

FILED

MAY 28 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 314936

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

CAMILLE L. MARTIN,

Plaintiff / Appellant

v.

M. SHANE MCNEVIN, M.D. and JANE doe MCNEVIN, husband and
wife; and SURGICAL SPECIALISTS OF SPOKANE, P.S., a Washington
State corporation;

Defendants / Respondents

APPELLANT'S OPENING BRIEF ON APPEAL

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ORIGINAL

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I. INTRODUCTION

COMES NOW plaintiff Camille Martin, by and through her attorney of record, George R. Guinn, with her opening Brief on Appeal, pursuant to RAP 10.4.

II. ASSIGNMENT OF ERRORS

Plaintiff Camille Martin believes the Spokane County Superior Court erred in granting summary judgment dismissal to defendants M. Shane McNevin, M.D. and Jane Doe McNevin, husband and wife; and Surgical Specialists of Spokane, P.S., a Washington State corporation (“these defendants”), on the basis of lack of expert testimony. The issues in this matter revolve around the following critical questions:

1) Should plaintiff Camille Martin’s claim against these defendants have been dismissed at summary judgment when the trial court judge failed to acknowledge expert testimony had been provided by plaintiff sufficient to survive summary judgment and establish her prima facie claim for failure to uphold standard of care?

2) Should plaintiff’s claim against these defendants have been dismissed at summary judgment when the trial court judge failed to allow plaintiff’s testifying medical expert to amend and/or provide an additional supporting affidavit pursuant to Washington State Superior Court rules?

III. STATEMENT OF THE CASE

On or about February 22, 2011, plaintiff Camille Martin went to see M. Shane McNevin, M.D. at Surgical Specialists of Spokane, P.S., regarding her symptomatic mixed hemorrhoids. It was agreed between patient and doctor that on March 11, 2011, plaintiff Martin would have a hemorrhoidectomy to alleviate plaintiff Martin's hemorrhoid problems.

Defendant Dr. McNevin agreed to be the physician/surgeon for treatment and repair of plaintiff's hemorrhoidal problems. Despite having voiced her concern about feeling very lightheaded and that her blood pressure was so low after the surgery, plaintiff Martin was discharged from Sacred Heart Medical Center in "good condition" according to defendant Dr. McNevin, on March 11, 2011.

Plaintiff Martin was feeling very lightheaded and voiced her concern that her blood pressure was really low when she was discharged on March 11, 2011. She and her husband traveled to the Group Health pharmacy to obtain her post-surgery prescriptions before going home. It was at that time that plaintiff Martin began feeling as though she needed to use the restroom and started feeling significant pressure at the surgical site.

After being home for approximately an hour, Ms. Martin began hemorrhaging and plaintiff Martin's husband called defendant Dr.

McNevin requesting plaintiff be readmitted to the hospital.

Defendant Dr. McNevin told plaintiff Martin the bleeding was “normal” and that she should stay off of the toilet and lie down. Dr. McNevin did not agree to re-admittance to the hospital and suggested that plaintiff Martin just continue to change the dressings on the wound site. Plaintiff Martin was bleeding so severely, she had exhausted all of the dressings supplied to her by the hospital, so her husband went to the store to obtain additional dressings per defendant Dr. McNevin’s orders.

While her husband was at the store, plaintiff Martin’s symptoms became worse and she went into the restroom feeling she needed to use the facilities. Instead, plaintiff Martin passed a large amount of blood and continued bleeding. She returned to her room to lie down as she was light headed due to blood loss.

While on lying on her bed, defendant Dr. McNevin’s office (defendant Surgical Specialists of Spokane) called on the phone, so Ms. Martin attempted to get out of bed to answer the phone as she was very worried about the excessive bleeding, lightheadedness and feeling ill.

While answering the telephone Ms. Martin lost consciousness due to blood loss, falling forward and striking her face on her bedpost causing a nasal fracture, maxillary fracture, and lacerations of her upper and lower lips. The fall also caused plaintiff Martin to lose and chip teeth.

Plaintiff Martin's husband returned from the store and found her unconscious on the floor. Plaintiff was immediately returned to the Emergency Room at Holy Family Hospital wherein her blood pressure was reported to be 68/45, and she had to be resuscitated. Thereafter, Ms. Martin had to undergo another surgery for repair of one of the rectal surgical sites that was oozing as well as repair of the through and through lip lacerations caused by the fall.

Since then, plaintiff Ms. Martin has had to endure multiple procedures, reconstructive and plastic surgeries for repair of the injuries sustained to her face as a result of losing consciousness due to blood loss after the surgery performed by defendant Dr. McNevin.

Plaintiff Martin filed a Complaint for Damages against these defendants in Spokane County Superior Court on July 13, 2012 (CP 5-11), alleging these defendants failed to uphold the standard of care pre, during and post- surgery.

On December 14, 2012, these defendants filed Defendant's Motion for Summary Judgment of Dismissal (CP 34-35), with prejudice, alleging plaintiff Martin could not establish a prima facie case of medical negligence because she had not set forth the *appropriate* expert testimony as required by Washington law (CP 37-40).

IV. ARGUMENT

1) Should plaintiff Camille Martin's claim against these defendants have been dismissed at summary judgment when the trial court judge failed to acknowledge expert testimony had been provided by plaintiff sufficient to survive summary judgment and establish her prima facie claim for failure to uphold standard of care?

In the [Plaintiff's] Response to Defendants' Motion for Summary Judgment (CP 55-59) and Declaration of George R. Guinn (CP 42-53), plaintiff Martin argued that expert testimony had indeed been provided, however due to circumstances beyond plaintiff counsel's control (CP 58-59) (RP at 19:6-12), it was not in a format the judge found acceptable. Plaintiff also provided medical records supporting her medical expert's testimony and identifying the negligent party (CP 49-53); the Curriculum Vitae of her medical expert, Joseph A. Scoma, MD, FACS, FASCRS (CP 44-47); and the Expert Opinion from Joseph A. Scoma, MD, FACS, FASCRS itself (CP 48).

Plaintiff Camille Martin also argued:

ER 702, Testimony of Experts, states "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto *in*

the form of an opinion or otherwise.” (CP 59)

Additionally, ER 703, Bases of Opinion Testimony by Experts provides, “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” (CP 59)

And finally, ER 704, Opinion on Ultimate Issue, states “Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” (CP 59)

In the instant case, the trial court refused to even consider evidence and argument presented by counsel for plaintiff Martin at summary judgment (RP 10:14 - 11:7); (RP 12:6 – 16), and even challenged counsel for plaintiff to “appeal me” (RP 22:17-24); (RP 23:5-10).

The written opinion of Joseph A. Scoma, M.D., F.A.C.S. filed as part of the Declaration of George R. Guinn, specifically stated “I believe there is reason to believe that the accepted standard of care in the management of Camille Martin was not followed. As a consequence, she suffered damages as noted in the records.” This format may not have been what the court wanted but there is no dispute that “an [affidavit] *or*

otherwise” was provided in response to summary judgment that included supporting qualifications and evidence to back up the opinion (CP 42 – 53).

2) Should plaintiff’s claim against these defendants have been dismissed at summary judgment when the trial court judge failed to allow plaintiff’s testifying medical expert to amend and/or provide an additional supporting affidavit pursuant to Washington State Superior Court rules?

CR 56(e) provides in pertinent part:

“...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, **but his response**, by affidavits or as **otherwise provided in this rule**, must set forth specific facts showing that there is a genuine issue for trial.” (Emphasis added)

Additionally, CR 56(f) - When Affidavits Are Unavailable, provides, “Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

Despite that plaintiff Martin did in fact provide valid evidence and argument sufficient to survive summary judgment, the trial court refused to allow a continuance for the purpose of putting the expert witness's opinion in the form of an affidavit. The evidence was presented, and the defense did not dispute the qualifications of the expert witness or the medical evidence provided in response to the Motion for dismissal (RP 7:13 - 21).

The trial court argued that a continuance had been granted already (RP 20:20-23). The reason plaintiff requested a continuance from the defense was due to the hospitalization and recovery of plaintiff's counsel from back surgery as well as the fact that despite best efforts, plaintiff's expert was unavailable, and those reasons were specifically outlined to these defendants when the request was made. As counsel for plaintiff argued, he firmly believed the Opinion and supporting documentation from the medical expert witness was enough to survive summary judgment based on court rule and case law (RP 23:1 - 2). Despite these valid points, they are not the reason plaintiff brings forth this appeal.

Finally, after hearing argument from counsel for plaintiff regarding dismissing plaintiff's claim *with or without* prejudice, the trial court itself stated "I would agree that the higher courts say they would like things to

go to trial and not be dismissed on it [summary judgment].” (RP 21:24 – 22:8).

V. CONCLUSION

Plaintiff Camille Martin respectfully requests this Court set aside the trial court’s Order (CP 69 - 70) granting summary judgment dismissal to these defendants based on the argument and evidence outlined above.

VI. FEES AND COSTS

Pursuant to Rule 18.1 of the Rules of Appellate Procedure, plaintiff Camille Martin respectfully moves the Court for an Order granting plaintiff recovery of her attorney fees and costs incurred herein.

RESPECTFULLY SUBMITTED this 28 day of May, 2013.



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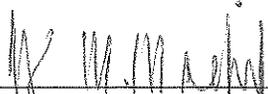
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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I hereby certify under penalty of perjury under the laws of the State of Washington that on the 28th day of May, 2013, I caused a true and correct copy of Appellant's Opening Brief on Appeal and the Verbatim Report of Proceedings to be served on the following in the manner indicated below:

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