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No. 72708-7-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION 1

MARSHA K. MCFADDEN as Personal Representative of the
Estate of DAVID R. MCFADDEN, deceased; on behalf of the
Estate of DAVID R. MCFADDEN, and on behalf of MARSHA K.
MCFADDEN, surviving spouse, and on behalf of KATHRYN
GREEN, CHRISTINA CARLSON and JACLYN FLEMING,
surviving adult children,

Appellants,

v.

SOUTH SOUND INPATIENT PHYSICIANS, PLLC; and
MONICA MARTON-POPOVICI, M.D.,

Respondents.

BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

1. The lower court erred in granting defendants' summary-judgment motion on statute of limitations grounds because questions of fact exist as to whether the plaintiff discovered, or reasonably should have discovered, the breach of duty and damages elements of a medical negligence cause of action against Dr. Marton-Popovici and SSIP at any time before September 17, 2012.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Is the plaintiff's medical-negligence action against Dr. Marton-Popovici and SSIP time barred under the one-year statute of limitations based on the discovery rule where the plaintiff could not, and did not, discover the breach of duty and damage elements of a medical negligence cause of action against Dr. Marton-Popovici until she was deposed on April 18, 2013?

2. Did the lower court erroneously grant the defendants' summary-judgment motion where the evidence the court relied upon in rendering its decision, i.e., plaintiff's counsel's assertions in two previously-decided motions, was vehemently disputed by the defendants in the prior motions until being submitted as "undisputed fact" in support of summary judgment?

STATEMENT OF THE CASE

- A. On March 3, 2009, David McFadden presents to the Valley Medical Center emergency room displaying typical symptoms of bacterial meningitis and dies two days later from its effects.**

On March 3, 2009, at 2:37 a.m., David McFadden presented to the Valley Medical Center ("VMC") emergency room complaining of a headache, earache, chills, and vomiting. CP 3. He was seen by Dr. Lapine and she administered pain medication and ordered a head CT. CP 4. Shortly thereafter, Mr. McFadden began pulling out his IV's and had to be restrained. CP 278. He was heavily sedated and intubated. CP 277. Dr. Lapine performed a lumbar puncture revealing cloudy fluid, indicating an infection. CP 4. At 8:30 a.m., Mr. McFadden was formally admitted to VMC by hospitalist, Dr. Marton-Popovici. CP 4. Mr. McFadden physically remained in the ER from 8:30 a.m. until approximately 1:30 p.m. while waiting for a room to open in the ICU. CP 4. He was not seen by Dr. Marton-Popovici during this time. CP 4. Dr. Marton-Popovici first saw Mr. McFadden after he was transferred to the ICU at approximately 1:30 p.m. CP 4. During this time he was hypotensive and Labetalol was administered to bring down his blood pressure. CP 278. His blood pressure dropped precipitously and his prognosis became grim. CP 279. He was declared brain dead at approximately 5:00 p.m. on March 4, 2009.

CP 5, 280. He died on March 5, 2009 after being removed from life support. CP 5, 280.

B. The September 9, 2011 state tort claim.

On September 9, 2011, the plaintiff filed a state tort claim against Public Hospital District No. 1 of King County d/b/a Valley Medical Center. The tort claim lists Monica Marton-Popovici, MD as an employee, agent, and/or ostensible agent of VMC. CP 125. It alleges negligence on behalf of VMC and its employees, agents, and ostensible agents, but is silent as to SSIP. CP 128. Notably, Dr. Marton-Popovici's actions are not mentioned as a basis for liability whereas the actions of Dr. Lapine expressly are. CP 128. Plaintiff never received any response to the tort claim from VMC or Dr. Lapine. CP 231-232.

C. On February 14, 2012, plaintiff commences a medical-negligence/wrongful-death action against defendants VMC, Associated Emergency Physicians, Inc. P.S., and Anne L. Lapine, M.D.

The 2012 complaint alleges that the emergency room physician, Dr. Lapine, failed to timely institute antibiotics, administer steroids, obtain a proper history, obtain an opening pressure from the spinal tap, failed to appreciate the likelihood of increased intracranial pressure, failed to obtain a neurosurgical consult, order proper fluids, and improperly ordering propofol. CP 168-169. It pleads all theories of recovery and bases for

liability available pursuant to the law against the named defendants, VMC and Dr. Lapine. CP 169. Dr. Marton-Popovici is listed under the "Identification of Defendants" section but she was not a named party to the action because the salient facts underlying a cause of action against her were not yet discovered. CP 163, 165. At the time, it was believed that Dr. Marton-Popovici was merely an employee, agent, or ostensible agent of VMC. CP 165. The complaint is silent as to SSIP because its relationship to Dr. Marton-Popovici was not discovered until her April 18, 2013 deposition. CP163-171.

D. On October 24, 2012, plaintiff's primary expert, neurologist, Dr. Stephan Mayer, provides a declaration based on Mr. McFadden's medical records. It is silent as to any potential claims against Dr. Marton-Popovici or SSIP.

Instead, Dr. Mayer's opinions focused exclusively on the medical negligence of Dr. Lapine and the health care providers at VMC. CP 281-284. The declaration did not identify any breach of duty or damages on the part of Dr. Marton-Popovici or her employer, SSIP. CP 281-284.

E. On March 11, 2013, plaintiff's primary expert, neurologist Dr. Stephan Mayer, provides a supplemental declaration based on Mr. McFadden's medical records which, for the first time, articulates a viable claim against Dr. Marton-Popovici and SSIP.

Dr. Mayer's supplemental declaration was the first instance where the facts underlying a viable claim against Dr. Marton-Popovici were

specifically spelled out. CP 285-290. Dr. Mayer opined that Dr. Marton-Popovici negligently failed to, among other things: timely consult with a neurologist/neurosurgeon; adequately treat Mr. McFadden's hypotension for several hours between 1351 and 1900; order and administer proper intravenous fluids between 0830 and 1530; intermittently hold the propofol drip between 0828 and 1530; order and institute ICP monitoring and lowering techniques; order a repeat head CT; and be aware of and properly treat the period of sustained hypotension from 1351 to 1720. CP 285-290.

F. Dr. Marton-Popovici is deposed as a non-party fact witness on April 18, 2013 and the salient facts supporting her breach of duty to Mr. McFadden and the resulting damages were discovered.

Though Mr. McFadden was formally admitted to VMC by Dr. Marton-Popovici at about 8:30 a.m.—thereby relieving Dr. Lapine as Mr. McFadden's attending physician—Dr. Marton-Popovici testified that Mr. McFadden was not her patient until he arrived in the ICU at approximately 1:30 p.m. CP 61-63. Dr. Marton-Popovici's deposition testimony revealed, for the first time, that she denied the existence of a physician-patient relationship between herself and Mr. McFadden from 8:30 a.m. to 1:30 p.m. while he waited in the ER. CP 61. Or put another way, the deposition

testimony revealed the salient facts supporting the elements of breach of medical duty and damages against Dr. Marton-Popovici:

Q. So would it be correct to say that at about 8:30, even though this patient remained in the emergency room because there weren't ICU beds for him, that this patient then became your responsibility at 8:30?

MR. CANNON: Objection, form.

A. Not really. It was just a verbal discussion.

Q. (By Mr. Otorowski) So when did care officially transfer to you?

A. Once the patient got to the ICU.

Q. So up until that time responsibility for this patient was with the Emergency Department?

A. Correct.

* * *

Q. Now, you just testified that it's your understanding that Mr. McFadden was not your patient at 8:30 and only became your patient at some point after he was physically transferred to the CCU --

A. Yes.

CP 61-63.

G. Mediation is held on June 27, 2013 and the case settles between the plaintiff, Dr. Lapine, and VMC.

In the corresponding release, entered into on July 1, 2013, Dr. Marton-Popovici was expressly not released. CP 259. Dr. Marton-Popovici, as a non-party fact witness that was not under the employ of VMC at the time of Mr. McFadden's treatment, was carved out of the release because, as indicated by defense counsel in an email dated March 15, 2013, "[VMC] will not pay anything in settlement for any care [Dr. Marton-Popovici] gave." CP 311. Plaintiff was even billed \$1,500 for Dr. Marton-Popovici's professional time to take the deposition. CP 258, 323-324.

H. On September 17, 2013 plaintiff commences a medical-negligence/wrongful-death action against Dr. Marton-Popovici and SSIP.

Unlike the 2012 complaint, the present complaint spells out the salient facts supporting each element of a claim for medical negligence against Dr. Marton-Popovici and SSIP, i.e., duty, breach, medical causation, and damages. CP 1-8. VMC and Dr. Lapine are not named defendants in the present complaint. CP 1.

I. On September 19, 2014, defendants move for summary judgment and, after oral argument on October 17, 2014, the motion is granted on the basis of statute of limitations under RCW 4.16.350.

In granting the defendants' summary-judgment motion by order dated October 17, 2014, the court found that it was "abundantly clear that the plaintiffs were aware of the role of Dr. Marton[-Popovici] as early as 9/9/2011 in numerous representations to the court." VRP (10/17/14) 21.

In reaching its decision, the court primarily relied upon counsel's statement contained in plaintiff's May 1, 2013 response to VMC and Dr. Lapine's motion for leave to file an amended answer. VRP (10/17/14) 10, 17-18, 20. The statement was quoted by the court as follows: "VMC was placed on notice of alleged fault of a non-party Dr. Marton[-Popovici] in both the Tort Claim filed on 9/9/11 and the Complaint filed on 2/14/12." VRP (10/17/14) 10, 17-18; CP 231. The court found that this statement confirmed that the plaintiff "knew" or "w[as] aware of [Dr. Marton-Popovici's] role" by the time of filing the state tort claim on September 9, 2011. VRP (10/17/14) 18.

The court also relied upon counsel's statements in plaintiff's May 13, 2013 reply to VMC's response to plaintiff's motion for reconsideration of the court's May 2, 2013 ruling granting VMC's motion to extend the trial date (CP 223-228). VRP (10/17/14) 20. Though the court did not

specify the particular statements made by counsel, defense counsel paraphrased a portion of the May 13, 2013 Declaration of Christopher L. Otorowski in support of plaintiff's reply (CP 134-142) as follows: "There is [sic] no new recently alleged claims pertaining to Dr. Marton[-Popovici]. These claims have been provided in various forms in the filed tort claim [and] in the 2012 complaint". VRP (10/17/14) 11.

The plaintiff's timely appeal of the court's October 17, 2014 order was filed on November 14, 2014.

LEGAL ARGUMENT

A. Standard of Review

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The statute of limitations applicable to this case is **RCW 4.16.350**, which provides in part:

Any civil action for damages for injury occurring as a result of health care . . . based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later[.]

A summary-judgment motion “based on the statute of limitations should be granted only if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced.” *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 109, 802 P.2d 826 (1991). “All facts and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate

only if, based on all of the evidence, reasonable persons could reach but one conclusion.” *Id.* Summary judgment is improper “where different inferences may be drawn from evidentiary facts as to ultimate facts such as knowledge.” *Weisert v. University Hosp.*, 44 Wn. App. 167, 172, 721 P.2d 553 (1986).

B. A question of fact exists as to when the plaintiff discovered, or reasonably should have discovered, the salient facts underlying the breach of duty and damages elements of her medical-negligence claim against Dr. Marton-Popovici and SSIP.

Under Washington’s one-year discovery rule, a cause of action does not accrue until the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of a cause of action, i.e., duty, breach of duty, medical causation, and damages. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). “This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action.” *Id.* “[M]ere inquiry by the plaintiff or her attorney into a possible cause of action is not enough to establish, as a matter of law, that the plaintiff discovered all the essential elements of that action.” *Olson v. Siverling*, 52 Wn. App. 221, 228-29, 758 P.2d 991 (1988). “The determination of when a plaintiff discovered or through the exercise of

due diligence should have discovered the basis for a cause of action is a factual question for the jury.” *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001) citing *Crisman v. Crisman*, 85 Wn. App. 15, 23, 931 P.2d 163 (1997).

In *Olson, supra*, the lower court granted the defendant physician’s summary-judgment motion on statute of limitations grounds finding that the plaintiff had “discovered all the elements of a possible cause of action more than 1 year before her suit was filed.” *Olson* at 229. The defendant relied upon exhibits demonstrating that the plaintiff had retained an attorney and that the attorney had inquired of a physician seeking an expert opinion of the defendant’s medical negligence. *Id.* In reversing the lower court’s decision, the Court of Appeals found no evidence indicating whether the physician responded to the inquiry or, if he did, what his opinion was. *Id.* It held that “the record shows nothing more than an *inquiry* into a possible cause of action, which is not sufficient in itself to establish, as a matter of law, that [the plaintiff] discovered all the essential elements of a possible cause of action.” *Id.*

In *Winbun, supra*, a defendant physician appealed a jury verdict on statute of limitations grounds because the physician was sued more than three years after the medical care in question, more than one year after the patient sought legal advice, more than one year after the

reviewing attorney had medical records, but—just as the case is here—less than one year from the first expert opinion that the physician’s care departed from the recognized standard of care. *See Winbun* at 210-11. The trial court denied the physician’s motion for a directed verdict. *Id.* at 212. The Court of Appeals reversed. *Id.* The Supreme Court reversed the Court of Appeals. *Id.* at 223. The Supreme Court held that the statute of limitations must be assessed individually for each potential defendant, such that a “plaintiff’s knowledge of an act or omission by one health care provider that triggers the discovery rule does not necessarily trigger the rule as to all providers.” *Id.* at 217. The Supreme Court further held that “[w]hether [the plaintiff] acted reasonably or should have discovered the negligence at an earlier time is a fact-specific inquiry properly reserved for the jury.” *Id.* at 218.

In *Lo v. Honda Motor Co.*, a case discussed by the *Winbun* court, a pregnant mother’s vehicle suddenly accelerated and, when she thrust the gear-shift lever backward and forward to kill the engine, she was thrashed about violently by the jerking of the vehicle. 73 Wn. App. 448, 450, 869 P.2d 1114 (1994). Within 24 hours of the incident, the mother experienced vaginal bleeding and premature uterine contractions. *Id.* One month later, the child was born in breach position with a prolapsed umbilical cord. *Id.* The child suffered hypoxic brain damage and was subsequently diagnosed

as a spastic quadriplegic with cerebral palsy. *Id.* at 450-51. The mother retained counsel to investigate whether the child's injuries were related to his premature birth, which, in turn, was believed to have been caused by the automobile malfunction. *Id.* at 451. Retained counsel sought multiple opinions regarding the causation of the child's injuries but the first physician to opine "as to the cause of [the child's] cerebral palsy and the first to opine that medical malpractice was a cause of the condition" occurred almost two years after counsel was retained and three-and-a-half years after the child was born with a known neurologic injury. *Id.* at 453. In affirming the lower court's denial of the defendant hospital and doctors' summary-judgment motion, the Court of Appeals held:

We decline to hold as a matter of law that the fact of a traumatic medical event (birth asphyxia) and knowledge of its immediate cause (prolapsed cord) equates with notice (imputed knowledge) that the injury was caused by medical error or omission. Like the products liability statute of limitation, RCW 4.16.350 provides that the claimant should have a reasonable opportunity to discover that the injury was caused by an act or omission.

Id. at 460.

The court further held that the due diligence of the plaintiff and her attorneys in discovering the salient facts underlying each element of the medical negligence causes of action were questions of fact. *Id.* at 464-65.

In *Olson*, *Winbun*, and *Lo*, despite the plaintiffs possessing knowledge of suspected medical negligence by a treatment provider—i.e., information about some, but not each, of the elements of a medical negligence cause of action—their causes of action did not accrue until a medical expert specifically opined about each element behind their potential claims. The facts here necessitate similar treatment.

As in *Winbun*, though the plaintiff was aware that Dr. Marton-Popovici was a treatment provider to Mr. McFadden upon filing the 2011 tort claim and 2012 complaint, the underlying facts supporting the breach of duty and damages elements of a medical negligence claim against Dr. Marton-Popovici and her employer, SSIP, remained unknown because they were not readily ascertainable through Mr. McFadden's medical records. The damage caused by Dr. Marton-Popovici could not be known until her deposition because it was not contained in the medical records and only her testimony made clear that she did not consider herself Mr. McFadden's physician from 8:30 a.m. until 1:30 p.m. when he arrived in the ICU. Dr. Marton-Popovici's testimony denies the existence of a legal duty of care prior to 1:30 p.m. and creates an unacceptable medical condition wherein Mr. McFadden was left without a hospitalist or attending physician for approximately five hours. Moreover, SSIP was not discovered as Dr. Marton-Popovici's employer until her deposition. Thus

because these “salient facts” were unknown until Dr. Marton-Popovici’s deposition, “[i]t was the lack of knowledge of any *act or omission* by [Dr. Marton-Popovici] which caused the injury that resulted in [Dr. Marton-Popovici and SSIP] not being named as . . . original defendant[s].” *Winbun* at 218. Indeed, at the time, Dr. Marton-Popovici was erroneously believed and alleged to be under the employ of VMC because SSIP had not been discovered and was an unknown entity to the plaintiff. Once the plaintiff discovered the facts demonstrating breach of duty and damages as to Dr. Marton-Popovici and SSIP, the present complaint was properly filed within the one-year period allotted by the discovery rule.

Moreover, . . .

- C. The lower court erred in granting the defendants’ summary-judgment motion because the evidence it relied upon in rendering its decision, i.e., plaintiff’s counsel’s assertions in two previously-decided motions, was vehemently disputed by the defendants in the prior motion practice until being submitted as “undisputed fact” in support of summary judgment.**

The defendants’ opportunistic and conflicting conclusions regarding plaintiff’s counsel’s general assertions made at different points in the litigation reveal a clear factual question for a jury. To wit: when the salient facts supporting the elements of breach of medical duty and damages against Dr. Marton-Popovici were first opined in the March 11, 2013 expert declaration of Dr. Mayer—and firmly uncovered during Dr.

Marton-Popovici's April 18, 2013 deposition—the defendants immediately moved for leave to amend their answers to the 2012 complaint to include allegations of non-party fault against Dr. Marton-Popovici. VMC steadfastly argued that it was put on notice for the first time of the newly discovered claim against Dr. Marton-Popovici after receiving Dr. Mayer's March 11, 2013 supplemental declaration. CP 293-298. In fact, the basis for VMC's motion was that, "only after VMC received the declarations of plaintiffs' experts in early March [of 2013], that any allegations of medical negligence specifically against Dr. Marton-Popovici were identified." CP 294. Tellingly, VMC asserted that "[m]erely identifying Dr. Marton-Popovici as a treatment provider within the [2012] Complaint was not sufficient to provide notice to the defendants that the plaintiffs would bring allegations of medical negligence against her. . ." CP 295. VMC further bolstered its position by arguing that, "[a]t the time the [VMC] Answer was filed, the plaintiffs had not asserted any allegations against Dr. Marton-Popovici. . ." CP 295.

Defendant Dr. Lapine joined VMC in the motion, arguing similarly:

[I]t was not until March 2013, through the declaration of a retained expert[, Dr. Stephan Mayer,] submitted in opposition to [VMC's] Motion for Summary Judgment, that Plaintiffs made allegations against Dr. Monica Marton-Popovici and [VMC's] ICU. The deposition of Dr. Marton-Popovici was

only taken last Thursday, April 18, 2013, when Plaintiffs' counsel elicited testimony supporting their newly alleged theories of recovery.

CP 299.

The court granted VMC and Dr. Lapine leave to file their amended complaints by relying on the same evidentiary "facts" it utilized in granting summary judgment—only interpreted in an opposing manner. CP 303-305.

Likewise, in VMC's April 19, 2013 motion for an extended trial date, it successfully argued that the expert declaration submitted by the plaintiff in March of 2013 provided, "for the first time, . . . allegations against [VMC] nursing staff" and "the care provided by a resident physician, and a non-employed hospitalist, [Dr. Marton-Popovici,] whom plaintiffs alleged is an agent of [VMC]," CP 218. VMC again insisted that it "would be unduly prejudiced if not allowed sufficient time to investigate these new allegations and prepare a defense." CP 218.

Thus in May of 2013, the defendants agreed with the plaintiff's present position. Namely, that (1) in March of 2013, a new viable claim for medical negligence was discovered against Dr. Marton-Popovici and her newly-discovered employer, SSIP; and (2) the testimony elicited from Dr. Marton-Popovici's April 18, 2013 deposition established the salient

facts underlying the breach of duty and damages elements of the newly discovered claim and also identified SSIP as her employer. It therefore cannot be said that the defendants met their prima facie burden in proving that the evidence leads to “but one conclusion” when they previously concluded that the very same facts meant something other than what they contended they meant in moving for summary judgment. Such is clear evidence that a question of fact exists as to when the plaintiff discovered, or reasonably should have discovered, the breach of duty and damages elements of her claims against Dr. Marton-Popovici and SSIP.

CONCLUSION

For the reasons stated, it is respectfully requested that the lower court’s decision granting the defendants’ summary-judgment motion be reversed.

RESPECTFULLY SUBMITTED this 17th day of February, 2015.

OTOROWSKI JOHNSTON MORROW & GOLDEN



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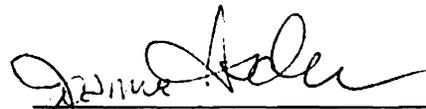
CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT, Postage prepaid, via U.S. Mail on the 17th day of February, 2015, and emailed to the following counsel of record at the following addresses:

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