Emphasis added)

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 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

The document further provided that the Release and Settlement Agreement “shall be construed and interpreted according to the laws of the State of Washington.” CP 20

The Agreement herein is not a general release, and is very limited in its scope and application. The terms of the Agreement are no bar to this litigation and the trial court erred by ignoring the specific terms contained in the entire document.

D. Hawkins had a “reasonable right to rely” on the Talbot Medical Records for purposes of a CR 12(b) motion

Talbot’s motion is a challenge to the pleadings, not the ultimate factual determination of whether or not Hawkins had a “right to rely” on

the information contained in her falsified medical records. The rules of pleading are not the same as the elements of proof to prevail on a claim of fraud.

The Washington rules of civil procedure merely require that a complaint provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” CR 8(a). The complaint simply must give sufficient notice to the Talbot of the nature of the claim being brought. Lightner v. Balow, 59 Wn.2d 856, 858, 370 P.2d 982 (1962) (“[P]leadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted.”). The Courts liberally construe pleading requirements in order “to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process.” State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. CR 9(c). “Particularity” requires that the pleading apprise the Talbot of the facts that give rise to the allegation of fraud. Adams v. King County, 164 WN.2d 640, 662, 192 P.3d 891, 902 (2008). Those facts are included in the Hawkins’ petition.

In order to insure that the Superior Court Civil Rules are construed, in accordance with CR 1, to achieve “just, speedy, and inexpensive” determinations, their application must be governed by pragmatic,

nontechnical considerations whenever possible. Kohl v. Zemiller, 12 Wn.App. 370, 529 P.2d 861 (1974).

Here Hawkins' right to rely on the accuracy of the falsified records is based on the facts that the records were created and kept by the Talbots; that the falsification was done while the records were in the Talbots possession; that Talbot and their legal counsel had a duty under CR 26(g), CR 33(a) and CR 34 to provide complete and accurate responses; and that the Talbots stated under oath in their interrogatory answers that the responses and documents provided to Wilson at Talbot were true.

The Talbot argument based on Kwiatkowski v. Drews 142 Wn.App. 463, 479-480, 176 P.3d 510, 518 (2008) that the "adversarial nature" of the parties bars any reliance as a matter of law is inaccurate. That case, and the authority it cites, are clearly distinguished from this action as the basic claims were based upon misrepresentation or fraud and do not address a situation in which there was a specific duty to disclose the misrepresentation. In the Guarino case, cited in Kwiatkowski, the Court considered the contention that the adversarial context in which the transaction occurred foreclosed the appellants' right to rely on the respondents' statements or omissions. The respondents in Gaurino urged the appellate court, as they successfully urged the trial court below, to rely upon an Eleventh Circuit case, Mergens v. Dreyfoos, 166 F.3d 1114 (11th

Cir.1999), *cert. denied*, 528 U.S. 820, 120 S.Ct. 63, 145 L.Ed.2d 55 (1999). The Eleventh Circuit court held in that case that reliance on information provided by the inside buyer in a securities transaction was unjustified because of the adversarial context in which the defendant corporation purchased the Hawkins stockholder's shares. Mergens, 166 F.3d at 1118–19. The court noted that “No Washington case law is cited for this proposition.” Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 119, 86 P.3d 1175, 1188 (2004)

The Court considered Mergens, and its underlying authority, Pettinelli v. Danzig, 722 F.2d 706, 709 (11th Cir.1984) and Jankovich v. Bowen, 844 F.Supp. 743 (S.D.Fla.1994), for the proposition that an adversarial relationship conclusively bars reliance. Both Mergens and Jankovich relied on Pettinelli to support the position that an adversarial relationship bars justified reliance in securities fraud cases. The Court held that Pettinelli and Jankovich are both distinguishable on the same grounds as Mergens. “In neither case did the Agreement protect the appellants' shareholder rights. Also, the underlying dispute differed: the securities transactions in Pettinelli and Jankovich were part of the underlying dispute leading to the Agreements at issue; and finally, in contrast to the release provision in the Agreement at issue here, the release provisions in the Pettinelli and Jankovich Agreements expressly barred all claims arising up

to the date of the Agreements.” Guarino , at 122 Wn.App. 95, 120-122, 86 P.3d 1175, 1188 – 1189. The Court found that “As a matter of law, Kwiatkowski cannot assert that he *reasonably* relied on the Banks' performance of their fiduciary duties when whether the Banks breached their fiduciary duties was the very issue being resolved in the adversarial relationship. Kwiatkowski, at 142 Wn.App. 463, 479-480, 176 P.3d 510, 518. (Emphasis added)

Here, the underlying action was not based on any allegation of fraud or misrepresentation, only negligence for personal injury. The specific language of the release is limited to “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. 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 concerning the nature and extent of the injuries and/or damages, and/or legal liability therefor.” (Emphasis added)

There is no release for falsifying medical records or committing fraud. The Hawkins had a right to rely on the accuracy of the Talbot statements and records provided under the rules of civil procedure and signed under penalty of perjury.

Additionally, the Hawkins had an independent statutory right to rely upon the accuracy of the falsified medical records. WAC 388-97-1720 provides that:

(1) The nursing home must:

(a) Maintain clinical records on each resident in accordance with accepted professional standards and practices that are:

(i) Complete;

(ii) Accurately documented;

And

(b) Safeguard clinical record information against alteration, loss, destruction, and unauthorized use.

For these reasons, the Hawkins had a statutory right to reasonably rely on the information contained in the falsified records.

For all of the reasons stated above, the trial court erred in finding it “questionable” whether Hawkins could establish the “reliance” element of her fraud claim.

E. The doctrine of res judicata does not apply to Hawkins’ 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. Richert v. Tacoma Power Util., 179 Wn. App. 694, 704, 319 P.3d 882, 888 (2014). Talbot makes the argument that because some of the background facts leading up to the fraud were also alleged in a prior pleading, this case is transformed into “new claims for personal injury arising out of Jeanne Hawkins’ care and treatment at Talbot Center.” This argument is without merit.

There is no identity of the subject matter or the causes of action between the two actions. The falsification of Hawkins’s medical records was not a part of her diagnosis, care or treatment at Talbot. In fact, at the time the records were altered, Hawkins had already been transferred to Valley Medical Center and admitted as a patient there; her “stay” at Talbot had terminated. There was no allegation regarding falsification of medical records or fraud in the prior litigation and no allegation of negligent care, diagnosis or treatment in this case. The Talbot falsification of the records and fraud is claimed as distinct and separate violation of the applicable statutes and regulations. The prior action was based on negligence claims; this action is based on claims for fraud.

Therefore, the issues herein are not precluded by the doctrine of res judicata and the trial court erred in dismissing Hawkins’ declaratory judgment action.

III. CONCLUSION

The trial court's order of dismissal with prejudice is plainly erroneous. The specific language of the release in the parties' settlement agreement limited its scope and negated its applicability to the facts of this case. The trial court's finding on the "questionable" ability of Plaintiff to prove reasonable reliance when the fraud is based on illegal conduct and perjury extend the Kwiatkowski analysis and rationale beyond reasonable limits.

The trial court erred in granting the Talbot CR 12(b) motion and this Court should reverse.

Submitted this 29 day of June, 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 29th day of June, 2015 to the following counsel of record at the following address:

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