

74127-6

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NO. 74127-6-I

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

KERRY TAYLOR,

Appellant.

v.

ALLSTATE INS. CO. & DEERBROOKS INS. CO.,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal arises from a dental mal-practice case where the court granted summary judgment before trial. The defendant moved for summary judgment after taking the deposition of Plaintiff designated expert's depose Dr. Kim Larson. In his deposition, Dr. Larson indicated several times that Plaintiff had either not suffered damages, or he could not say that she had. However, after he reviewed his deposition, he filed revised answers stating that she had suffered damages. In the back of the deposition portion allowing for changes, Dr. Larson stated that in the portion allowing for the reason for change as follows:

Please see the corrected deposition pdf file. My corrections are in red. I used Adobe Acrobat Pro DC to correct the document. There was not enough room on this correction and signature page to correct the document.

Plaintiff's Motion for Reconsideration, Exhibit A. CP 372-85.

Likewise, Plaintiff also filed deposition testimony of the defendant Dr. Nohr supporting a theory of the case that Dr. Nohr committed several instances of mal practice by making no diagnosis but nevertheless treating the patient by removing teeth and other matters when he had no justification for it in his records. In short, that that the doctor admitted that you had to have a diagnosis for removing teeth but that he failed to do so in this case.

Nonetheless, the court granted summary judgment and denied a motion for reconsideration. CP 369-71;386-87.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. The Trial Court erred by granting the defendants Motion for Summary Judgment when it refused to accept the stated changes for deposition and refused to consider changes even though a reason was given.
- B. The Trial Court erred by granting the defendants Motion for Summary Judgment because there was some evidence to find that plaintiff had suffered a loss.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY & SUMMARY OF FACTS

The case arose out of a Dental Mal-Practice claim against Dr. Alan Nohr. CP 22-32.. After taking the deposition of Dr. Kim Larson, defendant moved for summary judgment. *Id.* Dr. Kim Larson was plaintiff's designated expert, and he testified in his deposition on July 31, 2015, that Dr. Nohr's negligence did not cause harm to Ms. Taylor. CP 23-24. There were several

instances where Dr. Larson testified to matters that did not support causation in a dental mal practice case. CP 24-25.

However, following the deposition, Dr. Larson made voluminous changes to his deposition. CP 107-338. These changes were substantive and in some cases a complete change of his prior position. CP 77-85. Now, in his deposition, he stated that the failure to properly diagnose resulted in damages. *Id.*

While the motion was pending, but before the hearing, the Plaintiff was given the first opportunity to depose defendant. Thus, the plaintiff files defendant's deposition testimony with the court in a Supplemental Response to Defendant's Motion for Summary Judgment. CP 339-357. In his deposition, the defendant made several statements that corroborated Plaintiff's experts deposition after that expert changed it. *Id.* Put another way, Defendant's deposition supported the changes made by the Plaintiff's expert Dr. Larson. *Id.*

In that deposition, Dr. Nohr testified that it was the standard of care to make a diagnosis and record that diagnosis in the chart before doing any procedure unless that procedure was cosmetic. *Id.* Dr. Nohr then went on to testify to that he extracted a tooth from Kerry Taylor with no diagnosis to support that extraction. CP

339-57. In short, Dr. Nohr admitted that the standard of care required a diagnosis and that it should be in the chart, and that he took out a tooth without putting such a diagnosis in the chart. *Id.* And he had testified that the failed to do so. *Id.*

At the hearing on the Motion for summary judgment, the court refused to consider any of the corrected deposition portion of Dr. Larson, and accepted the testimony of Dr. Nohr, but nonetheless granted summary judgment. RP 15-23.

B. SUMMARY OF THE FACTS

Appellant has combined its statement of facts with procedural history since this case deals with what evidence is accepted and reviewed in a motion for summary judgment.

IV. ARGUMENT

A. The Trial Court erred by granting the defendants Motion for Summary Judgment when it refused to accept the stated changes for deposition and refused to consider changes even though a reason was given.

It is clear law in Washington that a motion for summary judgment should be denied if reasonable minds could differ. *Klinke*

v. Famous Recipe Fried Chicken, Inc., 94 Wash. 2d 255, 616 P.2d 644 (1980). CR 56 permits summary judgment only where there are no genuine issues of material fact. Furthermore, all inferences must be taken in favor of the non-moving party. And when there is some evidence favorable to the non-moving party summary judgment is unwarranted. CR 56. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

In its Motion for Summary Judgment, the defendant rightfully stated that a plaintiff must establish that a defendant breached the standard of care and that breach resulted in a proximate cause of damages to plaintiff. CP 77-106; CP 339-57. Here, Dr. Larson did testify that the standard requires a written diagnosis and that Dr. Nohr did not do so. *Id.* Thus, according to Dr. Larson, the plaintiff was damaged because the treatment was not probably required

5. The standard of care in Washington requires that a dentist must make a diagnosis must be made and written in the chart. The standard of care as required by the Washington State Department of Health requires that a the diagnosis be clearly documented in the clinical record.

6. Dr. Nohr breached this standard. There was an orange sheet in Dr. Nohr's records dated 11-20-07 (Nohr 0039) with findings for teeth 5,6,13,14,18,19,26,30,9-12,10,24-26,20-23 but no diagnosis. Since no diagnosis was clearly made in the chart, Dr. Nohr violated the standard of care required by all dentist in Washington State. Thus, all the work done cannot be justified as reasonably probably required. As such, at the very least, Ms. Taylor has been damaged by suffering through unnecessary unjustified treatment which caused her harm and pain.

CP 84. (Citing the Declaration of Dr. Kim Larson).

The court rejected this evidence in granting the summary. It appears that the basis for rejecting this was the changed or corrected testimony of Plaintiff. RP 10-24. Much of this seems to be hung on the fact that no reason had been given for the changes as CR 30(e) states:

Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall

then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign.

CR 30(e).

In corrected his deposition, Dr. Larson only stated as follows:

Please see the corrected deposition pdf file. My corrections are in red. I used Adobe Acrobat Pro DC to correct the document. There was not enough room on this correction and signature page to correct the document.

CP 372-385.

Accordingly, if we accept the rational by the trial court and defendant at the hearing, that there is no reason, so that the changes cannot be accepted, then this interpretation requires that if any reason is given, it must be second guessed by a court, and if not acceptable, the changes cannot be considered. That is not and should not be the law.

The defendant at the hearing also relied heavily on what is known as the *Marshall* rule. In *Marshall*, the plaintiff gave an unequivocal answer about when he first learned that he had

asbestosis. *Marshall v. A.C. & S., Inc.*, 56 Wash.App. 181, 183, 782 P.2d 1107 (1989). The answer placed his claim beyond the statute of limitations. The plaintiff then submitted an affidavit contradicting not only his deposition testimony, but also other evidence, including medical records. The *Marshall* court noted that it could not reasonably infer a genuine issue of material fact from the evidence. In doing so, the court determined that summary judgment dismissing Marshall's claim on statute of limitations grounds was appropriate, reasoning: "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Marshall*, 56 Wash.App. at 185, 782 P.2d 1107.

For two reasons, the court erred in its application of *Marshall*. First, *Marshall* applies to later contradictory declarations. Here, the plaintiff's expert changed testimony was done within the time frame of CR 30(e). Dr. Larson may have contradicted himself, but that goes to the weight of his testimony. It constituted some evidence for the court to consider. Second, Dr. Nohr, the defendant, testified to facts that were consistent with and

corroborated Dr. Larson theory that Dr. Nohr performed treatment that had no justification in the chart. CP 339-57.

The *Marshall* rule has also been reviewed in the case of *Schonauer v. DCR Entm't, Inc.*, 79 Wash.App. 808, 817, 905 P.2d 392 (1995). In *DCR*, a waitress (Schonauer) at a strip club was suing for retaliation and sex discrimination because she refused to enter the "nude waitress contest" at the club. She had testified in deposition to having only one conversation with a manager, Steve Fueston, and then Schonauer later testified to a second conversation with him. The court said (emphasis added):

DCR contends that Schonauer's second call to Fueston cannot be considered in these summary judgment proceedings. Its premise is that Schonauer, in her deposition, "testified that she had only had one conversation with Steve Fueston after her employment was terminated." This premise, however, is not supported by the record. Schonauer discusses her first call to Fueston on page 52 of her deposition. She discusses Kelley's call to Weisert on page 54 of her deposition. She says in her affidavit that she made the second call to Fueston before Kelley made his call to Weisert. The record omits page 53 of her deposition, and we have no way of knowing whether

she did or did not discuss the second call to Fueston on that page.

Even if DCR's premise were supported by the record, its argument would still fail. DCR relies on *Marshall v. AC & S, Inc.*, 56 Wash.App. 181, 185, 782 P.2d 1107 (1989), for the proposition that statements in a party's affidavit are inadmissible (*i.e.*, may not be considered by the court) if the affidavit is inconsistent with an earlier deposition and fails to explain the inconsistency. *Marshall*, however, does not stand for that proposition.

To say evidence is admissible is to say it may be considered. To say evidence is sufficient is to say, after considering it, that it is capable of raising an issue of fact for the jury. The *Marshall* court considered the plaintiff's affidavit in light of the other evidence in the case, *Marshall*, 56 Wash.App. at 184-85, 782 P.2d 1107, before concluding (1) that the affidavit was inconsistent with plaintiff's earlier deposition testimony, (2) was offered without explaining the inconsistency, and thus (3) was insufficient to raise a reasonable inference supporting plaintiff's position. The *Marshall* court was dealing with sufficiency, not admissibility, and its holding fails to support DCR's present argument.

Here, Schonauer asserts in a properly sworn affidavit that she has personal knowledge of a second phone call to Fueston. CR 56 does not require more before evidence is “admissible” in a summary judgment proceeding. Thus, we consider her assertion in the light most favorable to her, and, as in *Marshall*, in light of the entire record before the court.

Schonauer v. DCR Entertainment, Inc. 79 Wash.App. 808, 817-18, 905 P.2d 392 (1995), *review denied*, 129 Wash.2d 1014, 917 P.2d 575 (1996)(footnotes omitted).

Just like in *Shonouer*, Dr. Larsons' testimony should be considered in light of the testimony of Dr. Nohr himself. Dr. Nohr testified that you that it was the standard of care to make a diagnosis and record that diagnosis in the chart before doing any procedure unless that procedure was cosmetic. *Id.* Dr. Nohr then went on to testify to that he extracted a tooth from Kerry Taylor with no diagnosis to support that extraction. CP 339-57. In short, Dr. Nohr admitted that the standard of care required a diagnosis and that it should be in the chart, and that he took out a tooth without putting such a diagnosis in the chart. *Id.* And he had testified that the failed to do so. *Id.*

Accordingly, in looking at the complete record, the Court erred in granting summary judgment.

B. The Trial Court erred by granting the defendants Motion for Summary Judgment because there was some evidence to find that plaintiff had suffered a loss.

Even if the court agrees that Trial Court applied the appropriate standard in looking changed deposition testimony of Dr. Nohr, there is some evidence and that is the testimony of Dr. Norh himself. He explained that standard of care, and then testified to that breach. The causation is very clear, he pulled a tooth with no justification. That would enough for a jury to conclude that the standard of care has been breached and that some evidence of damages. It is clear law in Washington that a motion for summary judgment should be denied if reasonable minds could differ. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash. 2d 255, 616 P.2d 644 (1980).

The material in support of this information was filed late, but the court still considered it. RP 15-23. Likewise, *Keck v. Collins*, 181 Wn.App. 67, 325 P.3d 306 (Wash.App.Div.3 2014), holds that a trial court should consider such information even if it is filed late. Accordingly, the court should be reversed, there was some evidence that support the plaintiff's claims.

V. CONCLUSION

This Trial Court erred in granting summary judgment, and the Court of Appeals should remand this matter for trial because there is some evidence that supports a claim negligence.

RESPECTFULLY SUBMITTED this 31st day of May, 2016.

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CERTIFICATE OF SERVICE

I certify that I served, or caused to be served, a copy of the foregoing BRIEF OF APPELLANT on the 31st day of May, 2016, to the following counsel of record at the following address:

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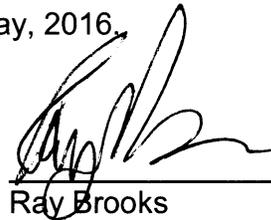
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DATED this 31st day of May, 2016.

A handwritten signature in black ink, appearing to read "Ray Brooks", is written over a solid horizontal line.

Ray Brooks