

No. 44856-4

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL FOSS

Appellant,

v

STATE OF WASHINGTON

Respondent.

APPELLANT BRIEF

THURSTON COUNTY SUPERIOR COURT
CAUSE NO. 12-2-00370-7

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FILED
COURT OF APPEALS
DIVISION II
2013 AUG 21 PM 1:12
STATE OF WASHINGTON
BY  DEPUTY

P/m 8/19/12

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INTRODUCTION

It must be noted initially that this case cannot survive the Supreme Court's ruling in McDevitt v. Harborview Medical Center, 291 P.3d 876 (Wash. 2012), which is under reconsideration at this time. There, the court held that RCW 7.70.100 (1), which requires a ninety-day pre-suit Notice in a medical malpractice case, is constitutionally valid in claims against the State, notwithstanding the court's earlier ruling in Waples v. Yi, 169 Wash.2d 152, 161, 234 P.3rd 187 (2010), that the statute is unconstitutional as against private defendants. The Court granted a Motion for Reconsideration in McDevitt, which is pending as of the time this brief is being filed. If the Court does not change its opinion, this case must be dismissed, because in reliance on the Court's holding in Waples, the plaintiff's lawsuit here was filed after the sixty-day waiting period contemplated in RCW 4.92.110, not ninety days as contemplated by RCW 7.70.100 (1).

That said:

In this case the Defendant State was negligent as a matter of law in failing for over two-weeks to see to it that Plaintiff's intraocular pressure was tested, when he made complaints consistent with glaucoma.

There is sufficient evidence for the trier of fact to infer that the failure to test Plaintiff's intraocular pressure was a proximate cause of (1) his severe eye pain and headaches; and (2) the severe damage to his optic nerve that rendered the eye useless. Where from the "facts and circumstances and the medical testimony given, a reasonable person can infer that the casual connection exists", the evidence is sufficient on that issue. Douglas v. Freeman, 117 Wn.2d 242, 814 P.2d 1160 (1991).

ASSIGNMENT OF ERROR

The court erred in dismissing Plaintiff's case on Defendant's Motion for Summary Judgment.

Issue: Was there sufficient evidence of negligence and proximate cause to defeat summary judgment?

STATEMENT OF THE CASE

Plaintiff's intraocular pressure was normal as he was processed into the Defendant's custody, in July of 2008, CP 72, 73. There is no record of any previous issue with elevated pressure.

On September 26th, 2008, Plaintiff was routinely examined by Dr. Clifford Johnson, as Plaintiff was processed into OCC. CP 73. Dr. Johnson deferred eye examination because of the recent normal exam, but did note Plaintiff's history of retinal detachment that had been surgically repaired. *Id.*

Dr. Johnson admitted at deposition that "previous eye surgery, previous trauma", are the "main" aspects of a patient's history that might be "pertinent to an assessment of potential glaucoma". CP 99 (emphasis edded)

On December 14th, 2008, Plaintiff filled out a "Health Services Kite" requesting a doctor's appointment. The "Kite" (CP 105) reads in part:

"My [eye] surgeon told me to watch my eye pressure and for glaucoma (sic). My symptoms may be the onset of glaucoma (sic). Could I please be allowed to get the pressure checked in my eyes so if it is glaucoma (sic) I can start the drops to control it?"

Plaintiff was seen by Dr. Johnson four days later, on December 18th, 2008, CP 73. Dr. Johnson's note from that visit specifically recites Plaintiff's history of eye surgery in 2005, and again in 2007. The note

also acknowledges that “silicone gel was placed in the right eye” during the 2007 surgery.

Plaintiff testified to his interaction with Dr. Johnson:

Q. But did he acknowledge that it might be a good idea to have the pressure checked?

A. Oh, yes.

CP 109

Though it would have been feasible to have sent Plaintiff to the emergency room at Forks Hospital, about a half hour away, Dr. Johnson didn't do so. (CP 100). Instead, according to plaintiff, he specifically told Plaintiff that he did not believe he had glaucoma, (CP 108, 109) and saying only that “if the pain became very severe” he should “talk to his custody officer and go to the emergency room.” CP 29. There is no suggestion that Dr. Johnson ever offered him testing at Forks Hospital Emergency Room as an option.

On December 22nd, 2008, Plaintiff filled out another “Kite”, asking to see the doctor again, saying:

“My eye still hurts badly. Glaucoma (sic).”

CP 106

Plaintiff saw Dr. Johnson on Wednesday, December 24th, 2008. CP 30. Dr. Johnson still did not send him to the Forks emergency room; instead he made arrangements to have Plaintiff transported to Clallam Bay the following Monday. *Id.* As Plaintiff had been saying for about two weeks, testing did show that he did have high pressures and he was placed on appropriate medication, which brought them down, almost immediately relieving his pain symptoms.

By January 2, 2009 Plaintiff's "headaches [had] diminished" and his vision had improved somewhat.

There is **no question** that Plaintiff suffered severe optic nerve damage from high intra-ocular pressure. The following is from Dr. Johnson's own deposition CP 101-103:

Q. And his intraocular pressure has essentially been in control since---or was brought into control thereafter?

A. Right away.

Q. Okay. And did you continue to follow the situation in his right eye in the months after? Did you become aware that—

A. Yes.

Q. —he had suffered optic nerve damage?

A. Yes. Well, I didn't know about optic nerve damage then, no. Couldn't see his retina.

Q. Right. But in the months following.

A. Oh, I see. Eventually did I find out that he had—yes.

Q. Right. As you sit here, do you have an opinion as to the cause of that damage?

A. Well, after reading about glaucoma some more, I was surprised that most people that go blind from glaucoma, it chronic. It's not acute. And it usually is related to trauma. And it specifies old---old trauma, not acute trauma. And certainly, Mr. Foss had surgery. So that's a trauma. He'd also had a septo-plasty on his nose, which he said he'd had his nose broken multiple times. So there could have been trauma from those injuries in the past also.

Q. My question is a little different than that. Do you believe that increased intraocular pressure occurring around the time of these visits in December of 2008 is what damaged the optic nerve?

A. No, no, I don't believe that.

Q. Do you have an opinion as to what damaged the optic nerve?

A. I think that probably chronic intermittent elevation of his intraocular pressure did it.

Q. Have you seen any records that show elevated intraocular pressure?

A. Pardon? Oh, of Mr.—

Q. Yeah.

A. Has he had any since then that I know about?

Q. Before.

A. Oh. Well, there was a long period of time where he didn't --- I have no medical record between 2005 and 2008.

Q. Okay. Have you seen any medical record that you can point to at this time here today that bases your belief that chronic intraocular pressure rises before he came to see you in December of 2008 is what caused his optic nerve damage?

A. I've seen nothing in his record that ---while he was at DOC where his pressure was up.

Q. All right.

A. In all the previous times.

Q. Okay. Are you aware of any record that documents increased intra-ocular pressure, other than the measurement that was taken the Monday following Christmas Eve, 2008?

A. No.

There are none.

ARGUMENT

The Standard of Care is "Reasonable Prudence"

Defendant submitted no expert testimony in support of the care given Plaintiff, instead asking the Court to dismiss because Plaintiff supposedly lacked sufficient evidence.

In Harris v. Groth, 99 Wn.2d 438, 663 P.2d (1983), our Supreme Court set out the legal standard of care in medical malpractice cases:

“The standard of care against which a health care provider's conduct is to be measured is that of a reasonably prudent practitioner possessing the degree of skill, care and learning possessed by other members of the same profession in the State of Washington. The degree of care actually practiced by members of the profession is only some evidence of what is reasonably prudent—it is not dispositive”.

In Helling v. Carey, 83 Wn.2d 514, 519 P.2d (1974) the court specifically held that the entire medical profession's “standard practice” may be negligent, and this as a matter of law, for failure to give a glaucoma test. There, the Defendant never tested the Plaintiff for glaucoma because at all times during his care she was under 40; all parties agreed that standard medical practice did not require such testing until the age of 40, because the incidence of glaucoma is so rare before then. In ruling that the legal standard of care shall be “reasonable prudence”, as

opposed to “standard practice”, the Supreme Court said at 83 WN. 2 518, 519:

“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

“In *The T. J. Hooper*, 60 F.2d 737, on page 740 (2d Cir. 1932), Justice Hand stated: (I)n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive.”

The Court went on to hold that, as a matter of law, reasonable prudence required glaucoma testing:

“Under the facts of this case reasonable prudence required the timely giving of the pressure test to this plaintiff. The precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the ophthalmology profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.

We therefore hold, **as a matter of law**, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, the defendants were negligent, which proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable.” (emphasis added).

83 WN.2d 519.

Defendant contended below that the legislature overturned the “Helling v. Carey” rule by enacting RCW 4.24.290 in 1975. This is mistaken. Indeed, in Gates v. Jensen, 595 P.2d 919, 92 Wn.2d 246, 247 (Wash. 1979) the Supreme Court held.

“The second question raised is whether the rule of *Helling v. Carey*, 83 Wash.2d 514, 519 P.2d 981 (1974), that reasonable prudence may require a standard of care higher than that exercised by the relevant professional group, prevails even after the enactment of RCW 4.24.290. We answer both these questions affirmatively, reverse the trial court, and remand for a new trial.”

Gates v. Jensen was also a glaucoma case. The defense there advanced the exact argument raised by Defendant here--- that RCW 4.24.290 was intended to, and did abrogate the “Helling v. Carey” rule.

In rejecting that argument, the Supreme Court at 92 WN 2d 253 said:

“Respondents contend, though, that the Helling rule was abrogated by legislative enactment. RCW 4.24.290 provides, in part:

In any civil action for damages based on professional negligence against . . . a member of the healing arts . . . the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care and learning possessed by other persons in the same profession . . .

The original house bill would have established the standard of care as that skill and care practiced by others in the same profession and specialty. HB 246, 44th Regular Sess. (1975). Respondent contends the clear intent of this bill was to abrogate the Helling rule. The original bill was amended though. The statute as passed requires physicians to exercise the skill, care and learning Possessed by others in the same profession. This standard is much broader than the one embodied in the original bill, and allows ample scope for the application of the limited Helling rule. It is not argued that respondent and other ophthalmologists did not possess the skill, care and learning required to choose and administer the two alternative, simple and risk-free tests.”

Because of its importance, and direct applicability to this case, the following language from Gates 92 WN.2 252 will be quoted at length:

“Helling v. Carey was an unusual case. The plaintiff there, like Mrs. Gates, had glaucoma. The evidence showed the disease could have been detected and successfully treated early enough to prevent her severe vision loss if routine pressure tests had been administered when she first reported troubling symptoms to her doctor. The tests were not given, however, because the doctor did not suspect glaucoma and the standard of practice among ophthalmologists at that time was not to give routine pressure tests to persons under the age of 40. The plaintiff was only 32. The pressure tests, which were then routinely given to persons over 40, are simple, inexpensive, reliable and risk-free. The court held that reasonable prudence required the use of this test on persons under the age of 40 as well, and that failure to give the test to the plaintiff was negligence. The unusual features of the case included the nature of the disease glaucoma, which may go undetected for years until severe loss of vision is unavoidable, and the existence of a simple and harmless test which can prevent this terrible result. The instant case presents the same unusual features. The disease is the same. The treating physicians had available to them at least two additional diagnostic procedures dilation of the pupils for a better

view of the optic nerve discs, and a vision field examination which are simple, inexpensive, conclusive and risk free. These tests need only be used when other diagnostic procedures are inconclusive for some reason, or when a red flag of warning has been raised by some abnormality suggesting the risk of glaucoma. When a patient's condition does indicate the necessity for further examination, however, reasonable prudence requires the use of the alternative tests.

The evidence in this case showed that Mrs. Gates' physical condition her severe myopia and her initial borderline glaucoma pressure readings indicated a high risk of glaucoma. Other evidence tended to show Dr. Hargiss complied with the applicable professional standard of care by examining Mrs. Gates' optic nerve discs with a direct ophthalmoscope. A jury could find, however, that where the risk of glaucoma was high and the pressure tests arguably inconclusive, reasonable prudence required the physician to dilate the pupils for a better view of the optic nerve discs and administer a visual field examination. The doctrine of *Helling v. Carey*, that reasonable prudence may require a higher standard of care applies; petitioners were entitled to have their proposed instruction given to the jury.”

Here, the testing that would have revealed Plaintiff's high intraocular pressures was a half-hour drive away. There is no question that Dr. Johnson failed to consider, let alone present this option to Plaintiff, though his own notes reflect Plaintiff's severe eye pain, his history of eye surgery, and Dr. Johnson's admitted knowledge that “previous surgery, previous trauma” is consistent with glaucoma.

The failure to exercise reasonable prudence here is more glaring than in Helling, where all parties agreed that the Plaintiff was of an age where glaucoma was so rare that no doctors would have tested her for glaucoma. On this record, the Plaintiff should be given summary judgment of liability. At the very least, as in Gates, the jury would be entitled to find that, due to the actual perceived risk of glaucoma, reasonable prudence required immediate testing that lay one-half hour or so away.

Sufficient Evidence of Causation

In Douglas v. Freeman, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991), our Supreme Court said:

“It is not always necessary, however, to prove every element of causation by medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient.”

To begin with, it is agreed by all parties that Plaintiff’s intraocular pressure came down “right away” with proper treatment, meaning that he unequivocally suffered severe eye pain and headaches, to say nothing of intense anxiety, for two weeks longer than he need have. At the very least, he deserves his day in court as to these damages.

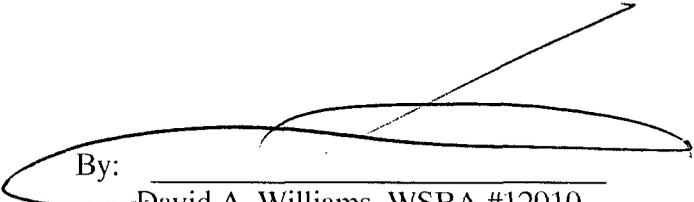
Furthermore, it is undisputed that Plaintiff lost the vision in his right eye from severe intraocular pressure. The only record of high pressures is under the Defendant's care. No alternative scenario is offered, except Dr. Johnson's completely speculative and totally unsupported theory that plaintiff suffered "chronic intermittent elevation" of his intraocular pressures.

The jury could rightly infer that the circumstantial evidence supports causation.

CONCLUSION

Plaintiff deserves his day in Court.

DATED this 19 day of August, 2013.

By: 

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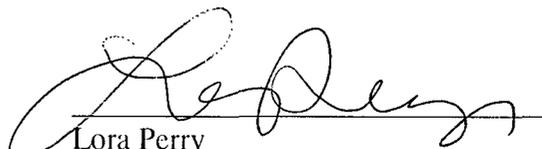
PROOF OF SERVICE

I hereby certify that a copy of the Appellant's Brief, was forwarded
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