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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.

REPLY BRIEF

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I. PRELIMINARY STATEMENT

In seeking to sustain the grant of summary judgment, defendants seek to hide the evident errors in a procedural morass. They claim that arguments were not raised below or were waived. As we shall show, the claim is baseless. Moreover, any argument concerning the purported insufficiency in complying with the notice of claim provisions is moot, because a proper notice has been served and since the statute of limitations has not run, a new action could be brought even at this time. Because such a dismissal does not implicate the merits, claim preclusion would not be applicable.

II. REPLY

A. “Abandonment” Theory Raised in Trial Court

As can be readily seen from even a cursory reading of the complaint and my affidavit in the Clerk’s Papers, the gist of the action is predicated on the theory of my “premature eject[ion] . . . from Harborview.” (CP: 59). The complaint specifically alleges that “Plaintiff [was] released prematurely and not according to protocol.” (CP: 10). This

was done because Harborview erroneously believed that I did not have medical insurance. (CP: 52).

To “abandon” is to “desert or leave permanently. **2** give up (an action or practice) completely.” Oxford University Press Dictionary, “Abandon.” “Abandonment means the voluntary failure or neglect to care for as well as failure to support.” *In Interest of D*, 42 Wn.App. 345, 348, 711 P.2d 368, 370 (1985), citing *In re Miller*, 86 Wash.2d 712, 717, 548 P.2d 542 (1976)).

We find the same definition in actions predicated on a physician’s abandonment of a patient. “The essence of abandonment is unilateral nonconsensual termination by the medical practitioner. When abandonment is claimed, termination by consent is implicitly denied. There had been no termination by consent of the parties.” *Dicke v. Graves*, 9 Kan.App.2d 1, 668 P.2d 189, 192 (1983) (citing *Capps v. Valk*, 189 Kan. 287, 290, 369 P.2d 238 (1962) (“It is the settled rule that one who engages a physician ... to treat his case impliedly engages him to attend throughout the illness or until his services are dispensed with. In other words, once initiated, the relationship of physician and patient continues until it is

ended by the consent of the parties, revoked by the dismissal of the physician, or until his services are no longer needed.”).

Numerous other cases confirm this definition. “Abandonment” is the “termination of the professional relationship between the physician and patient at an unreasonable time or without affording the patient the opportunity to procure an equally qualified replacement.” *Miller v. Greater Se. Comm. Hosp.*, 508 A.2d 927, 929 (D.C.1986); see Annot., Liability of Physician Who Abandons Case (1958) 57 A.L.R.2d 432, 440; *Lewis v. Capalbo*, 280 A.D.2d 257, 720 N.Y.S.2d 455, 457 (1st Dept. 2001) (“It is well established that a doctor who undertakes to examine and treat a patient (thus creating a doctor-patient relationship) and then abandons the patient may be held liable for medical malpractice.”);

Thus, it is evident that the issue of patient abandonment was raised below and is properly before this Court for determination. *Cf. Smukalla v. Barth*, 73 Wn.App. 240 243, 868 P.2d 888 (1994) (“We will consider and apply all court rules and statutes that bear on the issues before the Superior Court; such authorities are properly before this court, even if not argued to the lower court.”) Defendants posit reliance upon the general rule that a

pro se litigant is held to the same standard as an attorney, although even that is subject to exceptions, see, e.g., *Carver v. State*, 147 Wn. App. 567, 575 , 197 P.3d 678 (2008). But plaintiff has fully complied with the rule of preservation, so that reliance begs the question. In any event, even the preservation rule is not applied rigidly. See *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 465 P.2d 657 (1970).

In sum, there is no procedural bar to reaching the merits.

B. Expert Testimony Not Needed

Defendants recognize that expert testimony is not needed in every case of malpractice. In *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182, 189 (1989), so heavily relied upon by defendants, our Supreme Court said: “Where the determination of negligence does not require technical medical expertise, such as the negligence of amputating the wrong limb or poking a patient in the eye while stitching a wound on the face, the cases also do not require testimony by a physician.” This remains Washington law and this is such a case.

In *Maltempo v. Cuthbert*, 504 F.2d 325 (5th Cir.1974), the court construed an abandonment claim based on Florida law. A family doctor

told family members of a prisoner that he would inquire into some physical complaints that the prisoner had told the family. After calling the jail, he was informed that the jail physician would care for the patient. The family doctor did not follow up on the care provided to the patient, and he did not contact the family to let them know that he would inquire no further. The patient died, and the family sued the family doctor for abandonment.

At the trial, the doctor presented expert testimony that his conduct was within the standard of acceptable medical practice, but the court held that the doctor and his witnesses were attempting to tell the court what the law was. “Of course, medical expertise will govern as to standards of treatment or diagnosis. But the facts in this case involve neither.... It had nothing to do with medical skill and learning.” *Id.* at 327.

We find a similar holding in *Levy v. Kirk*, 187 So.2d 401 (Fla. 3d DCA 1966) (per curiam). In *Levy*, the Court reversed a grant of summary judgment to a physician in an abandonment case. The Court recognized the rule that expert testimony was *generally* necessary, “ However, in the instant case, where the charge is in the abandonment of the patient after

causing his admission into the hospital and the prescribing of certain medications, examinations, tests, etc., it is apparent from the hospital records and from the doctor's own admissions that he failed to personally observe the patient (although he was in the hospital) and he failed to review the results of the tests and examinations for several days." *Id.* at 402.

Woodfolk v. Group Health Ass'n, Inc., 644 A.2d 1367 (D.C. 1994) is also persuasive on this issue. In that case, the Court observed that in an abandonment case, "Expert testimony may or may not be necessary to establish abandonment, depending upon the facts at hand." 644 A.2d at 1368. The Court reversed the grant of summary judgment to the physician because defendant "presented nothing to the court which would have tended to show that this was the kind of abandonment case in which expert testimony would be required." *Ibid.*

Moreover, as the concurring judge pointed out, he was constrained to reverse because the plaintiff "testified under oath at her deposition that GHA refused to treat her further because she lacked insurance. GHA did not even attempt to meet this testimony with any affidavits or deposition

testimony to the contrary. . . . [B]ecause Ms. Woodfolk herself stated, under oath, that she had been abandoned by GHA, summary judgment was foreclosed.” *Id.* at 1369.

This case falls comfortably within these authorities. The discharge summary indicates that Dr. Chestnut authorized the plaintiff’s release “against medical advise.” (CP: 52, 136). It also states that “This stay exceeds the Medicare LOS outliner cutoff. . . .” (CP: 136; see 58-59).

Thus, the records show that the alleged abandonment occurred at a critical time of the plaintiff’s treatment and that the discharge apparently occurred due to insurance concerns. Inasmuch as plaintiff has stated under oath that she did not sign or agree to a discharge (CP: 53) (“. . . NO signed release documents exist with Plaintiff’s signature. . . .”), it is evident that a question of fact exists for jury resolution.

And this also addresses the matter of documentation and records that is in response to the query by counsel as to why the appellant did not file a motion to compel the respondents to complete discovery. This was due the fact that during a meeting between Ms. Stock and the trial counsel of record, D.K. Yoshida, in which they agreed to suspend discovery until

the matter of notice of claim had been resolved. To do such a motion would have then dissolved the verbal agreement and as the matter of notice had not been resolved this would have rendered the motion moot.

And without discovery there is no way to determine what type of experts would be needed. At the time of trial, the plaintiff submitted all the records in possession and it became clear at trial that said records are still incomplete.

As evident in the newly submitted document by the respondents from another Physician who contacted Ms. Stock's insured provider while professing to make a follow up call with regards to care, though unable to leave a message due to an apparently unrelenting busy signal, it appears the call was primarily to verify insurance. (CP 251-253)

This newly admitted document had been unseen by the appellant until trial and it was then the date of this contact was noted as one month after the premature release of Ms. Stock and done so by a different provider than who the medical records state as primary provider. This now adds another Doctor of record, further confusing the matter of whom the Physician of record was and why the respondents waited weeks later to

ensure continuity of care. As it appears the respondents knew Ms. Stock had a primary care provider at Group Health. What is more distressing is that the respondents waited a month to contact them when the release documents demanded a follow up at Harborview Medical Center within a week. (CP 251-253)

To determine abandonment there needs to be an establishment of a relationship or a proximity to a patient and the calls and the paperwork establish such. Note that there were Physicians of record who knew of Ms. Stock's injuries, released her against medical advice and knew of her insured provider, then followed up weeks later which are both indicative of negligence and in turn abandonment.

No supporting documentation exists nor any signed agreement made between any Physician of record and the Plaintiff nor with any Physician and her insured provider Group Health either ensuring continuity of care and in turn terminating the relationship between Ms. Stock and HMC.

As for the matter that Ms. Stock waived her rights at trial to this issue of abandonment, one needs to review *State v. Riley*, 121 Wn.2d.22,

31 846 P2d. 1365 (1993) and *Bernal v Am Honda Motor Co.*; 87 Wn2d, 406 414 553 P2d 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 appellant court, caution must be exercised so as to not deny the appellant the right to dispute the facts material to the new theory.”

C. Purported Failure to Strictly Comply with Notice of Claim Statute is Moot and Should Not Foreclose Plaintiff From Obtaining Relief

There is no question that the functional equivalent of a notice of claim has been served upon the appropriate agency. To be sure, the relevant statutory provisions require that it be served prior to the commencement of the action.

If the action were to be dismissed on that ground, however, plaintiff could bring a new action because the statute of limitations on such a suit has not run. Defendants apparently do not disagree, because they do not respond to Plaintiff’s argument on the point.

relevant statutory provisions require that it be served prior to the commencement of the action.

If the action were to be dismissed on that ground, however, plaintiff could bring a new action because the statute of limitations on such a suit has not run. Defendants apparently do not disagree, because they do not respond to Plaintiff's argument on the point.

Res judicata or claim preclusion would not bar such an action. Insofar as here pertinent, the doctrine requires a final judgment on the merits. See *Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 860, 726 P.2d 1 (1986); *Pederson v. Potter*, 103 Wash.App. 62, 11 P.3d 833 (2000).

Simply put, dismissal of an action for failure to satisfy a condition precedent is not "on the merits" for res judicata purposes. See *Costello v. United States*, 365 U.S. 265, 286 (1961) (dismissal of immigration proceeding on ground of government's failure to file statutorily required affidavit of good cause was not "on the merits"); *Saylor v. Lindsley*, 391 F.2d 965, 969 (2d Cir.1968) (dismissal for failure to prosecute due to inability to meet security bond precondition to suit not res judicata

because defendant never forced to prepare to defend on merits); *D'Angelo v. City of New York*, 929 F. Supp. 129, 134 (S.D.N.Y.1996).

Substance should prevail over form and matters resolved on their merits when possible. See *Griffith v. City of Bellevue*, 130 Wash.2d 189, 922 P.2d 83 (1996).

In *Griffith*, the court addressed whether a petition for a statutory writ of certiorari challenging the City's land use decision was properly dismissed for lack of jurisdiction. The petition and required affidavit were timely filed and served, but the affidavit was not signed as required by statute. There, although the affidavit accompanying the petition was unsigned, the parties agreed to the issuance of the writ, and the City provided a full record regarding the disputed land use application. A month later, the land owner moved to dismiss the petition for lack of subject matter jurisdiction, and the trial court dismissed the petition despite Griffith's motion to amend the petition. Griffith appealed and the Court of Appeals affirmed.

Our supreme court took review and held that a signed verification was not a jurisdictional requirement. The court noted that whenever

possible, the civil rules should be applied to allow substance to prevail over form. It reversed, reasoning that Griffith's petition and verification were timely, and that where a timely application lacked a signature, CR 11 permitted dismissal only if Griffith had failed to sign the verification promptly after the omission was brought to his attention.

Admittedly a different analysis has been applied in the context of a notice of claim statute. But, when, as here, if a dismissal is based upon the failure to strictly comply with that statute would not finally determine the case, judicial economy suggests that the principles of *Griffin* should be extended to the facts of this case.

Conclusion

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

Dated: December 24, 2014

Signed by _____

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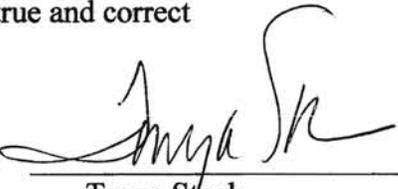
CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2014, I caused the foregoing Opening Brief upon the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

Court of Appeals Division 1	Hand Delivered
D.K. Yoshida Ogden Murphy Wallace	Hand Delivered
Howard Goodfriend Smith Goodfriend 1619 8 th Ave N Seattle, WA 98019	First Class/Certified Mail

Under penalty of perjury according to the State of Washington RCW 9A.72.085 the above is true and correct

Dated: December 24, 2014



Tanya Stock