

71123-7

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NO. 71123-7 -I
WASHINGTON STATE COURT OF APPEALS
DIVISION I

JOHN DOE, a single man;
and JANE DOE, a single woman,

Appellants,

vs.

PHILLIP J. ZYLSTRA, M.D. and BARBARA ZYLSTRA, husband and wife, and
the marital community composed thereof; MARK SPENCER, M.D. and
CYNTHIA SPENCER, husband and wife and the marital community composed
thereof; VERNON HALL, M.D. a single man; GLEN ISHAM; ANN DOE; TANYA
DOE; SHERRI DOE; CORRIN DOE; KIM DOE; and SHAYNI DOE,

Respondents.

APPEAL FROM THE
SUPERIOR COURT FOR SNOHOMISH COUNTY
THE HONORABLE DAVID A. KURTZ

APPELLANTS' REPLY BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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I. INTRODUCTION

The Does---appellants herein---were patients of the Arlington Medical Clinic ("Clinic")¹ for more than ten years before the tortious conduct described in their complaint, began.² During this period, the respondents became duty-bound to their patients to provide proper medical care and treatment. This included refraining from conduct and activities specifically identified and proscribed by the Department of Health, known to result in substantial harm to patients.

The respondents frame this appeal with the bare argument that they could not have prevented two consenting adults from engaging in an extra-marital affair. That is not what this case is about. This case is about a series of egregious errors by the physicians and staff of the Clinic for a protracted period of time.

Sometime prior to February 9, 2009, Glen Isham began a process of grooming Ms. Doe for a sexual affair during the patient

¹ The Clinic is variously referred to as the Arlington Medical Clinic, the Skagit Valley Clinic, and the Cascade Family Medical Group. All names refer to the same Clinic, which operated under different names at different times. However all three defendant physicians herein were continuously employed by the Clinic at all times relevant hereto.

² CP 12 at ¶2.

intake portion of her doctor visits.³ All healthcare professionals associated with the practice either tolerated, or negligently failed to take notice, that Mr. Isham routinely spent 45 minutes with Ms. Doe during such unsupervised visits.⁴

The trial court found Mr. Isham grossly negligent in violating virtually every legal and ethical duty owed to both plaintiffs, because both were his patients at the clinic where he was employed.⁵ The trial court which granted respondent's motion for summary judgment ignored all or most of the same evidence relied upon by the plaintiffs in obtaining judgment against Isham. Had the respondent's properly supervised Mr. Isham and protected Ms. Doe, as they were legally required to do, then trial court which granted summary judgment would have been correct. It was not.

II. FACTUAL BACKGROUND

Ms. Doe was treated mostly by the respondent Dr. Zylstra and on occasion by the respondent Dr. Hall.⁶ Appellant Jane Doe met Glen Isham in 2007⁷ at the Skagit Regional Clinic where he

³ CP 12, ¶4.

⁴ CP 289, ¶30; CP 12, ¶4.

⁵ CP 14, ¶4.

⁶ CP 284, ¶15.

⁷ CP 83, p. 60, ln. 1-3; CP 289, ¶26.

had recently been hired as a Medical Assistant ("MA"). Mr. Isham's tasks included doing patient intake which simply involves taking the patient's vitals, recording the patient's chief complaint, and informing the doctor the patient is ready.⁸ This entire process takes between three and ten minutes.⁹ However, Mr. Isham, began engaging Ms. Doe in conversations of a deeply personal nature taking advantage of his unique position to discuss matters of a deeply personal nature quite unrelated to the treatment she sought for her or her family.¹⁰ Isham routinely spent 45 minutes with Ms. Doe her during these unsupervised visits.¹¹ He paid more attention to Ms. Doe than the other patients, wanting to know everything there was to know about her: job at Target; relationship with her children; relationship with her husband; whether she did drugs; and how often she and her husband had sex.¹² He touched her inappropriately during the intakes: placing his hand over hers; holding her at the waist from behind while weighing her; and

⁸ CP 83-84, pp. 60-61, lns. 16-3.

⁹ CP 84, p. 61, ln. 4-6.

¹⁰ CP 288, ¶¶26-27.

¹¹ CP 289, ¶130; CP 12, ¶14.

¹² CP 288, ¶¶26-27.

hugging her when they were alone in the examination room.¹³ In early 2009, after two years of this conduct, Isham caught Ms. Doe in the reception area of the Clinic. In front of the Clinic staff and others, Isham asked Ms. Doe if she would go out that night with him.¹⁴ Shortly thereafter, Mr. Isham initiated a sexual relationship.¹⁵ Mr. Isham has had multiple marriages.¹⁶ He freely admits that when he tires of his latest conquest, he simply moves on.¹⁷

Dr. Zylstra claims to have never observed any inappropriate conduct by Mr. Isham and had no complaint about his work as a Medical Assistant.¹⁸ But even if he did notice anything unusual, he was not aware of the ethical duties by which any of the medical assistants with whom he worked were bound, never bothered to investigate them, and did not believe the duties he owed to Ms. Doe were in any way affected by the behavior of his subordinates.¹⁹ And while he believed a sexual relationship between an MA and a patient to be morally wrong, he didn't think anything about it as

¹³ CP 289, ¶31.

¹⁴ CP 290, ¶32.

¹⁵ CP 289, ¶33.

¹⁶ CP 70, p. 8, ln. 1-3; CP 74, p. 22, ln. 9-12; CP 85, p. 66, ln. 21-24.

¹⁷ CP 85, p. 66, ln. 13-14.

¹⁸ CP 245, p. 33, ln. 3-25.

¹⁹ CP 239, p. 11, ln. 2-10; CP 245-246, p. 36-37, ln. 27-1.

regards the clinic.²⁰ Neither Dr. Zylstra nor Dr. Hall believed that they had an independent duty to report the extra-marital affair to the Department of Health under Washington Law, despite that it was clearly an inappropriate relationship with a patient.²¹

In fact, in the State of Washington, Respondent health professionals owe, *inter alia*, the following widely recognized ethical and fiduciary duties to patients which arise from the trust placed in caregivers by patients, and are necessitated by the unequal power of the health care provider:

1. Beneficence - the primary goal of the provider-patient relationship is the doing of good for the patient;
2. No malfeasance - the provider has an affirmative obligation to avoid harm and protect the patient from harm;
3. Respect for autonomy - the provider must respect the patient's right to be an informed participant in health care decisions affecting his or her body;
4. Fidelity - the provider must be faithful to the relationship and may not place his or her own needs inappropriately above those of the patient. Fidelity subsumes

²⁰ CP 242, p. 21, ln. 3-11.

²¹ CP 239-240, p. 12-14, ln. 22-1; CP 250, p. 6, ln. 14-20.

responsibilities of truth-telling,
confidentiality and respect for privacy;

5. Justice - the provider is obliged to recognize that his or her involvement in the allocation of resources requires an appreciation of fairness.²²

Moreover, the standard of care for medical professionals requires that technical and ancillary personnel be hired with care, properly trained and supervised, and prevented from practicing outside the scope of their duties.²³ In fact, Respondents healthcare professionals breached their duties including but not limited to those outlined above.²⁴

III. REPLY

The respondent's ignore the most salient and critical aspects of this case. For approximately 2 years, they allowed Mr. Isham to engage in long, unsupervised visits with Jane Doe in prior to the

²² CP 382-383, In. 10-5. Respondents have argued that Mr. Fassett is not qualified to serve as an expert witness in this matter because he does not have experience with running a small family practice. But Respondent's petition exceeds the scope of the evidence rule. ER 702 simply requires a witness with knowledge, skill, experience, training, or education whose opinion will assist a trier of fact to understand the evidence or determine a fact in issue. First, no court has found plaintiffs experts unqualified to so act. Second, Mr. Fassett's opinions specifically applies to healthcare providers in the State of Washington. (CP 382, In. 11-17). Moreover, Mr. Fassett's qualifications to provide expert opinion testimony speak for themselves. (CP 381). No court has found plaintiffs experts unqualified to so act.

²³ CP 383, In. 6-13.

²⁴ CP 396, ¶¶ 1, 3-7, 9-10.

commencement of the sexual component of his wrongdoing. The sexual component of this case is not the chief wrong, rather it is the result of ongoing sustained negligence on the part of all defendants against whom plaintiffs filed suit. Mr. Isham took 45 minutes to do an intake that by his own admission should take no more than ten minutes. It is inconceivable that the healthcare professionals in a busy family medical practice such as the Clinic, would not notice one of their MA's out of rotation for that period of time.²⁵ It is during this grooming period that the negligent supervision primarily occurred.

Similarly, Respondents seek to distract and excuse their negligence by repeating over and over again that the sexual relationship between Mr. Isham and Ms. Doe was consensual. This would certainly be true had the relationship occurred exclusively outside of the Clinic---but it did not. If a person in a position of authority and trust takes advantage of their position to engage in a sexual relationship with the person over whom they have said authority and trust, there can be no consent.

Respondents also attempt to excuse their negligence during the grooming period by pointing out that she did not complain.

²⁵ CP 113-114, pp. 102-107, ln. 13-8.

Appellants ask the court to take judicial notice of the fact that victims of sexual predators often do not realize they are being victimized, nor do they possess the emotional and mental fortitude to speak out even if they do.

Similarly, respondents' attempt to dismiss their own culpability, and create culpability exclusively in Ms. Doe, is simply wrong as a matter of law. There is no legal defense to a medical assistant who seduces a patient, whether or not the female patient is the wife of another patient. There is no legal defense to a physician who provides medical care to a married woman and her husband, who learns that his medical assistant has seduced, initiated, and carried on an affair with the patient wife, and then does nothing about it. There is no defense to the physician providing medical care to the patient husband, who upon learning of the affair from his patient, the husband, does nothing about it.

These facts reveal the physician's utter abrogation of his explicit duty under Department of Health rules to supervise the work of his medical assistant. There is no defense to a physician's ignorance of ethical rules and duties applicable to his profession, including the duties of the staff practicing medicine under his supervision and his responsibility for their careful observance of

those duties. There is no defense to a physician who is ignorant of his duties under Department of Health rules regarding the requirements to report an improper, intimate relationship between another healthcare provider and one of his own patients.

Moreover, whether Mr. Isham took advantage of privileged information obtained while in, and only because of, the position of trust and authority he held with respect to Ms. Doe such that Ms. Doe became unable to consent is a question of fact for a jury, not a matter of law. At 15 years old Ms. Doe moved in with her boyfriend.²⁶ At 16 she was married to him and he immediately began a years-long pattern of emotional and physical abuse.²⁷ She was and is a high school dropout who remained stuck in an abusive and terrifying marriage, living with her abuser until she was 30 years old.²⁸ Her divorce from him was not final until she was approximately 32 years old.²⁹ When Mr. Isham met her, she and Mr. Doe struggled with their increasingly difficult and unhappy

²⁶ CP 281, ¶15.

²⁷ Id.

²⁸ CP 282 ¶19.

²⁹ Id.

marriage which was the result of a string of horrifying tragedies.³⁰ Mr. Isham took advantage of an older woman with low self-esteem, a tragic past, and a troubled marriage.³¹ But for Respondent healthcare providers negligence in failing to notice or stop the inexcusably long intake sessions, Mr. Isham would not have had the two year opportunity to groom Ms. Doe and prepare her for an affair.

Respondents claim that none of the license-holders involved in this case had a duty to report Mr. Isham because there was no conviction, determination, or finding that Isham, another license-holder, was guilty of a gross misdemeanor or felony.³² Respondent physicians are required to report unprofessional conduct and they are able to make determinations and findings. Other employees knew or should have known that another license-holder was taking an inordinate amount of time with one patient over the course of two years----but no investigation occurred. In this way,

³⁰ CP 286 ¶23.

³¹ CP 289 ¶31, ln. 19-24.

³² Respondents' Brief, p. 20. (*citing* WAC 246-16-235(1)(a); WAC 246-16-210(2); WAC 246-16-210(3)).

Respondents' seek to excuse their failure to report by relying on their own, negligent behavior. This cannot stand.

Respondents next argue that even if they had a duty to report Mr. Isham, such a duty is not owed to either of the Does.³³ They recite RCW 5.40.050 which states, "...an administrative rule shall not be considered negligence *per se*." In an apparent attempt to drive the point home the respondents cite *Pinckey v. Smith*.³⁴ *Pinckey* stands for the proposition that an administrative rule violation alone is insufficient to establish a breach.

Respondents clearly misapply the law here. They attempt to use the cited authority to try and establish that an administrative rule creates no duty to the patient. While the violation of an administrative rule is not negligence *per se*, the violation of a rule is evidence of a breach of duty. Such rules establish the *existence* of a duty.

Virtually the entire record of this appeal is replete with examples of respondents' *laissez faire* attitude toward social relationships between employees of the Clinic, and its patients. This is a key point----the medical professionals here owed their

³³ Respondents' Brief, p. 21.

³⁴ *Pinckey v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash 2007)

patients specific duties embodied by regulations and the expert testimony in the case. No experts could be found to provide supportive testimony on behalf of the respondents. The totality of evidence before the court establishes breach after breach of these duties. These are all issues for a trier of fact----not to be decided by a trial judge.

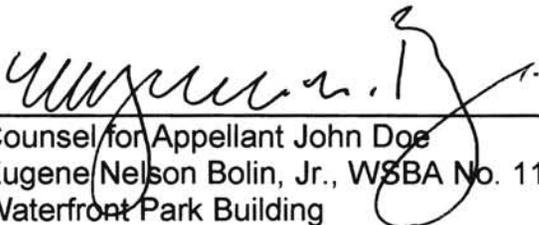
IV. CONCLUSION

The trial court completely ignored the grooming period when analyzing key issues such as proximate cause. When asked to address the two year period of grooming, the lower court explicitly stated that it did not find arguments on that issue persuasive. In so doing, it improperly usurped the province of the trier of fact on a motion for summary judgment.

Given the expert testimony of plaintiffs' experts and the witness testimony as to the facts of this case, a reasonable person could find that Mr. Isham was allowed, through the negligent supervision of respondent medical doctors, virtually unrestricted access over the course of years to a patient who was particularly susceptible to the kind of sexual predation of which Mr. Isham appears so adept.

A reasonable person could also find that the sexual relationship that resulted was the result of Mr. Isham's unusual access and that respondents therefore failed to protect their patient, breaching duties they owed to her. And once the respondents did discover that their medical assistant was engaged in an illicit affair with a patient, what did they do? Nothing. Summary judgment was erroneously granted and should be reversed and this case remanded to the lower court to be tried on its merits.

RESPECTFULLY SUBMITTED this 16th day of June, 2014.



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DECLARATION OF SERVICE

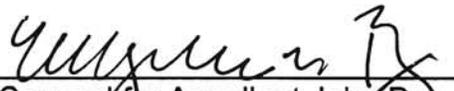
The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed and emailed a true copy of appellants' reply brief to counsel and parties at the following addresses:

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