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COA No. 35595-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBIN VERA HANKEL,

Appellant,

v.

ROCKWOOD CLINIC, P.S. (MULTICARE HEALTH SYSTEMS),

Respondent.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENTS OF ERROR

1. The court erred by granting summary judgment dismissal of Robin Vera Hankel's complaint for medical malpractice.

2. The court erred by denying Ms. Hankel's motion for reconsideration.

Issues Pertaining to Assignments of Error

A. Did the court err by granting summary judgment when genuine issues of material fact existed? (Assignment of Error 1).

B. Did the court err by denying Ms. Hankel's motion for reconsideration? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Ms. Hankel *pro se* filed a complaint for medical malpractice against Rockwood Clinic P.S. on January 20, 2017, claiming:

A violation of the standard of care by Rockwood Clinic P.S. took place when Plaintiff's hand was incorrectly casted after her right hand thumb surgery on January 24, 2014. Upon removing the cast the beginning of Chron's Ulcer was evident and the Plaintiff could have lost her right hand. The Plaintiff required another surgery on the same thumb incurring grief, suffering and financial loss. (CP 4).

Rockwood Clinic subsequently moved for summary judgment dismissal on May 10, 2017. (CP 44). In the supporting memorandum, it acknowledged:

The plaintiff . . . filed this lawsuit on or about January 20, 2017, claiming that she sustained injuries and damages associated with an allegedly incorrectly placed cast following right hand surgery which the plaintiff alleges occurred on or about January 24, 2014. (CP 37).

Rockwood Clinic then based the summary judgment on its records showing Ms. Hankel was seen by hand surgeon Dr. Randall Espinosa for right thumb pain on February 11, 2013, and was last seen on April 15, 2013. (CP 8-36). Dr. Espinosa performed surgery on March 1, 2013, for a right thumb ulnar collateral ligament reconstruction repair after finding a complete proximal detachment of her ulnar collateral ligament and a complete subluxation and a Stenar Style lesion with complete subluxation and dislocated ability of her thumb metacarpal phalangeal joint. (CP 20).

On March 6, 2013, Ms. Hankel came in for a wound check. (CP 24). She came back on March 12, 2013, because her post-op splint was loose and felt like it was rubbing her raw. (CP 26). At Dr. Espinosa's direction, a fiberglass short arm thumb spica cast was applied. (CP 27). Ms. Hankel was to schedule a follow-up for three weeks with x-rays out of her cast. (*Id.*).

The cast was removed on March 28, 2013. (CP 29). Dr.

Espinosa stated “independent review of x-rays of the right thumb showed some all of a radial subluxation of the proximal phalanx base consistent with failure of her ulnar collateral ligament repair.” (*Id.*). He recommended another week in the cast “but in all likelihood we will have to revise her repair or even consider a thumb metacarpal phalangeal joint fusion ultimately.” (*Id.*). Ms. Hankel stated she understood and wanted to do whatever was necessary to get the thumb repaired in stable position. (*Id.*)

On April 15, 2013, she had another office visit where she indicated some residual floppiness and instability of the joint that was less than it was before surgery. (CP 33). Dr. Espinosa determined:

On my examination today she still has a mushy end point to the ulnar collateral ligament reconstruction with obvious subluxation albeit not as severe because before surgery. I recommended revision reconstruction with palmaris longus tendon graft and she would like to try course of several days of trial of life before she considers surgical intervention. . .

Independent review of x-rays taken out of the cast today showed persistent subluxation and radial deviation of her thumb metacarpal phalangeal joint consistent with failed ulnar collateral ligament repair. (*Id.*)

The doctor scheduled her for a revision right thumb ulnar

ulnar collateral ligament reconstruction with palmaris longus tendon autograft. (CP 34). Ms. Hankel called Rockwood Clinic on April 29, 2013, and said she was going to wait until later to do her thumb revision. (CP 37). In its summary judgment memorandum, Rockwood Clinic stated she was not seen again. (CP 39).

In response, Ms. Hankel filed a declaration stating under penalty of perjury:

Care was provided at Rockwood AFTER APRIL 20, 2014 as opposed to January 24, 2013. The second surgery was performed at Rockwood Clinic by Dr. Espinoza who was then working at Spokane Orthopedics. The thumb was cast by a Rockwood employee by the name of Cheryl (last name unknown). See medical records in EXHIBIT A. The exhibits presented in the memorandum are for the first surgery in March of 2013 at which time a clamp was placed on the thumb. It is the second surgery on January 24, 2014 in which the pin was placed in the thumb that addresses the lawsuit against the defendant. The defendants have presented the incorrect dates and are addressing the incorrect surgery. (CP 47).

In Exhibit A, Dr. Espinosa stated Ms. Hankel had undergone revision of a previous failed repair on January 24, 2014. (CP 50). It is the improperly placed cast following this 2014 revision, not the March 2013 surgery, which is the subject of this medical malpractice action. (CP 4, 47).

At the June 16, 2017 hearing on the motion for summary

judgment, Rockwood Clinic's counsel argued:

In this medical malpractice action, plaintiff doesn't have an expert to establish standard of care violations or medical causation. And so summary judgment is appropriate, and we'd ask the order to be entered. (6/16/17 RP 4).

As noted by the court, Ms. Hankel had asked for a continuance in her response. (*Id.*). It then granted a continuance to July 21, 2017, right after the July 17, 2017 date for disclosure of lay and expert witnesses in the case scheduling order. (*Id.* at 8; CP 6). The court advised Ms. Hankel:

Obviously, ma'am, if you have counsel and if you have an expert that comes forward to rebut the summary judgment, then I'll proceed with the hearing. But if you don't, then I'm seriously going to have to consider granting summary judgment, which basically will dismiss your case. (6/16/17 RP 8).

At the July 21, 2017 hearing, Ms. Hankel acknowledged to the court that no additional pleadings had been filed since June 16, except for her disclosure of lay and expert witnesses. (7/21/17 RP 10; CP 83). Dr. Espinosa was listed as an expert witness. (CP 85). The court told her the "issue was an expert to come in and discuss standards of care and that sort of a thing." (7/21/17 RP 10). Rockwood Clinic argued its motion was "obviously premised on the lack of expert testimony." (*Id.* at 11). The court told Ms. Hankel

she “needed to file a declaration by an expert today.” (*Id.* at 12). It further stated:

So this is a motion for summary judgment. Mr. King has argued that this type of a case, you need to have an expert in the field respond. You need to hire an expert. You need to have somebody that is going to present a case on your behalf as the plaintiff. Today is the day to have that in. I gave you a continuance to get that done. (*Id.*).

The court granted summary judgment dismissal:

The law requires that in this type of a case with this type of a claim, you have to present expert testimony that will opine on the standard of care. And I gave you some time to get that done, and we’re still not – we’re still not there. So without a response in the file that would create a material issue of fact, I don’t have a choice but to dismiss your case. (*Id.* at 13).

The orders granting the continuance and dismissing Ms. Hankel’s case on summary judgment were entered. (CP 87-91).

Ms. Hankel filed a motion for reconsideration on July 31, 2017. (CP 93). On August 16, 2017, the court acknowledged receipt of her motion, asked for any response within 10 days, and advised the parties the matter would be decided without oral argument. (CP 94). In a letter decision, it denied the motion for reconsideration because Ms. Hankel “did not satisfy her burden on summary judgment to present expert evidence which, at the least,

creates a material issue of fact as to standard of care.” (CP 128). An order denying reconsideration was filed on August 28, 2017. (CP 127). Ms. Hankel appealed the denial of the motion for reconsideration on September 25, 2017. (CP 128).

III. ARGUMENT

A. The court erred by granting summary judgment dismissal as genuine issues of material fact existed.

The summary judgment dismissal comes up for review along with the denial of the motion for reconsideration. RAP 2.4(c).

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007). When determining whether any genuine issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The appellate court engages in the same inquiry as the trial court and review is de novo. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

In a medical malpractice action, the plaintiff must show the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances. RCW 7.70.040(1). The applicable standard of care is generally established through expert testimony. *Miller v. Jacoby*, 145 Wn.2d 65, 71-72, 33 P.3d 68 (2001). If a plaintiff lacks competent expert testimony to create a genuine issue of material fact as to one of the elements of the medical malpractice claim and is unable to rely on an exception to this requirement of expert witness testimony, a defendant is entitled to summary judgment. *Morinaga v. Vue*, 85 Wn. App. 822, 935 P.2d 637, *review denied*, 133 Wn.2d 1012 (1997).

Here, Rockwood Clinic based its summary judgment on events in 2013 involving Ms. Hankel while under its care. (CP 8-45). It said there were no other records for Ms. Hankel after April 29, 2013. The 2013 care is not at issue in her complaint for medical malpractice. (CP 3). Rather, she alleged an improperly placed cast by a Rockwood Clinic employee following her revision surgery in January 24, 2014, caused the injuries and damage. (CP 4, 47).

Rockwood Clinic's motion for summary judgment dismissal rested solely on the lack of expert testimony supporting Ms. Hankel's case for 2013 medical care. (CP 8-36). The Clinic's motion and supporting medical records did not address Ms. Hankel's claim arising from 2014 care. She did not have to provide expert testimony on medical treatment which was not the basis for her claim. That treatment was not complained of and the only thing Rockwood Clinic's motion for summary judgment accomplished was to dismiss any claims Ms. Hankel may have had for improper medical care in 2013. It missed the point as her claim was based on improper medical care after her January 24, 2014 revision surgery and the motion for summary judgment did not address it. Ms. Hankel will support her 2014 claim with expert testimony, but she was not required to in response to Rockwood Clinic's motion on the 2013 events as they are not the basis for her medical malpractice action.

Ms. Hankel presented genuine issues of material fact as to when the alleged medical malpractice occurred and the basis for her claim. The Clinic erroneously based its summary judgment on 2013 events. *See Elber v. Larson*, 142 Wn. App. 243, 173 P.3d 990 (2007). Ms. Hankel controverted the Clinic's version of the

facts and the dismissal was inappropriate at that stage of the litigation. She claimed improper placement of the cast following her January 24, 2014 revision surgery and supported it with her declaration responding to Rockwood Clinic's motion for summary judgment. (CP 46). All inferences are construed in her favor as the nonmoving party; they were not. *Reid*, 136 Wn.2d at 201.

Before even having to produce expert testimony supporting her claim, it must first be established when the alleged medical malpractice occurred and what it was. This was missed by Rockwood Clinic and the court. Reasonable minds could differ on these issues of genuine material fact upon which the outcome of the litigation depends. *Peyton Building, LLC v. Niko's Gourmet, Inc.*, 180 Wn. App. 674, 686, 323 P.3d 629 (2014). Summary judgment based on the lack of expert testimony relating to 2013 medical care was improper since her claim arose after January 24, 2014. The court cannot resolve factual questions on summary judgment as that determination must be made at trial. *Jones v. State*, 170 Wn.2d 338, 354, 242 P.3d 825 (2010).

B. The court erred by denying reconsideration.

Although the court said Ms. Hankel's motion for reconsideration was untimely, it was not. CR 59(b). Because the

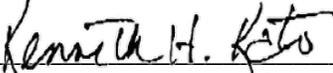
court erred by granting summary judgment dismissal, it follows that the denial of the motion for reconsideration was erroneous for the same reasons as the dismissal of her action was improper.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Hankel Smith respectfully urges this Court to reverse the summary judgment dismissal and the order denying reconsideration and remand for further proceedings.

DATED this 21st day of September, 2018.

Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on September 21, 2018, I served a copy of the brief of appellant through the eFiling portal on James B. King at his email address.



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