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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

No. 31726-9-III

CATHLEEN and RANDALL LE CAIRE
Appellants/Plaintiffs,
v.

RODERICK W. TATARYN, JANE DOE TATARYN, and RODERICK W. TATARYN D.D.S., M.S., P.S. d/b/a RODERICK ENDODONTICS
Respondents/Defendants

BRIEF OF RESPONDENTS

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A. INTRODUCTION

In January 2012, Plaintiffs/Appellants Cathleen and Randall Le Caire ("Le Caires") filed this lawsuit against Dr. Roderick Tataryn and Tataryn Endodontics (together, "Dr. Tataryn") alleging that Dr. Tataryn committed professional malpractice while performing a root canal procedure in January 2009. Dr. Tataryn filed a Motion for Summary Judgment in July 2012 contending that the Le Caires lacked the requisite expert witness testimony to support their claims.

Appellants were granted multiple continuances[1] to provide materials responsive to the summary judgment motion. Despite those continuances, Appellants were unsuccessful in securing admissible expert witness testimony in support of their claims.

On May 10, 2013, the trial court dismissed Appellants' claims based upon their failure to provide admissible expert witness testimony in support of their standard of care claims. Appellants likewise failed to offer any evidence whatsoever that Dr. Tataryn failed to obtain informed consent prior to the procedure in question. Accordingly, the informed consent claim was likewise dismissed.

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[1] As well as an Order Denying Defendants' Motion without prejudice.

B. ASSIGNMENTS OF ERROR

Respondents do not assign any error to the trial court. The trial court properly granted summary judgment in favor of the Respondents under Civil Rule 56 based upon the Appellants' repeated failure to provide evidence of a standard of care violation by Dr. Tataryn and evidence of a causal relationship between the alleged negligence and the harm allegedly suffered by Mrs. Le Caire.[2]

C. STATEMENT OF THE CASE

Dr. Tataryn performed a root canal procedure on Mrs. Le Caire on January 21, 2009. CP 109. Prior to the substantive procedure Dr. Tataryn anesthetized the area by way of a mandibular block using Lidocaine 2%. CP 132. During the root canal procedure, Mrs. Le Caire required additional anesthetic because her teeth were highly inflamed. CP 132-133. It is common to require additional anesthetic during a root canal procedure when teeth are highly inflamed. *Id.* Therefore, Dr. Tataryn performed a buccal infiltration (otherwise known by the misnomer of an intrapulpal "injection") of Septocaine 4%. *Id.* A buccal infiltration is simply a rinse

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[2] Appellants do not address the dismissal of their informed consent claim. Absent any argument or citation to any authorities addressing that distinct issue, the trial court's dismissal of Appellants' informed consent claim should be affirmed. *See, RAP 9.2(b); 10.3(a)(6); Allemeier v. Univ. of Wash.,* 42 Wash.App. 465, 472-473, 712 P.2d 306 (Div.1, 1985), *State v. Jackson,* 36 Wash.App. 510, 516, 676 P.2d 517 (Div.1, 1984).

of the pulp chamber of the tooth with anesthetic solution, as opposed to a "block" procedure which is an actual injection of anesthetic. *Id.*

The Le Caires contend that Dr. Tataryn's use of Septocaine fell below the applicable standard of care for an endodontist. CP 110. They further allege that Dr. Tataryn's use of Septocaine caused a condition known as atypical trigeminal neuralgia. CP 110.

On July 19, 2012, Defendants filed a Motion for Summary Judgment. CP 123-124. Defendants' Motion challenged the Le Caires to produce expert witness testimony establishing the standard of care, its violation by Dr. Tataryn, and a causal relationship between the violation of the standard of care and an injury sustained by Mrs. Le Caire. CP 116-122. Thereafter, the Le Caires filed the Declaration of Darlene M. Chan, D.D.S. CP 8-16. Dr. Chan opined that a "dentist...would not have injected 3cc off 4% Septocaine with 1:100,000 epinephrine for an anesthetic block of the Inferior alveolar nerve..." CP 9. Dr. Chan further opined that the nerve-block injection of Septocaine at or near the inferior alveolar nerve caused pain, numbness, and other injury. CP 9-10.

In response to Dr. Chan's Declaration, Defendants filed the Declaration of Dr. Roderick Tataryn. CP 131-136. Dr. Tataryn explained that he did not perform a nerve-block injection of Septocaine. CP 131-132. Dr. Chan simply misread or misunderstood Dr. Tataryn's chart notes.

CP 132 at 4. Dr. Tataryn used Septocaine as a buccal infiltration, which is simply a "rinse" of the pulp chamber of the tooth. CP 132-133. It occurs nowhere near the inferior alveolar nerves. CP 132 at 6. By contrast, a nerve block is a true injection at or near the trunk of the nerve. *Id.* Dr. Tataryn's office records corroborated his testimony and highlighted Dr. Chan's misunderstanding. CP 136.

Defendants' Motion was denied, without prejudice, on September 21, 2012. CP 142-143. The Court denied the Motion, with leave to re-file, on the basis that Dr. Chan's mistaken impressions regarding the procedures performed by Dr. Tataryn only became evident to the Le Caires during the exchange of summary judgment materials. CP 144-145.

After waiting nearly five (5) months, Defendants renewed their Motion for Summary Judgment on February 7, 2013. CP 152-153. A Notice of Hearing accompanying the Renewed Motion set a hearing date of March 15, 2013. CP 125-126. On March 12, 2013, the Le Caires filed a motion to continue the summary judgment hearing for the purpose of obtaining new counsel. CP 127-128. Their Motion was granted, and the CR 56 hearing was continued until March 29, 2013. CP 169. The Le Caires were directed to provide the trial court with a written summary of their efforts to procure counsel by the time of the new hearing. CP 43. The Le Caires failed to do so. *Id.* Nevertheless, the trial court extended

the deadline to April 1, 2013. *Id.* The Le Caires filed materials in which they claimed to have discussed the case with counsel. *Id.;* CP 38-39. In recognition of the Le Caires need to locate an expert, the trial court granted the Le Caires until May 1, 2013 to file a declaration from an expert witness supporting their claims. CP 43. The Court stated: "If the declaration is not timely filed, the court will sign a Summary Judgment Order of Dismissal." CP 43.

The Le Caires failed to file a declaration as required by the trial court's order. Defendants filed a Notice of Presentment regarding their Order Granting Defendants' Motion for Summary Judgment on April 29, 2013. CP 176-181. Two days prior to the presentment hearing, the Le Caires attempted to submit additional evidence in support of their claims. CP 45-68. Defendants objected to the additional materials. CP 184-188. The trial court declined to consider the additional materials, and entered the Order Granting Defendants' Motion for Summary Judgment. CP 69-71.

D. ARGUMENT

1. Standard of Review.

On appeal of a summary judgment order, the proper standard of review is de novo, and thus, the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d

29, 34, 1 P.3d 1124, 1127 (2000). Summary judgment is appropriate where there are no genuine issues of material fact. CR 56. "Factual issues may be decided as a matter of law when reasonable minds could reach but one conclusion or when the factual dispute is so remote it is not material." *Weaver v. Spokane County,* 275 P.3d 1184, 1187 (Div.3, 2012).

"A judgment appealed from may be affirmed upon any theory established by the pleadings and proof even if on a ground different from that expressly relied on below." *Stratton v. U.S. Bulk Carriers, Inc.*, 3 Wash.App. 790, 796-797, 478 P.2d 253, 257 (Div.1, 1970). *See Also, Herron Northwest, Inc. v. Danskin,* 78 Wash.2d 500, 501, 476 P.2d 702, 703 (1971) ("It is the rule, of course, that the trial court can be sustained on any theory within the pleadings and the proof.")

The trial court's Order Granting Defendant's Motion for Summary Judgment should be upheld where Appellants failed to establish a violation of the standard of care and/or a causal relationship between the alleged negligence and any injury to Mrs. Le Caire.

2. Burdens of Proof In Health Care Negligence Lawsuits.

All claims alleging injury resulting from the failure of a healthcare provider to follow the accepted standard of care are controlled by RCW 7.70 et seq. A dentist is a healthcare provider within the meaning of RCW 7.70 et seq. *See* RCW 7.70.020. Summary judgment in healthcare

malpractice cases may be brought in one of two ways. *Guile v. Ballard Community Hosp.,* 70 Wn. App. 18, 851 P.2d 689 (1993). In *Guile,* the Court of Appeals noted:

> A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. *Hash v. Children's Orthopedic Hosp & Med. Cntr.,* 110 Wn.2d 912, 916, 757 P.2d 507 (1988). Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lack sufficient evidence to support its case. *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986)). In this latter situation, the moving party is not required to support its summary judgment motion with affidavits. *Young,* at 226. However, the moving party must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. *White v. Kent Med. Cntr., Inc., P.S.,* 61 Wn. App. 163, 170, 810 P.2d 4 (1991) (citing *Celotex Corp. v. Catrett,* 477 U.S. at 323; *Baldwin v. Sisters of Providence in Wash., Inc.,* 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

Guile, at 21-22.

The Court further stated as to the standard for a motion for summary judgment as follows at page 25:

> In a medical malpractice case, expert testimony is generally required to establish the **standard of care and to prove causation**. *Harris v. Groth,* 99

> Wn.2d 438, 449, 663 P.2d 113 (1983). Thus, a defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. *Young* at 226-27.

Guile, at 25. CR 56 requires that judgment be "rendered forthwith" if the supporting materials and affidavits show there is no genuine issue as to a pertinent material fact.

In the present case, the Appellants failed to provide the requisite expert witness testimony establishing the standard of care, a purported breach, and a causal relationship between that activity and an injury. The vast majority of the evidence relied upon by the Appellants on appeal was disregarded by the trial court, as it was submitted after the trial court's self-executing order requiring a signed declaration from an expert witness by May 1, 2013. *See,* CP 43; 69-71. Moreover, even if offered consideration, the submissions fail to satisfy Appellants' burden of proof as outlined above.

3. Withdrawal of Plaintiffs' Counsel.

In their final argument, Appellants contend that they were misled by their former counsel, Robb Grangroth, in his explanation of CR 71. *Amended Appellant's [sic] Brief, pg. 7.* There is no evidence in the record

supporting their contention. Nor did Mr. Grangroth's withdrawal have any impact on the trial court's decision to dismiss Appellants' claims.

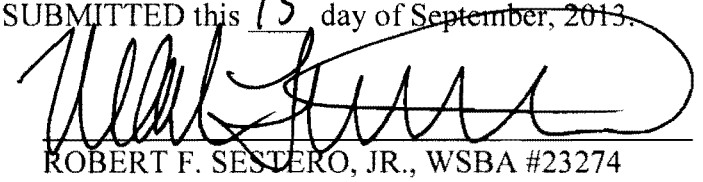
Nevertheless, it appears that Appellants are under the mistaken impression that their termination of Mr. Grangroth's services allowed him to extricate himself from the litigation without providing successor counsel. *Id.* However, under either scenario (termination or withdrawal), Mr. Grangroth was free to file a Notice of Withdrawal pursuant to CR 71(c). Mr. Grangroth did, in fact, file a "Notice of Intent to Withdraw As Attorney of Record" on March 8, 2013. CP 33-34.

The form of the Notice of Intent to Withdraw satisfied the requirements of CR 71(c)(1), including the recitation that it would be deemed effective if, after ten (10) days, no party or attorney objected to the same. *Id.* The document was served upon the Appellants prior to filing with the trial court. *Id. at 34.* No objection was filed or served. In addition, the Le Caires were given multiple opportunities to obtain successor counsel by the trial court, and the trial court deferred granting the defense Motion for Summary Judgment for that very purpose. CP 43-44. The Le Caires apparently retained successor counsel, and were given an additional month to file the necessary evidence to refute Defendants' Motion for Summary Judgment. *Id.* They did not do so, and the defense motion was granted.

E. CONCLUSION

The trial court properly dismissed Appellants' claims based upon their failure to provide expert witness testimony establishing a violation of the pertinent standard of care and a causal relationship between the alleged violation and an injury to Mrs. Le Caire.

RESPECTFULLY SUBMITTED this 13th day of September, 2013.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 16th day of September, 2013, a true and correct copy of the foregoing *Respondent's Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

Cathleen and Randall LeCaire 352 Spanish Prairie Road Colville, WA 99114	Via Regular Mail Via Certified Mail Via Overnight Mail Via Facsimile Hand Delivered	☒ [ ] [ ] [ ] [ ]

Dated: 9-16-13

Shawna L Wade
Shawna Wade