

AUG 31 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 294765-III

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

MARY BRYSON BAECHLER, individually and doing business as MAGPIE
FARM,

Appellant,

v.

MICHELLE BEAUNAUX, DVM, MAPLEWAY VETERINARY CLINIC, T.C.
“TONY” SMITH, DVM, and DOES 1 -100, inclusive,

Respondents.

BRIEF OF RESPONDENTS

Melissa P. Fuller, WSBA #41428
Attorney for Respondents Michelle Beaunax, DVM
and Mapleway Veterinary Clinic
Law Office of William J. O'Brien
999 Third Avenue, Suite 805
Seattle, WA 98104
(206) 515-4800

West H. Campbell, WSBA #9049
Attorney for Respondent T.C. “Tony” Smith, DVM
Velikanje Halverson P.C.
405 East Lincoln Avenue
Post Office Box 22550
Yakima, WA 98907
(509) 248-6030

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. The trial court correctly found that there were no facts to support Appellant Mary Baechler's causes of action for veterinary malpractice, outrage, negligent infliction of emotional distress or violations of the consumer protection act.

2. Notwithstanding that Ms. Baechler had ample time to conduct discovery, obtain expert witness testimony, and take depositions, the trial court correctly held that additional party depositions would not have elicited any facts or evidence to sustain Ms. Baechler's claims.

3. Ms. Baechler fails to provide any support for her assertion that consumer complaints filed with the Department of Health against Respondents is evidence of expert opinion.

II. RESPONDENTS' STATEMENT OF THE CASE

A. Summary of Undisputed Facts.

Ms. Baechler owns a farm on which she breeds and sells Swedish warmblood horses (CP 59). On or about October 9, 2006, Ms. Baechler's mare, Madeline, was experiencing signs of colic. (CP 60) The mare was exhibiting physical signs of pain and distress. (*Id.*) Ms. Baechler called Respondent T.C. "Tony" Smith, DVM for assistance with the horse, as he was the backup to her regular treating equine veterinarian. (*Id.*) Dr. Smith examined the mare and ultimately determined that she was in bad shape and needed to be "put down." (*Id.*)

Ms. Baechler did not believe that the horse should be put down and argued with Dr. Smith over his diagnosis. (CP 61) Ms. Baechler contacted Respondent Dr. Michelle Beaunau for her opinion. (*Id.*) Dr. Beaunau and Dr. Smith conferred regarding Dr.

Smith's findings and Dr. Beaunau ultimately advised Ms. Baechler that she agreed the mare should be put down. (*Id.*)

Ms. Baechler would not let Dr. Smith administer the drugs to affect the euthanasia. (CP 62) Dr. Smith left the drugs with Ms. Baechler with instruction as to how to administer them and then he left. (*Id.*) The mare was still in obvious pain and distress. (*Id.*) Ms. Baechler euthanized her horse that same evening. (*Id.*)

On or about April 22, 2008, Ms. Baechler filed a complaint against Dr. Smith with the State of Washington Department of Health, Veterinary Board of Governors ("DOH"). (CP 209-215) The DOH issued a Statement of Allegations and Summary of Evidence alleging that Dr. Smith failed to meet the standard of care because he left the client to administer euthanasia medicine. (CP 221-224) An Informal Disposition of the matter was issued on or about December 20, 2009, however that disposition is not a part of the record in the instant appeal.

On October 5, 2009, four days before the statute of limitations expired, Ms. Baechler filed the underlying lawsuit *pro se*. (CP 1-16)

B. Pertinent Case History.

Ms. Baechler filed her complaint, *pro se*, seeking damages against Respondents Dr. Beaunau, Mapleway Veterinary Clinic ("Mapleway"), and Dr. Smith, for Veterinary Malpractice, Outrage/Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and violations of the Washington Consumer Protection Act. (CP 2-16) Additionally, and while appearing *pro se*, Ms. Baechler filed a Motion to Recuse West H. Campbell, and also filed a Motion for Default Judgment as to Dr. Smith. (CP 28-39 and 45-57)

By or about April 29, 2010, all parties had appeared and answered and the matter was at-issue.

A Motion for Summary Judgment was filed by Dr. Beaunau, Mapleway and Dr. Smith on June 18, 2010. The motion was scheduled to be heard on July 20, 2010. (CP 58-77) In or around mid-July 2010, Ms. Baechler retained Moni T. Law as counsel. (CP 177-178) In light of Ms. Baechler having retained counsel, Dr. Smith and Dr. Beaunau renoted the motion for hearing on September 14, 2010. (CP 342-343) The hearing was continued a second time to October 5, 2010. (RP 1) The parties had a little more than three months to continue conducting their discovery from the date the summary judgment motion was filed until the date of the hearing.

During the October 5, 2010 hearing, and after a review of all of the alleged facts and evidence, the trial court granted the motion for summary judgment and dismissed Dr. Beaunau, Mapleway, and Dr. Smith from the lawsuit with prejudice and without costs. (CP 277-278)

C. Ms. Baechler's Appellate Brief Incorrectly States Certain Alleged Facts.

Ms. Baechler's appellate brief contains at least two instances of a purported fact that is either incorrect or misstated.

First, the last sentence of the first paragraph states, "(t)his is inadequate time to treat and assess a colic case (CP pages 238-242) and to prepare for an orphan foal." The citation to the Clerk's Papers is to the Declaration of Dr. Emily J. Briggs. Nowhere in Dr. Briggs' declaration is the proposition stated that any length of time is either inadequate or, alternatively, sufficient for treating a horse with colic.

Second, in the last paragraph at page 5, Ms. Baechler writes of “a pattern of prior incidents (CP pages 222-236), complaints and outrageous behavior from Dr. Smith to clients.” The statement implies that the record will reflect a number of incidents or complaints made by other clients against Dr. Smith. It does not. As to Dr. Smith, the record only contains Ms. Baechler’s complaint to the DOH. (CP 209-236) There is one complaint to the DOH made by someone other than Ms. Baechler in the record, but that complaint is against Dr. Beaunau and does not include the final disposition, if any, of that matter. (CP 226-231)

III. STANDARD OF REVIEW

The appropriate standard of review for cases resolved on summary judgment is well-settled. The Court considers such matters *de novo* and relies on the same evidence presented to the trial court. *Lybbert v. Grant County*, 141 Wn. 2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the non-moving party. *Id.*

IV. ARGUMENT

Respondents’ Motion for Summary Judgment challenged Ms. Baechler to put forth evidence to support her causes of action. She was unable to do so. Accordingly, Summary Judgment was granted and the case was properly dismissed.

A. Ms. Baechler’s Cause of Action for Veterinary Malpractice Fails.

While preparing this brief and conducting related legal research, counsel for Respondents discovered the case of *Sherman v. Kissinger*, 146 Wn. App. 855, 195 P. 3d 539 (2008) in which Division I holds that the medical malpractice act under RCW 7.70 *et seq.*, does not apply to veterinary care. This case was only very recently discovered by

counsel and was not presented to the trial court in connection with the Summary Judgment motion. In light of this case, Ms. Baechler's argument that additional discovery, depositions, or expert testimony would have elicited sufficient facts to support a claim for malpractice is moot.

Respondents note that, while *Sherman* holds that the medical malpractice statutes do not apply to instances of veterinary care, the claims brought under that case were different than the claims asserted by Ms. Baechler. In this case, Ms. Baechler's claim is for veterinary malpractice. However, by analogy, the same burden of proof would apply to Ms. Baechler's case. Ms. Baechler is still required to present expert testimony to meet the burden of establishing a violation of the standard of care and proximate cause. She was unable to do so. Accordingly, the trial court found that the cause of action for veterinary malpractice was not supported by the facts as she alleged them to be and properly dismissed the claim. (RP 33-36)

B. The Trial Court Correctly Found No Facts to Support a Claim of Outrage.

The tort of outrage, or intentional infliction of emotional distress, requires: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress." *Rice v. Janovich*, 109 Wn. 2d 48, 61, 742 P. 2d 1230 (1987). The test for outrageous conduct is whether such conduct is outside the bounds of civilized conduct. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Rough language, unkindness or inconsiderate behavior is not enough to establish the claim. In short, the facts put forth by Ms. Baechler do not rise to the requisite level to maintain this tort.

Ms. Baechler appears to argue on appeal that party depositions or further discovery might elicit additional facts that would support such a claim. However, the trial court, after viewing the presented evidence and alleged facts most favorably to Ms. Baechler, determined that the requested discovery would not yield facts sufficient to make out the prima facie case for this tort. (RP 34) Accordingly, the trial court dismissed this claim on summary judgment.

C. The Causes of Action for Negligent Infliction of Emotional Distress and Violations of the Consumer Protection Act are not available within the context framed by Ms. Baechler.

As previously argued in support of the Motion for Summary Judgment (CP 71-72), the tort of negligent infliction of emotional distress does not apply to emotional distress suffered over the loss of one's animal, absent evidence of deliberate cruelty to the animal. *Pickford v. Mason*, 124 Wn. App. 257, 98 P. 3d 1232 (2004). Here, there was no evidence of cruelty to Ms. Baechler's mare. Indeed, in conducting its analysis, the trial court could not find any evidence that Dr. Smith's assessment or diagnosis of Ms. Baechler's horse was wrong. (RP 35) It should be noted that the DOH made no finding of animal cruelty resulting from Dr. Smith's alleged conduct and treatment. The DOH only asserted that the act of leaving Ms. Baechler with euthanasia drugs fell below the standard of care under that agency's policies. (CP 221)

Similarly, Ms. Baechler fails to set forth facts sufficient to sustain a claim for violation of the Consumer Protection Act. Under the CPA, it is the entrepreneurial or commercial aspects of professional services that are subject to the CPA. " 'Claims directed at the competence of and strategies employed by a professional amount to negligence and are exempt from the Consumer Protection Act.' " *Michael v. Mosquera-*

Lacy, 165 Wn. 2d 595, 604, 581 P.2d 1349 (2009), citing *Ramos v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007).

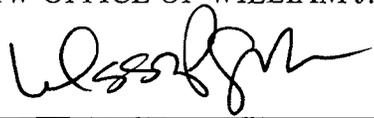
The trial court, applying the correct standard for review, found no evidence to support Plaintiff's claims. Accordingly, Ms. Baechler's claims were dismissed.

V. CONCLUSION

Simply stated, there are no facts to support any claims asserted by Ms. Baechler against the Respondents. For all of the reasons set forth above, Respondents respectfully request that this Court affirm the judgment.

RESPECTFULLY SUBMITTED this 30th day of August, 2011.

LAW OFFICE OF WILLIAM J. O'BRIEN

By 

Melissa P. Fuller, WSBA #41428
Attorney for Respondents Michelle Beaunoux,
DVM and Mapleway Veterinary Clinic

VELIKANJE HALVERSON P.C.

By 

West H. Campbell, WSBA #9049
Attorney for Respondent T.C. "Tony" Smith