

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY *Cm*
DEPUTY

No. 49516-3

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Lisa Barton, an individual,

Appellant,

v.

Dr. Steven Sandifer, D.C. and Jane Doe Sandifer, individually and
their marital community, and Champion Chiropractic Center, INC.,
a Washington Corporation,

Respondents.

REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENT'S "RESTATEMENT OF THE CASE"

The "Restatement of the Case" simply does not mention the Respondent Sandifer's frank and "very specific" admission to Appellant Barton that his treatment had caused her stroke. CP 75-79:

"In January of 2015, I had another conversation with Dr. Sandifer. I told him of how drastically the stroke and impacted my life, and he apologized profusely. He told me that he had "not been able to sleep for a month" after my stroke **because he was so upset at having caused it**. He told me that nothing like this had ever happened to him in his career, or to his father in his own chiropractic career.

"During this conversation, I very specifically told Dr. Sandifer that I would, like some sort of acknowledgment from him that his treatment had caused my stroke. Dr. Sandifer very specifically agreed that his treatment had caused my stroke. He told me that "this exact situation" is why he carries insurance, and that he would contact his insurance company as soon as possible". (All emphasis is original.)

Neither does the "Counterstatement of the Case" mention Dr. Sandifer's "profuse" apology to Barton for having "caused [her] stroke". (Id) (Indeed, the "apology statute", RCW 5.64.010, is neither discussed, nor even cited in Respondent's Brief.) Neither does the "Restatement of the Case" mention his statement to her that "this exact situation" is why he carries insurance, and that he would "contact his insurance company as soon as possible". (Id)

Thus: The “Restatement of the Case” ignores the exact evidence triggering two of the very issues of which Appellant requests review:

Was the Respondent’s **own “very specific admission”**, directly to Barton, that his treatment caused her stroke, sufficient evidence of causation?

Was his **own “profuse apology”** to her for causing the stroke, and his promise to contact his insurance company because **“this exact situation”** is why he carries insurance, sufficient evidence of negligence?

Respectfully, the “Restatement of the Case” indeed “restates the case”, but in the light most favorable to Dr. Sandifer, not in the light most favorable to Barton--the non-moving party.

Finally, though critical throughout the Brief of Barton’s counsel for not “initiating the process” of seeking expert testimony, the “Restatement of the Case” overlooks the practical fact that the Summary Judgment Motion, seeking dismissal for want of “expert testimony”, was originally filed (with minimum notice) over a year from the scheduled trial date, and almost six months before the Case Schedule deadline for identifying experts. Indeed, even after continuance, the Motion was heard and ruled upon over three months before the expert disclosure deadline.

REPLY TO ARGUMENT THAT “MS. BARTON SUBMITTED NO
MEDICAL EXPERT TESTIMONY ON THE STANDARD OF CARE”

Respectfully, this argument is based on the stubborn refusal to acknowledge that Dr. Sandifer, presumably an “expert” on the standard of care for reasonably prudent chiropractors, “profusely apologized” directly to Barton for having caused her stroke.

Characterizing this “profuse apology” as Barton’s “interpretation” of the conversation adds nothing to the analysis, since (1) Dr. Sandifer submitted no evidence explaining or denying his “profuse apology”, and (2) even if he had, for purposes of summary judgment, the Court is guided by the non-moving party’s “interpretation” of the conversation!

This apology was obviously Dr. Sandifer’s “own statement”, made directly by him, directly to Ms. Barton. It therefore unambiguously fits ER 802 (d) (2) (i)’s definition of an “Admission by Party-Opponent” because it is “the party’s **own statement**” (emphasis added). Ms. Barton would obviously be able to testify to this admission on the witness stand at trial, and her Declaration testimony to that effect sets forth a “fact” that would be “admissible in evidence”, satisfying CR 56 (e), which states in part:

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein

The issue, then, is: Does a medical negligence defendant's "profuse apology" for causing injury to his patient constitute sufficient evidence of his/her negligence to defeat summary judgment? Respondent doesn't address the issue.

A fair question would be: Why would the legislature exclude such apologies, if offered within 30 days of the event in question, if they weren't such persuasive evidence of "knowledge of fault"? Another might be: In what context is a "profuse apology" anything other than an acknowledgment of fault? Certainly in this case, a fair inference----and therefore the governing inference for purposes of summary judgment----is that Dr. Sandifer "profusely apologized" because he knew his care had been substandard.

Further, in connection with his "profuse apology", Dr. Sandifer also told Barton that this "exact situation" is why he carries insurance, and that he would contact his insurance company "as soon as possible". Again, for purposes of summary judgment, a reasonable and therefore governing inference is that Dr. Sandifer knew his care had been negligent, and therefore covered by his malpractice policy.

REPLY TO ARGUMENT THAT “MS. BARTON SUBMITTED NO
MEDICAL EXPERT TESTIMONY ON CAUSATION”

This argument literally ignores Dr. Sandifer’s “very specific” admission, directly to Barton, that his treatment caused the stroke.

Yes, there is conflicting evidence (as in many medical negligence cases), but for purposes of summary judgment, how is Barton not entitled to the benefit of this obvious admission?

Respondent’s Brief does not say.

Though it should not be necessary to argue this point in connection with summary judgment, the fact is that Dr. Sandifer was the one who had his hands on Plaintiff’s neck during the treatment in question, not the subsequent treating physicians. Dr. Sandifer knows the force he applied and Barton’s reaction, and at least arguably would be in the best position to judge whether his care in fact triggered the stroke. And what “admissible evidence” from Dr. Sandifer did his counsel offer in connection with the summary judgment motion?

None.

REPLY TO ARGUMENT THAT BARTON “FAILED TO PRODUCE
COMPETENT EXPERT TESTIMONY” RELATIVE TO HER
INFORMED CONSENT CLAIM

This section of Respondent’s Brief sets forth an excellent recitation of the law, generally, relative to informed consent. However, it does not identify the supposed dearth of “expert testimony” to support Barton’s claim. Presumably, the argument is that there was insufficient evidence that “stroke” is a “material risk” of chiropractic care.

As argued in Appellant’s opening Brief, a jury could decide that a “reasonably prudent patient” would attach significance to a risk listed in the health care provider’s own consent form, making that risk “material” for purposes of informed consent. And again, the informed consent form is an “admission” because Dr. Sandifer obviously “manifested an adoption or belief in its truth”. 801 (2) (ii).

No other argument is offered to support dismissal of the informed consent claim.

CONCLUSION

Appellant asks the Court to reverse the trial court's dismissal of her case.

DATED this 22 day of February, 2017



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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on February 22, 2017, I arranged for service VIA ELECTRONIC MAIL and US MAIL of the foregoing REPLY BRIEF OF APPELLANT to the parties to this action as follows:

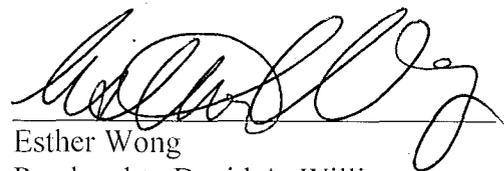
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