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**No. 717685
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON**

TANYA STOCK,

Appellant,

v.

HARBORVIEW MEDICAL CENTER,
UW PHYSICIANS, ET. AL

Respondents.

OPENING BRIEF

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON~~

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	1
Assignments of Error	1
Issues Pertaining to Assignments of Error	2
C. STATEMENT OF THE CASE	4
D. ARGUMENT	6
1. Summary Judgment	6
2. Scope of Appellant Review	7
3. Prior Notice Not Necessary	7
4. No Dismissal for Failure to Designate Expert	10
E. Conclusion	13

Table of Authorities

CASES

Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990)	6, 7
Brandt v. Grubin, 131 N.J.Super. 182, 329 A.2d 82 (Law Div.1974).....	11
Carson v. Fine, 123 Wn.2d 206, 214, 867 P.2d 610 (1994)).....	12
Earle v. Froedtert Grain & Malting Co., 197 Wash. 341, 85 P.2d 264 (1938).....	9
Folsom v. Burger King, 135 Wash.2d 658, 958 P.2d 301 (1998)	6
Grant v. Douglas Women's Clinic, P.C., 260 Ga.App. 676, 580 S.E.2d 532 (2003)	10
Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 47, 785 P.2d 815 (1990).....	9
Le Juene Road Hospital, Inc. v. Watson, 171 So.2d 202 (Fla. 3d DCA 1965)	11
May's Estate v. Zorman, 5 Wn.App. 368, 487 P.2d 270 (1971)	12
McDermott v. Manhattan Eye, Ear and Throat Hospital, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E. 2d (1964).....	2, 12
McDevitt v.. Harborview Medical Center, 179 Wn.2d 59, 316 P.3d 469 (2013).....	1, 2, 6, 7, 8
Meiselman v. Crown Heights Hospital, 285 N.Y. 389, 34 N.E.2d 367 (1941).....	10, 11
Ravsten v. Department of Labor and Industries, 72 Wn.App. 124, 865 P.2d 1 (1993).....	10

Rivett v. City of Tacoma, 123 Wash.2d 573, 870 P.2d 299 (1994).....	7
Shoulberg v. Public Utility Dist. No. 1 of Jefferson Cy., 169 Wn.App. 173, 280 P.3d 491, rev. denied, 175 Wn.2d 1024 (2012)	7
Schroeder v. Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 297 P.3d 677 (2013)	7
State v. Douty, 92 Wn.2d 930, 603 P.2d 373 (1979)	9
Torgerson v. One Lincoln Tower LLC, 166 Wn.2d 510, 517, 210 P.3d 318 (2009)	7
Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)....	6

STATUTES

Wash. Rev. Code § 4.16.350.....	9
Wash. Rev. Code § 7.70.100(1)	<i>passim</i>
CR 41(a)(1)(B).....	9
CR 56(c).....	6

MISCELLANEOUS

Annot., Liability of Physician Who Abandons Case (1958) 57 A.L.R.2d 432.....	10
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A. Introduction

This is an action to recover damages for medical malpractice, predicated, in part, upon the abandonment of a patient. The appeal is from an order of the Superior Court, King County (Catherine Shaffer, J.), dated March 28, 2014, which granted summary judgment and dismissed the complaint on the grounds that the plaintiff, TANYA STOCK (“Plaintiff” or “Stock”) did not comply with 90 day presuit notice requirement of RCW 7.70.100(1)¹ and did not adduce expert testimony in opposition to the motion for summary judgment and could not rely upon cross-examination of the defendant physicians. CP: 199-200.²

B. Assignments of Error

Stock assigns as error:

1. Order granting summary judgment on the grounds that she did not comply with 90 day presuit notice requirement of RCW 7.70.100(1).
2. Order granting summary judgment on the grounds that it was

¹Subsequent to the filing of this suit, the legislature amended RCW 4.92.100(1) to remove the reference to chapter 7.70 RCW. See LAWS OF 2012, ch. 250, § 1. Since the effective date of that statutory change (June 7, 2012), claims must be made under RCW 4.92.100, not under chapter 7.70 RCW.11 LAWS OF 2013, ch. 82, § 1. Nonetheless, because this case is governed by prior statutory law, we will refer to chapter 7.70 in this brief.

²CP refers to the Clerk’s Papers.

necessary to adduce expert testimony on the ground that she did not adduce expert testimony in opposition to the motion for summary judgment and could not rely upon cross-examination of the defendant physicians.

Issues Pertaining to the assignments of error:

1. In *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 316 P.3d 469 (2013), the Supreme Court held that the 90 day presuit notice requirement of RCW 7.70.100(1) was constitutional, but limited its application as prospective only. This suit was filed before *McDevitt* was finally decided. May the defendants reply upon RCW 7.70.100(1) to preclude suit in this case?

2. Assuming that RCW 7.70.100(1) applies to this case, is substantial compliance with the provisions in a pre-*McDevitt* case sufficient to satisfy the statutory requisites?

3. Whether plaintiff was required to tender expert testimony in opposition to summary judgment at an early stage of the litigation or was she entitled to rely upon the analysis in *McDermott v. Manhattan Eye, Ear and Throat Hospital*, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E. 2d 469 (1964), a decision that has been followed in this state, that plaintiff in a

malpractice suit has a right to call a doctor against whom she brought the action and question him as a medical expert in order to make out a prima facie case.

4. Whether the effective abandonment of a patient constitutes such a deviation from the standard of care that no expert testimony is necessary.

C. Statement of the Case

On February 8, 2012, plaintiff was involved in a singular vehicular accident in which her automobile hit a metal traffic light pole singular head on. CP: 5, 45, 66-67. A witness said that a nefarious figure approached the car, opened the passenger side, verified that plaintiff was breathing and vanished. CP: 46. She was unconscious, incubated at the scene by EMT and transported to Harborview Medical Center (“Haborview”). CP: 5, 45. 46.

Still unconscious, plaintiff was admitted to Haborview where she was found to have a small right-sided intraventricular hemorrhage and an elevated blood alcohol level, and was administered midazolam CP: 17, 47, 48. She contended that she was the victim of “date rape.” CP: 46. Purportedly due to overcrowding, plaintiff was placed in the children’s intensive care unit. CP: 59

On February 11, 2012, only 72 hours after admission, less than 48 hours after being removed from mechanical ventilation, and despite showing all the affects of person whom suffered near catastrophic injuries, including traumatic brain injury, despite being insured with a local provider, Group Health, to whom they could have transferred Plaintiff to

ensure continuity of care and appropriate diagnosis and treatment, Harborview ostensibly evicted Plaintiff wearing medical waste and few if any personal possessions she was admitted with and to person or person(s) unknown. CP: 50, 54, 56, 59, 60.

On November 13, 2012, Plaintiff sent the risk manager for the University of Washington and Washington State Risk Management a certified letter indicating that she intended to file a tort claim. CP 42, 43. That letter was not “verified” and defendants objected. Accordingly, following the commencement of suit, Plaintiff filed a properly verified claim. CP: 19.

D. Argument

1. Summary Judgment

Plaintiff contends that the defendants' motion for summary judgment should have been denied. Summary judgment may not be granted unless the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See CR 56(c); *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).

Defendants, as the moving party, bear the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Compliance with RCW 7.70.100(1) was not required because the case was filed prior to *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 316 P.3d 469 (2013), which held that the requirement was prospective only from the date of the decision.

Similarly, there are outstanding questions of fact as to whether the defendants deviated from the standard of care by effectively abandoning their patient. There was no requirement that the plaintiff produce experts at this stage of the litigation and she was entitled to make the defendants here experts, if that be necessary.

2. Standard of Review

This Court reviews a trial court's summary judgment ruling de novo, *Torgerson v. One Lincoln Tower LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009), and considers "all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party." *Atherton*, 115 Wn.2d at 516; see *Shoulberg v. Public Utility Dist. No. 1 of Jefferson Cy.*, 169 Wn.App. 173, 177, 280 P.3d 491, rev. denied, 175 Wn.2d 1024 (2012). Questions of law are also reviewed de novo. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013); *Rivett v. City of Tacoma*, 123 Wash.2d 573, 578, 870 P.2d 299 (1994).

3. Prior Notice Not Necessary

In *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 316 P.3d 469 (2013), the Supreme Court held that the 90 day presuit notice

requirement of RCW 7.70.100(1) was constitutional, but limited its application as prospective only. This suit was filed before *McDevitt* was finally decided. Consequently, the notice of pre-suit requirement may not be applied in this case.

That the requirement should not be imposed here is mandated by the language of the statutory provisions in effect when suit was commenced. Former RCW 4.92.110 (2009), which was the version of the statute in effect at the time suit was filed mandated that all claims subject to the filing requirements of former RCW 4.92.100 be presented to the risk management division 60 days prior to the commencement of the action. Former RCW 4.92.100(1) (2009), however, exempted all “claims involving injuries from health care” because those claims “are governed solely by the procedures set forth in chapter 7.70 RCW.” This health care exemption was incorporated into RCW 4.92.100 in 2009 to avoid inconsistent presuit notice requirements found in former RCW 4.92.110 and former RCW 7.70.100(1) for medical malpractice cases. The current version of RCW 4.92.100, however, has removed the health care exemption.

The amendments are presumed to have a prospective effect only.

See *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990) (“Statutory amendments are also presumed to be prospective unless there is a legislative intent to the contrary or the amendment is clearly curative.”); *State v. Douty*, 92 Wn.2d 930, 935, 603 P.2d 373 (1979) (“It is a fundamental rule of statutory construction that a statute is presumed to operate prospectively and ought not to be construed to operate retrospectively in the absence of language clearly indicating such a legislative intent.” (quoting *Earle v. Froedtert Grain & Malting Co.*, 197 Wash. 341, 344, 85 P.2d 264 (1938))).

Since there was no direct statutory provision requiring specified presuit notice, and the Supreme Court has made its determination concerning the validity of the statutory provisions prospective effect, the suit should not have been dismissed.

In any event, there is no question that the Plaintiff did file and serve a proper verified notice when defendants raised the question of non-compliance. CP: 19. Medical malpractice actions have a three year statute of limitations. Wash. Rev. Code § 4.16.350. The statute thus will not expire until February 12, 2015. Accordingly, Plaintiff could have simply filed a notice of discontinuance, pursuant to CR 41(a)(1)(B), waited 90

days, and recommenced suit. The law does not require such an idle gesture. *Cf. Ravsten v. Department of Labor and Industries*, 72 Wn.App. 124, 131, 865 P.2d 1 (1993).

4. No Dismissal for Failure to Designate Expert

The trial court dismissed the complaint on the ground that expert testimony was needed. The court failed to perceive that expert testimony was not necessary and that if it was, it could be brought out on cross-examination of the defendants, as plaintiff contended.

Patient abandonment is a form of medical malpractice; “abandonment of a case by a physician without sufficient notice or adequate excuse is a dereliction of duty, and if injury results therefrom, the physician may be held liable in damages.” Annot., *Liability of Physician Who Abandons Case* (1958) 57 A.L.R.2d 432, 440.

Thus, the law is settled that a physician who undertakes to examine or treat a patient and then abandons her, may be held liable for malpractice. See, e.g., *Meiselman v. Crown Heights Hospital*, 285 N.Y. 389, 34 N.E.2d 367 (1941); *Tierney v Univ of Mich Regents*, 257 Mich App 681, 669 NW2d 575 (2003) *Grant v. Douglas Women's Clinic, P.C.*, 260 Ga.App. 676, 580 S.E.2d 532, 533 (2003)(before unilaterally withdrawing

from treating a patient, a doctor must provide reasonable notice of withdrawal to enable the patient to obtain substitute care); *Brandt v. Grubin*, 131 N.J.Super. 182, 193, 329 A.2d 82 (Law Div.1974).

At bottom, that is what the case is about. In *Meiselman*, which is the fountainhead case, the New York Court of Appeals said that expert testimony is not need in such a case: “Common sense and ordinary experience and knowledge, such as is possessed by laymen, without the aid of medical expert evidence, might properly have suggested to the jury that the condition of the boy at the time that he was left without hospitalization and abandoned by the defendants was not compatible with skillful treatment.” 34 N.E.2d at 370.

In *Le Juene Road Hospital, Inc. v. Watson*, 171 So.2d 202, 204 (Fla. 3d DCA 1965), the Court, holding a hospital liable for abandonment, quoted the Health Law Center of the University of Pittsburgh, Hospital Law Manual, Admitting & Discharge § 3-2 (1960) and said: ““Once a hospital begins to treat a person, it must not act unreasonably in having him removed from the premises. The law requires that a patient be kept in the hospital and treatment continued if it is foreseeable that his condition will be aggravated or his danger increased by removal.””

Moreover, contrary to the statement of the trial court, plaintiff could rely upon cross-examination of the defendants to make out a case of malpractice.

That was the decision of the New York Court of Appeals in *McDermott v. Manhattan Eye, Ear and Throat Hospital*, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E. 2d 469 (1964), a case that has been followed in this State. See *May's Estate v. Zorman*, 5 Wn.App. 368, 487 P.2d 270 (1971) (cited with approval and followed in *Carson v. Fine*, 123 Wn.2d 206, 214, 867 P.2d 610 (1994)). Quoting *McDermott*, this Court said:

It is at least arguable that the doctor's knowledge of the proper medical practice and his possible awareness of his deviation from that standard in the particular case are, in a real sense, as much matters of 'fact' as are the diagnosis and examination he made or the treatment upon which he settled. More importantly, however, by allowing the plaintiff to examine the defendant doctor with regard to the standard of skill and care ordinarily exercised by physicians in the community under like circumstances and with regard to whether his conduct conformed thereto, even though such questions call for the expression of an expert opinion, the courts do no more than conform to the obvious purpose underlying the adverse-party-witness rule. That purpose, of course, 'is to permit the production in each case of all pertinent and relevant evidence that is available from the parties to the action.'

5 Wn.App. at 370.

In short, on this record, defendants did not meet their burden of

showing the absence of a question of fact as to whether there was a breach of the duty of care and summary judgment should have been denied.

Conclusion

For the reasons stated, the judgment of dismissal should be reversed and the matter remanded for further proceedings.

Dated: September 5, 2014

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DECLARATION OF MAILING/SERVICE

The undersigned, Tanya Stock, certifies that on the below dates she caused to be filed in the Court of Appeals Division I, the Opening Brief of the action of Tanya I. Stock, Plaintiff and Harborview Hospital, Respondent, which was hand delivered to the address below.

As noted below the brief was mailed by first class mail, a true and correct copy of the brief to the counsel as listed below:

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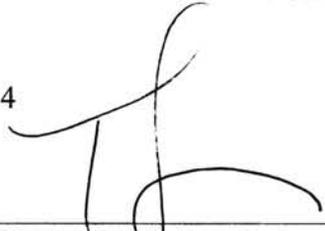
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I certify under penalty of perjury and under the laws of the State of Washington that foregoing is true and correct

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