

JAN 27 2012

Court of Appeals of the State of Washington, Division III

Case No. 299112

Sandra Taylor, Appellant

v.

Dr. Brent Maughn and Deaconess Hospital, Respondents

REPLY Brief of Appellant

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I. REPLY SUMMARY

Sandra Taylor, Plaintiff-Appellant, was left with an untreated uterine infection, which devastated her life over 7 months. (CP 6-9, 67-84) She filed her Complaint against the Respondents on 8/13/10, and served Deaconess, and then served Dr. Maughan. Mr. Rekofke appeared for Deaconess on 8/26/10, and *Mr. Sestero appeared on 11/22/10*, and Mr. Sestero filed an affidavit of prejudice against Judge Tompkins on 12/9/10.

The case was transferred to Judge Leveque, at which time the Respondents immediately moved for summary judgment. (The prior-filed *Brief* of the Appellant is incorporated herein.)

Respondent, *Respondent Brent Maughn, M.D.'s Response Brief* [hereinafter "Maughn's Response"], at p.4, makes much of the following "concession" from the Appellant's opening *Brief*:

Ms. Taylor's initial expert had promised his declaration by early January. However, as he continued to review the records, the expert decided that Ms. Taylor's infection had, indeed, not been treated in violation of standards of care, but since Dr. Maughan was denying that he had ever received word from his staff of Ms. Taylor's infection, and her agonies, the focus of expert opinion shifted to the staff for not communicating the injuries to Dr. Maughan. Thus, liability for Dr. Maughan shifted from a failure to treat properly to a failure to sufficiently supervise and train his staff. Deaconess was liable for the same issues.

Respondent Maughan emphasizes that under Dr. Maughan's new factual allegations (Dr. Maughan claiming that he never heard about Sandra's infection from his staff), the Appellant, Sandra Taylor, "concedes" her expert no longer could fault Dr. Maughan for violating the standard of care regarding treatment of an infection of which he did not know. (This shifted the focus to why Dr. Maughan's and Deaconess's staff did not communicate Sandra Taylor's complaints of the infection to Dr. Maughan.)

Obviously, it was surprising to Ms. Taylor that Dr. Maughan would deny knowledge of the infection, despite all of Sandra Taylor's calls to him about it (CP: 82-83, 72-72), and this was the kind of thing that could not be known so early in the case. Premature summary judgment was inappropriate, especially as Dr. Maughan refused to provide significant answers to discovery because "defendant and his counsel have just commenced discovery" themselves (CP: 116).

As also stated in the opening *Brief*, excerpted above, "the focus [of the case] shifted from a failure to treat properly to a failure to sufficiently supervise and train his staff." The declarations of Nurse Mohammed and of Dr. Heller were appropriate to the evolving facts of the case. (CP: 128-141)

The nursing liability expert, Natalie Mohammed, filed a declaration (CP 128-133) regarding the substandard behavior of the staff at issue, and the hospital administration expert, Brian Heller, Ph.D, filed a declaration (CP 134-141) stating that the failure of Deaconess to train and to supervise staff had caused Ms. Taylor's damages.

The case was proceeding and evolving through discovery as expected by the court in *Putnam v. Wenatchee Valley Medical Center*, 166 Wn. 2d 974, 216 P.3d 374 (2009), in which the *Putnam* court counseled against premature summary dismissals.

Ms. Taylor should be allowed her day in court.

It is reasonable that the facts of a case will evolve through discovery, and Dr. Maughan did not appear until 11/22/10, and judges were changed in December, 2010. The early dismissal of the case was inappropriate.

II. STANDARDS OF REVIEW

Respondent Dr. Maughan is correct that review of summary judgment is de novo, and review of denial of CR 56(f) and of reconsideration is for abuse of discretion. *Maughan's Response at p.5.*

Respondent Deaconess is correct that the standard of review of a denial of a motion to amend a complaint is also an abuse of discretion

standard. *Respondent Deaconess Hospital's Amended Brief at p. 28* [hereinafter "Deaconess Response"].

Summary judgment should be reversed upon de novo review, and it was manifestly unreasonable to deny Ms. Taylor's CR 56(f) request for continuance, and Sandra Taylor's motion for reconsideration should have been granted once the trial court received the transcript of 1/21/11 showing the clearly erroneous factual predicates of the trial court, and the court abused its discretion once again by not reconsidering its CR 56 rulings once the court reviewed the declarations of Nurse Mohammed, and Dr. Heller.

The following outline of the facts shows the rush to judgment.

III. SUBSTANTIVE FOCUS ON THE FACTS

It is most reasonable to keep an eye on the actual facts and timelines of this case.

11/22/10: Dr. Maughan appeared through Robert Sestero.

11/29/10: Deaconess Hospital filed a motion for summary judgment.

12/09/10: Dr. Maughan filed an affidavit of prejudice against Judge Tompkins.

1/3/11: Sandra Taylor filed a CR 56(f) request seeking a continuance to March, 2011. (CP 15-19)

1/18/11: Sandra Taylor filed a Memorandum on Corporate Liability, and requested time to receive and process Respondent's Interrogatory Answers. (CP: 19-24, and see CP: 25-88, Sandra Taylor's Reply on CR 56(f) Request, and Addendum, CP: 39-51)

1/21/11: Judge Leveque orally continued the matter, stating that Deaconess should answer Sandra Taylor's ROGS and RFPS by 2/17/11, and that the hearing should be continued to 2/25/11. (CP: 125 & 126 – full hearing transcript of 1/21/11 runs from CP 119-27).

1/31/11: Sandra Taylor filed her proposed order of continuance, after the Respondent omitted the discovery requirement that can be seen on the transcript at CP: 125-26.

2/4/11: Judge Leveque signed an order contrary to his oral ruling of 1/21/11. (Sandra Taylor then filed a request for reconsideration on 2/14/11, CP: 57-58, and then filed the transcript of CP 119-27)

2/23/11: Sandra Taylor filed her CR 56(f) Reply. (CP: 85-117) Note: Respondent Deaconess errs on p.6of *Deaconess Response* to imply that CR 56(f) issues were not before the court on 2/25/11.

2/25/11: Judge Leveque denied CR 56(f) relief and granted summary judgment to Deaconess.

3/4/11: Judge Leveque denied CR 56(f) relief and granted Dr. Maughan summary judgment.

3/7/11: Prior to written orders being entered on summary judgment, and in request of reconsideration, Sandra Taylor filed the Declaration of Natalie Mohammed (CP : 128-133, a nursing liability expert, and of Dr. Bruce Heller (CP: 134-141), a hospital administration expert. These declarations on the failures of Dr. Maugan's staff, and of Deaconess' staff, respectively, created genuine issues of material fact in a rapidly evolving factual context early in the case.

3/7/11: Sandra Taylor also filed her Supplemental Reply on Motion for Reconsideration on Presentment of CR 56(f) Order, in which she was able to show the court the transcript regarding the hearing of 1/21/11, and what the court had orally ordered Deaconess to provide. (CP: 142-144, and also CP: 145-150, vis-à-vis Dr. Maughan)

There were other subsequent requests for reconsideration filed, and there was at least one "live" one remaining when Sandra Taylor filed her motion to amend her complaint. (Note: *Deaconess Response* states on pp. 7-8 that there was no need for Sandra Taylor to amend her complaint, and under the case law of notice-pleading, that is most likely correct. However, Sandra Taylor was engaging in due diligence as the facts of her case were rapidly evolving under discovery.)

In sum, in just three months, which included the Christmas holidays, the case had rapidly evolved from Ms. Taylor blaming Dr.

Maughan for her illness, to her experts diagnosing that the problem was the failure of Deaconess staff and of Dr. Maughan's staff to communicate her infection to him, and the corporate liability of each defendant for the breaches of their staffs' duties had genuine issues of material fact surrounding them.

By any reasonable standard, Ms. Taylor should be allowed to proceed with her case, by either reversal of summary judgment, or by granting her more time and more discovery. The fundamental reasonableness of Ms. Taylor's request inheres in these facts, and shows that the truth was being pursued and ferreted out by Ms. Taylor with due diligence, and that her injuries merit a reasonable day in court.

IV. CONCLUSION: REMAND IS PROPER

Ms. Taylor has incorporated her *Brief* herein, and will not tax the court with repetition.

Instead, Ms. Taylor will ask the court to look at how Dr. Maughan did not substantively appear until 12/9/10, when he asked for a new judge, and once he began to respond in the suit, Ms. Taylor learned the evolving facts, which led her to have to change the focus of her expert analysis, which Ms. Taylor pursued with due diligence within the time constraints of busy experts.

Genuine issues of material fact exist already, and more are sure to be created as this case resumes upon remand. Ms. Taylor has not delayed the prosecution of her case; instead her case changed focus through discovery. Sandra Taylor needs to allow her staff expert and corporate liability expert to continue to analyze discovery to further build her case; and although genuine issues of material fact already exist, more will follow from providing discovery data to her experts. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007), compare *Durand v. HIMC Corp.*, 151 Wn.App. 818, 214 P.3d 189 (2009) (Denial of CR 56(f) continuance proper where no depositions were taken nor interrogatories delivered before the discovery cut-off).

Ms. Taylor requests this court to recognize her diligent response to the changing nature of her case, and Sandra Taylor requests that this court restore her access to the courts through remand to proceed with her case.

Respectfully submitted,

1/27/12



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V. APPENDIX

CR 56(f):

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Also, please see Appendix attached to opening Brief.