6-18-2012

Hall v. Rocky Mountain Emergency Physicians Augmentation Record Dckt. 39473

In the Supreme Court of the State of Idaho

HEATHER HALL, Plaintiff-Appellant, v. ROCKY MOUNTAIN EMERGENCY PHYSICIANS, LLC; KURTIS HOLT, M.D.; RANDALL FOWLER, M.D.; and JEFF JOHNSON, Defendants-Respondents.	)	ORDER GRANTING MOTION TO AUGMENT THE RECORD Supreme Court Docket No. 39473-2011 Bannock County Docket No. 2011-1740

A MOTION TO AUGMENT THE RECORD ON APPEAL was filed by counsel for Respondents on June 12, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondents' MOTION TO AUGMENT THE RECORD ON APPEAL be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Decision on Plaintiff's Motion to Alter or Amend Judgment Under Rule 59(a) (Motion to Reconsider), file-stamped February 27, 2012.

DATED this 18th day of June, 2012.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT,

STATE OF IDAHO, BANNOCK COUNTY

HEATHER HALL, **Plaintiff,** v. **ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C., and KURTIS HOLT, M.D., and RANDALL FOWLER, M.D., and JEFF JOHNSON,** **Defendants.**	**Case No.: CV-2011-1740-PI** **DECISION ON PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(a) (MOTION TO RECONSIDER)** **Hon. David C. Nye**

This matter came before the Court for a hearing on Plaintiff Heather Hall's Motion on January 23, 2012. Allen Browning appeared on behalf of Plaintiff Heather Hall, and Tracy Wright appeared in behalf of all Defendants. At the hearing, the Court took Hall's motion under advisement, and now issues its decision, **denying** the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of Hall's visits to the Portneuf Medical Center ("PMC") emergency room in Pocatello to receive treatment for headaches. She alleges that on one occasion, a physician's assistant, Jeff Johnson, in the course of a medical examination, touched her breast

inappropriately while listening to her heartbeat with a stethoscope. She brought claims against Johnson for battery, intentional infliction of emotional distress, and invasion of privacy. She also asserted claims against Drs. Kurtis Holt and Randall Fowler for negligent supervision of Johnson. Additionally, Hall asserted a claim against Rocky Mountain Emergency Physicians, L.L.C., under the theory of *respondeat superior*. Defendants did not submit an answer to Hall's complaint, but moved for summary judgment in August 2011. On October 25, 2011, the Court granted summary judgment to Defendants on all of Hall's claims against them, and entered judgment on November 1, 2011.

On November 10, 2011, Hall filed a document entitled "Memorandum in Support of Motion to Alter or Amend Judgment Under Rule 59(a)." Hall's Memorandum in Support was filed alone—unaccompanied by a separate document containing an actual motion. At the January hearing, Hall requested that the Court consider her Memorandum as a motion as well. The basic substance of Hall's Memorandum is a request that the Court reconsider its summary judgment decision. However, the Court noted at the January hearing that Rule 59(a) of the Idaho Rules of Civil Procedure pertains only to a motion for a new trial, so Hall also requested at the hearing that the Court consider her Memorandum a motion to reconsider brought under Rule 11(a)(2)(B). Defendants object to the substance of Hall's Memorandum, as well as both requests Hall made at the hearing.

II. ANALYSIS

The Court denies Hall's "motion" on three alternative grounds: no motion was filed with the Memorandum, Rule 59(a) is not the proper rule for a motion to reconsider, and summary judgment to Defendants was proper.

A. No motion filed with Memorandum

Under IRCP 7(b)(1), "[a]n application to the court for an order shall be *by motion* which, unless made during a hearing or trial, shall be made in writing . . . ."[1] Additionally, Rule 7(b)(3)(C) provides:

> It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the face of the motion whether the party desires to present oral argument or file a brief within fourteen (14) days with the court in support of the motion.

Nothing in Rule 7 provides that a brief or memorandum in support of a motion may be considered the actual motion itself. The beginning portion of Rule 7(b)(3) does contain the phrase "[u]nless otherwise ordered by the court," suggesting that the trial court has the discretion whether to allow a memorandum in support to be considered as a motion also.

The Court hereby exercises its discretion by denying Hall's request to treat her Memorandum as a motion also. Rule 7(b)(1) plainly indicates that when a party makes an application to the court for an order, it *shall* be by *motion*. The Rule does not provide that such an application can be made by simply a memorandum in support. The Court therefore finds Hall's Memorandum in Support procedurally improper because no motion was properly filed in accordance with IRCP 7(b)(1).

[1] (emphasis added).

Any oral motion made at the hearing on January 23, 2012, was untimely and cannot be considered a proper motion under Rule 7.

B. Rule 59(a) not proper for a motion to reconsider

The Court also finds, alternatively, that Hall's Memorandum was not brought under the correct rule. IRCP 7(b)(1) provides that a motion to the court "shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought." In this case, Hall's Memorandum cites IRCP 59(a), which provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons . . . ." Nothing in Rule 59(a) provides for a motion to reconsider when, as in this case, there has been no trial.

The Court denies Hall's request to treat her Memorandum as a motion for reconsideration brought under Rule 11(a)(2)(B). The Court finds that Hall's Memorandum, even if the Court considered it an actual motion under Rule 7(b)(1), was not procedurally proper because it failed to cite the appropriate Rule, thereby failing to give Defendants notice of the precise grounds for her request.

C. Summary judgment to Defendants was proper

Alternatively, even if the Court agreed to treat Hall's Memorandum as a motion for reconsideration properly brought under Rule 11(a)(2)(B), the Court would still deny Hall's motion on its merits because summary judgment to Defendants was proper in the first place.[2]

[2] The well-known standard of review on summary judgment was set forth in the Court's prior decision. It is hereby incorporated by reference.

When Defendants moved for summary judgment, they produced several affidavits. In the affidavit of Johnson, he described how he has actual, personal knowledge of the applicable standard of care for Pocatello and PMC, and he stated that he did not violate the standard of care in his treatment of Hall. The affidavits of Drs. Kurtis Holt and Randall Fowler also described how they have actual, personal knowledge of the standard of care for physicians supervising physician's assistants in Pocatello and PMC, and they stated that they did not violate that standard of care in their supervision of Johnson. Hall did not challenge the admissibility of those affidavit opinions. Hall's response in opposition was based solely on the affidavit of Dr. David Bowman.

Assuming that Hall's claims are properly treated as medical malpractice claims—which is addressed below—the Defendants' affidavits successfully shifted the burden in summary judgment to Hall to produce a qualified expert opinion in accordance with Idaho Code § 6-1012. Hall had to provide at least some evidence that Defendants violated the applicable standard of care in her case in order to survive summary judgment. Hall responded by submitting the affidavit of Dr. Bowman, but the Court found it inadmissible in its entirety for lack of foundation. As a consequence, Hall had no other admissible evidence that Defendants violated the standard of care. Therefore, Hall failed to demonstrate that there was a genuine issue of material fact necessitating a trial on the medical malpractice claims. Accordingly, the Court held that Defendants were entitled to summary judgment.

In her current motion, Hall does not challenge the Court's ruling that Dr. Bowman's affidavit was inadmissible. She argues that the Court should have denied summary judgment

because Defendants did not acknowledge or admit Hall's allegations that Johnson inappropriately groped her. She also argues that Defendants never claimed that the alleged groping would not violate the standard of care. Hall also argues that Defendants never contradicted Dr. Bowman's statement that the alleged groping violated the statewide ethical standards for physician's assistants.

Hall's argument concerning Dr. Bowman's statement fails because the Court previously found Dr. Bowman's affidavit inadmissible, and Hall has not challenged that ruling. Hall's other arguments primarily depend on whether her intentional tort claims were properly treated as medical malpractice claims.

In its summary judgment decision, the Court noted that although Hall brought intentional tort claims, her entire case would be treated as a standard medical malpractice case rather than an ordinary tort case. The Court acknowledges that some additional explanation is necessary to clarify that particular ruling, but the overall outcome remains the same.

Idaho Code § 6-1012, which governs medical malpractice cases, contains the following provision concerning cases which fall under its purview:

> [A]ny case, claim or action for damages due to injury to or death of any person, brought against any [health care provider] . . . on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto . . . .

Such cases falling under this definition must comply with the other provisions of 6-1012, which requires the opinion of an expert witness to prove a violation of the applicable standard of healthcare.

Obviously, not every conceivable lawsuit against a health care provider would require compliance with 6-1012. In *Hough v. Fry*, the plaintiff fell and was injured while using a balance board as part of her supervised physical therapy treatment.[3] The plaintiff attempted to sue her physical therapist under a theory of ordinary negligence rather than medical malpractice, but the Idaho Supreme Court stated:

> Hough argues that § 6-1012 should not be read to require expert testimony every time a provider of medical care is sued for negligence. We agree. We can conceive of circumstances where the alleged act of negligence is so far removed or unrelated to the provision of medical care that § 6-1012 would not apply. This, however, is not one of those cases. The act complained of was so directly related to providing Hough with physical therapy that it cannot be reasonably argued that § 6-1012 does not apply.[4]

Thus, the plaintiff in *Hough* still had to comply with the requirements of 6-1012 in order to survive summary judgment.

Similarly, this Court recognizes that there are conceivable circumstances where the healthcare provider's alleged act of intentional tort is so far removed from or unrelated to the provision of medical care that 6-1012 should not apply. However, Hall's case is not one of those circumstances. The intentional torts allegedly took place during and in connection with the provision of medical treatment—listening to a heartbeat with a stethoscope. Surely these alleged acts fall under the purview of 6-1012, especially in light of the language including "any matter incidental or related" to the provision of medical care. Other than the Idaho Supreme Court's statement in *Hough*, no Idaho case has addressed precisely how a court should determine if a

[3] 131 Idaho 230, 231-32, 953 P.2d 980, 981-82 (1998).
[4] *Id.* at 233, 953 P.2d at 983.

claim against a healthcare provider is *related enough* to the provision of healthcare such that the claims should be required to comply with the expert witness provisions of 6-1012. However, this Court finds that due to the proximity and connection between the alleged acts of intentional tort and the provision of medical care, Hall's claims should be required to comply with 6-1012. This Court's holding is bolstered by the Idaho Court of Appeals' decision in *Litz v. Robinson*, where the Court stated:

> [W]e conclude that Litz was required to comply with I.C. §§ 6–1012 and 6–1013. Litz's later attempt to escape the requirements of I.C. §§ 6–1012 and 6–1013 by artfully labeling his cause of action as a claim for the intentional infliction of emotional distress is not persuasive in consideration that the underlying nature of Litz's claim, as pled in his complaint and in further documentation submitted to the district court, was inextricably intertwined with a claim of negligence.[5]

Thus, it is apparent that the Idaho appellate courts disfavor allowing plaintiffs to escape the requirements of 6-1012 and 6-1013 by "artfully" labeling their causes of action as something other than medical malpractice when the alleged actions are connected to and intertwined with the provision of medical care.

Obviously, in an ordinary intentional tort claim, a defendant could not be granted summary judgment without submitting at least some evidence refuting the plaintiff's allegations of what events took place. In this case, if Hall's intentional tort claims were treated as such instead of medical malpractice claims, Defendants could not be granted summary judgment without at least first denying that inappropriate touching took place. However, when the case is treated as a medical malpractice case, Hall's own specific allegations of what took place are not

[5] 131 Idaho 282, 284, 955 P.2d 113, 115 (Ct. App. 1997).

as important as an expert's opinion that such conduct violated the standard of care. Even though Johnson's own affidavit did not directly deny that he groped Hall, his qualified opinion that he did not violate the standard of care is enough to shift the burden of production to Hall in summary judgment, because that is how medical malpractice cases proceed under Idaho law. Furthermore, the doctors' opinions that they did not violate the standard of care in supervising their physician's assistant were enough the shift the burden of production in summary judgment to Hall. Since the only expert opinion produced by Hall in response was found inadmissible, the Defendants' affidavits stood unopposed. Thus, summary judgment was proper. Therefore, even if the Court treated Hall's Memorandum as a procedurally proper motion, the motion is denied.

III. CONCLUSION

Hall's Memorandum was procedurally improper because there was no motion filed with the Memorandum. Alternatively, Hall's Memorandum was procedurally improper because it failed to cite an appropriate rule as grounds for the request. The Court denies Hall's requests to treat her Memorandum as a proper motion for reconsideration brought under IRCP 11(a)(2)(B). Additionally and alternatively, even if the Court treated Hall's Memorandum as a proper motion for reconsideration, the motion fails on its merits because summary judgment was proper.

IT IS SO ORDERED.

DATED February 27, 2012.

DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of February, 2012, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Allen Browning
BROWNING LAW
482 Constitution Way, Ste. 111
Idaho Falls, ID 83402

- [x] U.S. Mail
- [ ] Overnight Delivery
- [ ] Hand Deliver
- [ ] Fax: (208)542-2711
- [ ] Email:

Terrence S. Jones
Tracy L. Wright
CAREY PERKINS, LLP
P.O. Box 519
Boise, ID 83701

- [x] U.S. Mail
- [ ] Overnight Delivery
- [ ] Hand Deliver
- [ ] Fax: (208)345-8660
- [ ] Email:

Amy J. Beers
Deputy Clerk