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NO 70491-5

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

SARAH A. EVISON,

APPELLANT

v.

DAVID VOSSLER, M.D., VALLEY MEDICAL CENTER – KING
COUNTY HOSPITAL DISTRICT NO. 1,

RESPONDENTS

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant/Plaintiff Sarah Evison submits the following Reply to the Response Brief of Defendants/Respondents David Vossler, M.D. and Valley Medical Center – King County Public Hospital District No. 1 (“Valley Medical Center”). In their response, they improperly ask this Court to affirm based on another dispositive motion which was not heard, argued, or ruled on below. Accordingly, the appellate record is too undeveloped to affirm on that basis.

Instead, Ms. Evison asks this Court to focus its attention on the state of the law at the time she filed her Standard Tort Claim and to reverse the trial court’s order of summary judgment of dismissal accordingly.

II. ARGUMENT

Dr. Vossler and Valley Medical Center filed three motions for summary judgment. The first was filed on July 5, 2012, and noted for hearing on August 24, 2012. It was based on the claim that Ms. Evison failed to comply with RCW 7.70.100(1) as applicable to public entities under RCW 4.96.020. The trial court denied this motion on August 24, 2012. CP at 79-81.

The second summary judgment motion was served on December 18, 2012, and noted for hearing on February 1, 2013. In this motion, Dr. Vossler and Valley Medical Center claimed that they were entitled to summary judgment of dismissal because Ms. Evison had not produced expert testimony to establish breach of the applicable standard of care or proximate cause. CP at 84-95. This motion was never argued. No order was entered granting this motion.

The third summary judgment motion was served and noted for hearing on February 1, 2013. This motion was based on the Washington Supreme Court's decision in the case of *McDevitt v. Harborview Medical Center*, ___ Wn.2d ___, 291 P.3d 876 (2012), decided on December 27, 2012, which held that RCW 7.70.100(1) and its 90-day presuit notification was "constitutional as applied to lawsuits against the State." This motion was granted by an Order signed February 11, 2013. The order specifically provided that "Defendants' Third Motion for Summary Judgment is GRANTED." CP at 439-41.

A. Ms. Evison's Pre-Suit Notice under RCW 4.96.020 Was Proper Notice to Both Dr. Vossler and Valley Medical Center.

Ms. Evison filed a Standard Tort Claim form on March 9, 2012. At the time of filing, the Washington Supreme Court had ruled in 2010 that RCW 7.70.100 was unconstitutional. *Waples v. Yi*, 169 Wn.2d 152, 161, 234 P.2d 187 (2010). The *Waples* decision unequivocally held that RCW 7.70.100 was a procedural law and would not prevail over conflicting court rules. Specifically, it held the statute to be unconstitutional in its entirety: "The notice requirement of RCW 7.70.100(1) irreconcilably conflicts with the commencement requirements of CR 3(a) and is unconstitutional because it conflicts with the judiciary's power to set court procedures." *Id.* at 161.

The *Waples* decision did not hold that the law was unconstitutional only when applied to disputes between private parties. The decision made no distinction as to whether it remained constitutional as to claims against governmental entities. Rather, the decision was that the law was unconstitutional because it conflicts with the judiciary's power to set court procedures. Ms. Evison was therefore required to file her complaint under the provision of RCW 4.96.020.

McDevitt v. Harborview Medical Center, ___ Wn.2d ___, 291 P.3d 876 (2012), was decided on December 27, 2012, nine months after Ms. Evison served her notice of intent and notice of claim on Dr. Vossler and Valley Medical Center. That decision is now being reconsidered by the Washington Supreme Court for the purpose of deciding whether the decision should be given only prospective application.

The Washington Supreme Court's opinion on reconsideration may be dispositive of the claim that Ms. Evison should have filed under RCW 7.70 even though that statute had been held to be unconstitutional when she filed her complaint.

B. This Court Should Not Affirm Based on Any Alleged Lack of Experts for Ms. Evison.

Dr. Vossler and Valley Medical Center's second motion for summary judgment regarding the lack of expert testimony was originally noted for hearing on February 1, 2013. On January 29, 2013, the trial court continued the hearing of this motion to April 12, 2013. CP at 428-29. The trial court specifically noted on this order:

The motion on the legal issue / 7.70 is not continued. It will be heard this Friday. It is not sufficient to request that discovery be completed before the motion be heard; however, as a practical matter, the

court has concluded that a continuance may be inevitable for the motion on expert evidence.

Id.

No subsequent order was ever entered in the docket or otherwise indicating any ruling regarding this second motion for summary judgment. This motion was not argued on April 12, 2013. Their third motion for summary judgment was in fact argued. An Order Granting Summary Judgment of Dismissal was entered on February 11, 2013. CP at 439-41. This Order specifically provided that “Defendants’ Third Motion for Summary Judgment is GRANTED.”

Dr. Vossler and Valley Medical Center nevertheless argue at page 8 of their brief that this Court now can affirm their dismissal on the basis of their second motion for summary judgment, *despite the fact that this motion was never argued and no order was ever entered granting or denying that motion*. The hearing of this second motion for summary judgment was continued to April 12, 2013. There was never any argument on this motion because the trial court granted their third motion and dismissed the case on February 11, 2013.

Only an aggrieved party may seek review by the appellate court. RAP 3.1. The only methods for seeking review of decisions

of the superior court by the Court of Appeals are “appeal” and “discretionary review.” RAP 2.1(a). Dr. Vossler and Valley Medical Center have not filed a cross-appeal or sought discretionary review of the status of their second motion for summary judgment regarding lack of expert testimony. There was no argument, decision, or order with regard to this second motion. Nevertheless, their appellate brief relies primarily on the lack of expert testimony to support affirmance of the dismissal of Ms. Evison’s case.

In their brief, Dr. Vossler and Valley Medical Center also rely on *McGowan v. State*, 148 Wn.2d 278, 60 P.3d 67 (2002). But *McGowan* does not support their position that this Court may rely on a motion that was not argued or decided. The issue at the trial court level in *McGowan* was whether Initiative 732 mandated a cost-of-living increase for all school district employees and, if so, whether it required the State itself to fund a cost-of-living increase for all district employees or only for those employees who were state-funded as part of its constitutional duty to provide basic education. The trial court held that annual cost of living increases were required but that the State is required to fund the increase only for state-funded employees. Following the plaintiffs’ appeal, the Washington Supreme Court reversed in part, holding that the

State is required to fund the increase for all school district employees and not only those who were state-funded.

On appeal, the State renewed its argument that I-732 required cost-of-living increases only for state-funded positions. Plaintiffs contended that the State had not cross-appealed the trial court's declaratory judgment and therefore was not entitled to pursue this argument. The Washington Supreme Court held:

Appellants are mistaken. Because the State prevailed, it was not required to cross-appeal the court's ruling as to section 2(1)(a); it seeks no further affirmative relief from this court. *The State is entitled to argue any grounds in support of the superior court's order that are supported by the record.*

148 Wn.2d at 287-88 (emphasis added and citations omitted).

McGowan is not authority for the proposition now argued by Dr. Vossler and Valley Medical Center. Here, the trial court's ruling on their third motion for summary judgment is the only motion that was argued and decided. Their second motion about expert testimony was never argued and never ruled on. It was not before the trial court when it granted their third motion for summary judgment. CP at 440.

Dr. Vossler and Valley Medical Center also rely on *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134-35, 847 P.2d 428 (1993). But this decision does not support their contention that their

dismissal can be supported by a pending, but undecided, motion for summary judgment based on a purported lack of expert testimony.

In *Hoflin*, the plaintiff was employed by the City of Ocean Shores. He was terminated after being indicted and convicted for the felony of disposing of hazardous waste. He filed suit claiming that he was illegally discharged. The trial court initially granted plaintiff's motion for summary judgment, finding that the termination under RCW 9.92.120 was improper. The City later contended on a motion for reconsideration that the statute provided two alternative grounds for dismissal of a city employee. The City contended that the plaintiff employee had committed malfeasance in office and therefore forfeited the office. The plaintiff employee claimed that the only reason originally given for his dismissal was his felony conviction. He contended that the City was adding additional reasons. The trial court ultimately ruled that whether malfeasance in office occurred as a result of plaintiff's conviction is a "matter that must be resolved at trial." *Hoflin*, 121 Wn.2d at 432. The trial court ultimately ruled that the malfeasance portion of the forfeiture statute was not applicable in this case.

The Washington Supreme Court affirmed the trial court's summary judgment dismissal of plaintiff's claims. The trial court ruled that *Hoflin* was employed "at will," or in the alternative, that "just cause" existed for his termination under the City's Municipal Code because of the felony convictions in federal court. The Supreme Court concluded that the trial court's grant of summary judgment to the City was not based upon the proper reasons. *Id.* at 134. "We nevertheless affirm the trial court because it reached the right result, but for the wrong reason." *Id.* Note, however, that the Court could have, under the evidence and law presented to the trial court, dismissed the plaintiff because of his conviction as a felon. In a footnote, the Court referred to the decision in *Tropiano v. Tacoma*, 105 Wn.2d 873, 876, 718 P.2d 801 (1986).

Tropiano involved a slip-and-fall case against the City of Tacoma. The City sought indemnity from the abutting property owners Theo and Patsy Seats. The Seats made two arguments: first, that the statute invoked by the City was unconstitutional, and second, that the sidewalk did not present a dangerous or hazardous condition. The trial court ultimately denied the Seats' motion to dismiss. On appeal, the City argued that the Seats were attempting to raise a new issue initially on appeal in arguing lack of evidence

of a dangerous sidewalk. The Washington Supreme Court disagreed:

We reject this assertion. The record shows the Seats made the factual argument to the trial court at the September 9, 1983 hearing. The trial court's order of summary judgment recites that the trial court considered the evidence which the Seats presented in support of that argument. Whether the trial court based its judgment on the Seats' factual contentions or their constitutional argument is immaterial; *both arguments were raised at trial and both are properly before this court now.*

Id. at 876 (emphasis added).

As is pointed out above, Dr. Vossler and Valley Medical Center argued their third motion for summary judgment to the trial court. Their second motion regarding lack of expert testimony was not granted or considered. Unlike *Tropiano*, both arguments were not raised at the trial court level and both arguments are not now properly before this Court.

A party may present an alternate ground for affirming a trial court if the record has been sufficiently developed to consider the ground. RAP 2.5(a). Such is not the case here. See *Blueberry Place Homewoners Ass'n v Northward Homes, Inc.*, 126 Wn. App. 352, 362-63, 110 P.3d 1145 (2005). This case involved a general contractor's claim against a subcontractor for attorneys' fees and costs based on a theory of equitable indemnity. On appeal, the

general contractor argued in the alternative that the subcontractor's bad faith litigation conduct provided an independent basis to award attorneys' fees. In rejecting this claim, Division One stated:

Although the issue of MacDonald-Miller's alleged bad faith litigation conduct was raised below by Northward, it was not addressed by the trial court and we cannot on this record consider this argument for the first time on appeal. See RAP 2.5(a) (a party may present an alternate ground for affirming a trial court if the record has been sufficiently developed to fairly consider the ground). See also *Sorrell v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 38 P.3d 1024 (2002) (where the trial court had no opportunity to address an issue on summary judgment, appellate court would decline to consider it on appeal of summary judgment).

Id. (footnotes omitted).

This Court should decline to consider Dr. Vossler and Valley Medical Center's second motion for summary judgment about lack of expert witness testimony because the trial court had no opportunity to hear argument or rule on this issue below.

Wingert v Yellow Freight Systems, Inc., 146 Wn.2d 841, 50 P.3d 256 (2002), reaches the same conclusion. Yellow Freight had pleaded as an affirmative defense that its employees' claims were preempted by federal law. "However, these defenses were not pursued before the trial court." *Id.* at 853. The Court went on to state: "Arguments not raised in the trial court generally will not be considered on appeal." *Id.* (quoting *State v. Riley*, 121 Wn.2d 22,

31, 846 P.2d 1365 (1993)); *see also Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976) (“Thus, when the alternative ground for affirming the trial court’s order of summary judgment has not been argued and briefed by the parties either before the trial court or the appellate court, caution must be exercised so as not to deny the appellant the right to dispute the facts material to the new theory.”).

Because the trial court continued the hearing on Dr. Vossler and Valley Medical Center’s argument about a lack of expert testimony summary judgment to April of 2013, Ms. Evison neither responded to the motion nor had the requisite opportunity to argue in opposition to that motion to the trial court. As such, the record below is too undeveloped for this Court to affirm the summary judgment order on that unrelated, alternative basis.

The Court should not consider this alternate ground for affirmance of the dismissal of Dr. Vossler and Valley Medical Center.

C. This Court Should Stay This Matter Pending Resolution of the Washington Supreme Court’s Partial Reconsideration of *McDevitt*.

On June 13, 2013, Chief Justice Barbara Madsen signed an Order Granting Motion for Reconsideration of the *McDevitt*

opinion. Appendix, Attachment A to Br. of Respondents (*McDevitt v. Harborview Med. Ctr.*, No. 85367-3). The Order specifically provides that the motion for reconsideration “is granted in part, limited to the issue of whether the decision should be given only prospective application.” *Id.*

Ms. Evison agrees with Dr. Vossler and Valley Medical Center’s suggestion that this appeal should be stayed pending the Washington Supreme Court’s decision on reconsideration in *McDevitt*. Br. of Respondents at 25. The trial court order granting summary judgment on appeal here was entered after oral argument and submission of Dr. Vossler and Valley Medical Center’s briefing, which noted the then-recent decision in the case of *McDevitt*. If the Supreme Court decides that its decision should be given prospective application only, the basis for the trial court’s order granting summary judgment is gone.

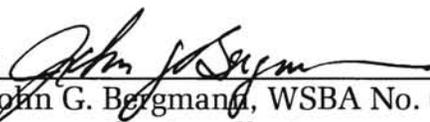
III. CONCLUSION

Ms. Evison respectfully requests that this Court reverse the trial court’s order of summary judgment of dismissal and remand her claims for additional proceedings below. In the alternative, she requests that this Court stay argument and its decision on this appeal until such time as the Washington Supreme Court enters its

decision on whether *McDevitt* should be given only prospective application.

Respectfully submitted this 22nd day of October, 2013.

HELSELL FETTERMAN LLP

By 
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 Fourth Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Evison v. Vossler, et al., I did on the date listed below, (1) cause to be filed with this Court a Reply Brief of Appellant; and (2) to be delivered via messenger to Bruce Megard, Bennett Bigelow, & Leedom, 601 Union Street, Ste. 1500, Seattle, WA 98101, who are counsel of record of Respondent.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: October 22, 2013


Kyna Gonzalez

FILED
OCT 22 2013
CLERK OF COURT
SUPERIOR COURT
JAN 10 2013