3-14-2014

Mattox v. Life Care Centers of America Appellant's Reply Brief Dckt. 40762

IN THE SUPREME COURT OF THE STATE OF IDAHO

GENE L. MATTOX, Individually and as Personal Representative of the Estate of Rosamond Vivian Mattox, Plaintiff-Appellant, vs. LIFE CARE CENTERS OF AMERICA, INC., d/b/a LIFE CARE OF LEWISTON, a Tennessee Corporation, JOHN DOES I-V, JANE DOES VI-X, and JOHN DOE CORPORATIONS XI-XX, Defendants-Respondents.	DOCKET NO. 40762-2013 APPELLANT'S REPLY BRIEF

APPELLANT'S REPLY BRIEF - GENE L. MATTOX, Individually and as Personal Representative of the Estate of Rosamond Vivian Mattox

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for Nez Perce County.
Honorable Carl Kerrick, District Judge, Presiding

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STATEMENT OF FACTS

It would be less than accurate to allow the defendant's statement of claimed facts go without reply; had things been as the defendant claimed in their statement, Rosamond Mattox would not have died a pain-filled death while suffering from multiple broken bones.

While the defendant does respond to plaintiff's statement of facts, their response is without factual support. Most of the citations to the record refer to either exhibits attached to counsel's affidavit (and therefore without weight as counsel was wholly incompetent to lay any foundation for the records, which largely do not support the defendant's story), or referred to attachments attached to the affidavit of Wendy Thomason (such as the care plan adopted in August of 2008) which do not offer any support for the claims of the defendant. For example, the care plan, to which the defendant points as exemplifying the extraordinary measures they took, was so thoroughly neglected by LCL staff as to render it useless: 86% NON-compliance with check and change; 74% NON-compliance with use of bed side rails; 86% NON-compliance with a low bed; and 99.3% NON-compliance with hip protectors, (R. Vol. III, p. all of which are integral portions of the defendant's tale.

Not only are Defendant's claims are without factual support (as touched on above), worse yet, their response distorts the factual record beyond recognition:

- the "fall release" referenced by defendants, was signed more that TWO (2) YEARS prior (R. Vol. II, p 331 dated September 4, 2006). For over a year after the signing of the release her falls DECREASED to ZERO falls per year. Then as the

defendant's compliance with their own care plan fell, so did Ms. Mattox's safety as she had NINE (9) documented falls in the final 10 months of her life. (R. Vol. III, pp. 497) During this time defendants were failing to follow their own care plan between 74 and 99.3 % of the time.

- The defendant references a Do Not Resuscitate order, suggesting that somehow an order to not jumpstart her heart should it suddenly stop (R. Vol. III. p. 488) absolves them for the 74 - 99.3% NON-compliance with the care plan and 9 falls in 10 months, including the final broken hip that killed her.
- The defendant points out that Ms. Mattox was admitted for terminal end-of-life compassionate comfort care. Such a status shouldn't be considered a license to kill, but rather it an order to care. While it is true that Ms. Mattox was admitted for "terminal end-of-life compassionate comfort care" ... that did not occur shortly before her death, it was years before. The records cited to (R, Vol. II, pp. 336, 356) are from 2006 and 2005, and this court has records before it going back to 2004 (R. Vol.II, p. 391); Ms Mattox died from her second broken hip on November 1, 2008. (R, Vol. III, p. 592.)
- The defendant actually claims that Ms. Mattox's son (Gene) "continuously interfered with lowering the mediation [sic] levels..." Gene isn't a doctor, couldn't order medications, couldn't give the medications, and the defendant's claim that his actions

"substantially contributed to Decedent's fall. R. Vol. II, pp.367-379" is without any factual support. Not only are the records cited to without foundation and not to be considered, but there is nothing contained therein to support this wild claim. Further, defendant has not offered a single expert who could have offered such an opinion. The claim is without any factual, opinion or legal basis.

- The defendant continues to distort the historical record by claiming that Gene Mattox "specifically declined the use of hipsters and requested they not be placed on his mother. R. Vol. II, p. 391." In 2004, more than FOUR YEARS before the fatal fall, this was true. In 2005, Ms. Mattox fell two (2) times. In 2006, she fell two (2) times. There are no documented falls in 2007. (R. Vol. III, p. 497.) In 2008 there were NINE (9) falls in 10 months, including falls that led to two (2) separate broken hips and a compression fracture of the spine (R. Vol. III, p. 498-505). There were no declinations for "hipster" use in 2008, 2007, 2006 or 2005. In fact, during 2008, Gene attended a care plan conference (R. Vol. III, p. 528), and the plan that was developed and agreed to INCLUDED the use of "hipsters" (R. Vol. III, p. 539). But despite this plan, the defendants violated this 99.3% of the time in the last months of Ms. Mattox's life.

- Defendant claims that "[i]n the afternoon of October 31, 2008, Decedent was taking a nap and the movement alarm on her bed mattress sounded and a CNA went directly

to her room." Despite having a citation to the record, there is no support in the record for such a claim. The page cited to by defendant is, again, submitted by the incompetent affidavit of counsel. But even accepting it for illustrative purposes, we see it says, "Resdt found sitting on floor next to Bathroom Door. ..." (R. Vol. I, p. 98) Nurse Thomason reviewed these records, in depth, and noted, "October 31, 2008, at 2:20 p.m. Ms. Mattox was found on the floor (the ninth and last fall) by the bathroom, her right leg was under her body and her left leg was stretched in front of her, she was complaining if right hip pain. There was no mention of a functional alarm in place per doctor's orders and care plan. At 2:55 p.m. Ms. Mattox was transferred to Tri-State Hospital and was diagnosed with a right hip fracture."

It is of concern to the plaintiffs that the defendant's claimed facts are without factual support and could be a source of confusion to the Court. Care is to be taken to be accurate in representing the record and the case to the Court, and it is of concern that such care is not evidenced by the defendant.

ARGUMENT

A. A motion for summary judgment must be properly supported by affidavit before the burden shifts to the responding party.

Idaho case law and the Idaho rules are consistent and clear:

> ... When a motion for summary judgment is made and supported as provided in this rule [by competent affidavit including sworn or certified records and supplemented with depositions, interrogatories or other affidavits], an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ...

I.R.C.P. 56(e).

Caselaw is consistent with this rule, the initial showing must be made by the moving party, and only once the motion "is made *and* supported" does the burden shift to the non-moving party. *Celotex* and the cases cited by the defendant support this proposition: "[t]he party moving for summary judgment initially carries the burden to establish there is no 'genuine issue of material fact' and that he or she is entitled to judgment as a matter of law. [citation omitted.]" *Dunnick v Elder*, 126 Idaho 308, 311, 882 P.2d 475 (Idaho App. 1994). The *Dunnick* court then explains that when the moving party for summary judgment will not carry the burden of production of proof at trial, then the lack of genuine issue of material fact may be "met by establishing the absence of evidence" on a material element (*Id.)*; which may be done through interrogatories and depositions as set forth in the rule. There was no attempt by the defendant to offer depositions or interrogatories to establish an "absence of evidence" in the instant case; they relied exclusively on the nine- sentence conclusions of Carol McIver.

In *Peterson v Shore*, 146 Idaho 76, 197 P.3d 789 (Idaho App. 2008) (cited by defendant as one of the *Celotex* line of cases) cites the *Dunnick* case and then expounds in how the absence of evidence may be demonstrated:

> Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct.App.2000).

Peterson at 478.

The other case cited in this string is *Antim v Fred Meyer Stores, Inc*, 150 Idaho 774, 251 P.3d 602 (2011), which also relies on *Eliopolus v. Knox*, 123 Idaho 400, 848 P.2d 984 (Ct. App. 1992) and *Heath* and *Dunnick* to establish the proposition that a party may rely on interrogatories and depositions to establish a lack of evidence on a material element.

Similarly, the *Bromley* case does not leave room for doubt, it is only "[o]nce the absence of evidence on an element has been shown" that the burden shifts and then the non-moving party must also "produce affidavits, depositions, or other evidence establishing an issue of material fact." (*Bromley v Garey*, 132 Idaho 807, 810-811, 979 P.2d 1165, 1168 (1999).)

This standard is stated and re-stated throughout the rule and caselaw. The defendant's apparent confusion comes from a mis-reading of the case of *Chandler v Hayden*, 147 Idaho 765, 215 P.3d 485 (2009). In *Chandler*, not only does the Supreme Court reaffirm the foregoing rule and analysis, the Court then addresses who carries the burden when the defendant has raised affirmative defenses. The Court introduces this analysis by stating "[t]his summary judgment standard leaves open the question which party bears the burden of production as to a nonmoving defendant's affirmative defense." But such analysis does not apply to the case at bar, the parties herein are not dealing with affirmative defenses. The question before this court turns on whether a self-serving,

nine sentence set of vague conclusions, without more, is sufficient to transfer the burden on to the non-moving party. The plaintiff submits it is not. Summary judgment was improperly granted for defendants and this case should be remanded.

B. The Plaintiff's experts are qualified to testify.

Two experts, a local doctor and a qualified nurse. Both with the requisite experience and knowledge to properly offer the needed expert testimony.

Wendy Thomason is not only a well-qualified nurse, she became fully acquainted with the proper standard of care. Nurse Thomason is "fully acquainted with the federal laws and regulations governing skilled nursing facilities and [is] acquainted with the applicable standard of care on the national level" (R. Vol. III, p. 494). She had been an expert in Idaho on previous occasions (Tr. p. 27, ll 5-6; R. Vol. III, p. 494), and is familiar with the Idaho laws and regulations governing skilled nursing facilities.

Thus knowing the state and federal regulations and standards, Nurse Thomason became familiar with the standard of care for a skilled nursing facility in "the Lewiston region in 2008". To obtain this familiarity, Nurse Thomason spoke with four local medical practicioners. Each of the four are named. Each of the four have a basis for their own knowledge of the standard of care for a skilled nursing facility in that area for the applicable time frame. Nurse Thomason then swears that she has "become acquainted [with the standard of care for a skilled nursing facility in the Lewiston

region in 2008] and therefore [she has] knowledge of that standard of care." (R. Vol. III, pp. 494-5.) Nurse Thomason provided an 18-page affidavit with an additional 50+ pages of attachments.

The four named medical professionals with whom Nurse Thomason spoke includes two doctors. Both of whom treat elderly patients in the area skilled nursing facilities, and did so during 2008. Dr. Fore worked with wound patients; Dr. Mackay is a primary care physician. Both of them are personally aware of the standard of care for nurses in nursing home in the Lewiston region in 2008. The differences between the case at bar and the cases relied upon by defendant are significant and perhaps can be easily seen as follows:

Dulaney and *Arregui* compared to *Mattox*

Number of Local Practitioners consulted:

Dulaney: 1 Arregui: 1 Mattox: 4

Local Practitioner's Specialty and Basis of Knowledge of Defendants Practice Area:

Dulaney: **Local Practitioner identified, but neither worked in or with the specialty at issue.** The defendant was an orthopaedic surgeon working in the Emergency Room. The local practitioner practiced internal medicine at the VA in Boise and though he was board certified in Emergency Medicine, had neither practiced Emergency Medicine nor practiced in an ER in Boise.

The second person consulted was a neurologist in California, who had practiced in Boise near the timeframe, but who had no basis of knowledge of the standard of care for an orthopaedist in an emergency room.

Arregui: **Local practitioner NOT identified, worked in specialty, but no indication of experience or basis of knowledge**. The proposed expert was from California, had never been to Idaho, (at one time testified she had never spoken to anyone in Idaho), who at some point spoke to an unnamed chiropractor, who's type of practice was not described, and who's basis of knowledge of the standard of care was unexplained,

and it was unknown how long the unnamed chiropractor had even practiced in Idaho.

Mattox: **Four local practitioners identified. Each work in or with the specialty at issue, each have a basis of knowledge**. The violation is of nursing standards in a skilled care facility (nursing home). Of the four local practitioners, two are medical doctors who treat residents of area nursing homes: one for wound care, the other a the primary care physician. Both reference extensive experience in the relevant year in dealing with nursing staff in area nursing homes. Both have actual knowledge of the standard. (R.Vol. III, p. 417)

The other two are nurses: Nurse Stellmon conducted her own survey to familiarize herself with the standard of care in nursing homes in 2008, and conveyed that information to Nurse Thomason. (R. Vol. III, p. 496.) The final expert, Nurse Lemon, holds a Masters degree in the relevant area of expertise, has extensive knowledge of and experience in the skilled nursing sector before, during and after the relevant time period: she been the administrator of an area nursing home, taught geriatric care to local nursing students, and did so at the time of the incident, and had been and was a nurse consultant for adult care facilities. (R. Vol. III, p. 495, 516.)

It should be remembered that Nurse Thomason had more of a basis than just these four local experts for forming her understanding and knowledge of the local standard (the extensive backgrounds of these four qualified professionals has been set forth in greater detail in the opening brief and within the affidavits and attachments of Dr. Mackay and Nurse Thomason). Nurse Thomason was an experienced expert in Idaho, she was completely acquainted with both the State and Federal regulations which control the administration of care in a skilled nursing facility (R. Vol. III, pp. 494, 496). She reviewed the defendant's records relating to the care of this patient (which includes care plans and the documentation of what was and was not done, thus showing abject failure to follow even their own rules and is not this virtually negligence *per se*[1], to fail to keep the most

[1] It is acknowledged that this Court has held that negligence *per se* is not applicable to medical negligence cases, such as this. *Schmechel v Dille,* 148 Idaho 176, 219 P.3d 1192 (2009).

basic commitments of care made to the patient and her family; and which revealed nursing staff actually changing the doctor's order in violation of state and federal regulations (R.Vol. III, pp. 502-03); review of the records of the local hospitals (St. Joseph's in Lewiston and Tri-State in Clarkston, WA) review of the doctor's records; plus a review of information available regarding the defendant, including: national awards, ratings and reviews from CMS (Center for Medicare Services) and other organizations, and the history of substantiated complaints for defendant[2].

Each of these areas she investigated gave her more understanding of the applicable standard of care, and provided it from different perspectives (including the defendant's own perspective when reviewing awards, complaints and care plans). When taken as a whole: interviewing four disparate professionals who teach and work in and with skilled nursing, who individually have a basis of knowledge and know the standard of care; a view of the regulatory scheme from the federal and state levels; experience as an expert in Idaho; and continuing to narrow the focus down to the explicit errors committed in violating the standard at the most basic level, the care plan, Nurse Thomason had an intimate understanding of the standard of care. Even if one were to believe that any one of the elements is insufficient, the accumulation of knowledge of the standard of care applicable to this

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Thus, it is expressly NOT plaintiff's position that is negligence per se involved in this case, but rather that the violations by the defendant are of such a basic and plain nature as to be clear and unmistakable to an expert with experience and understanding of the standard of care in this arena ... such as Nurse Thomason and Dr. Mackay.

[2] Nurse Thomason also review the affidavit of Carol McIver in her efforts to become fully acquainted with all the relevant facts and information. While it was reviewed by Nurse Thomason, it is of no help to anyone.

case is, and should be, more than adequate to meet our legal standard.

So too, Dr. Mackay, who provides primary care area nursing home residents (R.Vol. III, p. 484), and who was involved in and oversaw the care (or neglect thereof) provided to Ms. Mattox until her death. The defendant's nursing staff was in frequent communication with Dr. Mackay (R. Vol. III, pp. 484-85, 493-511), reporting to him each problem and discussing changes in care and condition. Averaging approximately three exchanges per month of her final ten months, Dr. Mackay was highly involved in the care of Ms. Mattox; more than "any other patient" he as in nursing homes. (R. Vol. III, p. 484.) As a primary care physician in the Lewiston region (offices in Clarkston, Washington at Tri-State) who has many patients in nursing homes and who has done so for many years (R. Vol. III, p. 496), with on-going nursing exchanges for all of his patients through 2008, Dr. Mackay had a wonderful vantage to obtain personal knowledge of the applicable standard of care.

C. The Lewiston region is the appropriate community.

Idaho code defines "community" as it relates to medical negligence as follows:

> As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

I.C. 6-1012. Though the defendant complains that plaintiff has used the term "Lewiston region" instead of community, the defendant's complaint is without merit.

First, "community refers to that geographical area...". As members of the Court may know, Lewiston is part of the LC Valley (Lewis-Clark Valley). The valley consists primarily of Lewiston, Idaho and Clarkston, Washington; however, a quick look at the map proves there is certainly more in the valley: Lewiston; Lewiston Orchards (not part of the City of Lewiston) and other unincorporated portions of Nez Perce County; Clarkston Heights (not part of the City of Clarkston), the City Asotin, and portions of unicorporated Asotin County. But St. Joseph's hospital also draws (and indeed is the primary hospital for) Lapwai; Sweetwater; Culdesac; Winchester; Pierce; Lenore; Anatone, WA; Cloverland, WA; and others. Indeed, St. Joseph's is a *regional* medical center; hence the name St. Joseph Regional Medical Center (SJRMC).

It should be noted that there are two hospitals that serve the valley: both SJRMC and Tri-State Memorial Hospital (in Clarkston, WA). This case has ties to both. Ms. Mattox was variously transferred to SJRMC and Tri-State to deal with injuries suffered at defendant's facility. After the final fall, defendants transported Ms. Mattox to Tri-State.

In the LC area (region or valley), there are several skilled nursing facilities with whom Dr. Fore and Dr. Mackay work.

Defendant's argument is without merit.

D. A Final Order Dismissing the Complaint is an Appealable Order.

A party may appeal a final judgment so long as it meets the definition of judgment as stated

in Rule 54(a). Idaho Appellate Rule 11(a) sets forth the appealable judgments and orders in civil cases. Under that rule, "[f]inal judgments, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure" and "[a]ny order made after final judgment" are appealable. I.A.R. 11(a)(1) & (7). Rule 54(a) of the Idaho Rules of Civil Procedure defines what constitutes a final judgment as follows:

> "Judgment" as used in these rules means a separate document entitled "Judgment" or "Decree". A judgment shall state the relief to which a party is entitled on one or more claims for relief in the action. Such relief can include dismissal with or without prejudice."

In *Camp v. East Fork Ditch Co.*,137 Idaho 850, 55 P.3d 304 (2002), the Court attempted to define the court documents that would constitute final judgments for purposes of I.A.R. 11(a)(1). The Court stated:

> Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title. *Idaho Best, Inc. v. First Security Bank of Idaho, N.A.*, 99 Idaho 517, 584 P.2d 1242 (1978). As a general rule, a final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999). It must be a separate document, *Hunting v. Clark County School Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997); IDAHO R. CIV. P. 58(a), that on its face states the relief granted or denied.

Id. at 867, 55 P.3d at 321.

In the instant case, the court signed an Order to Dismiss Without Prejudice on January 9, 2013. On January 11, 2013 the trial court signed a Judgment on the Order to Dismiss with Prejudice. Once the Judgment was entered, it became a final judgment as defined by Rule 54(a) and is thereby appealable under I.A.R. 11(a)(1). Appellant is appealing the Judgment of the Dismissal with Prejudice (*see*: Notice of Appeal, appeal is from "the final judgment, entered in the above entitled

action on the 9th day of January, 2013.... The issues on appeal are as follows: All issues of fact and law....") which is allowable under I.A.R. 11(a)(1) and where there is a final Judgment a party may appeal.

Defendant's argument is without merit. This appeal is properly taken.

E. Attorney fees should not be awarded.

The case law is well-settled that an appellate court may not assess attorney fees to the prevailing party unless it finds that the appeal was defended on untenable grounds. In a line of cases beginning with *Minich v. Gem State Developers, Inc.*, the Court has consistently ruled that attorney's fees may be awarded where the appellate court makes a finding that the appeal was without a reasonable basis. *Heritage Excavation, Inc. v Briscoe*, 141 Idaho 40, 105 P.3d 700 (App. 2005); *Telford Lands, LLC v. Cain*, 154 Idaho 981, 303 P.3d 1237 (2013); *Merrill v. Gibson*, 139 Idaho 840, 87 P.3d 949 (2004)(attorney fees awarded where the Court found that Appellant's claim was "invalid, is frivolous and without foundation").

> Idaho Code section 12-121 provides that "[I]n any civil action,the judge may award reasonable attorney's fees to the prevailing party or parties. . . ." Such an award is appropriate when this Court has the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979).

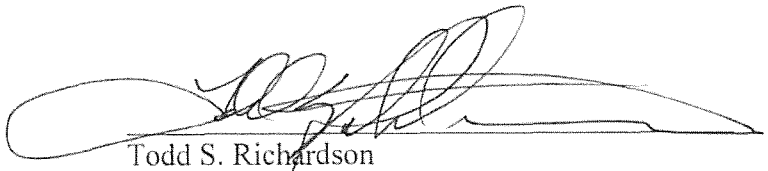
Lovelass v. Sword, 140 Idaho 105,212, 90 P.3d 330 (2004.)

In the instant case, Appellant asserts that the court abused its discretion when it struck the affidavits of Dr. Jayme MacKay and Wendy Thomason and granted Summary Judgment in favor of Defendant. These are issues of fact and law that are appropriate for review. Appellant has set forth various legal authorities demonstrating how the trial court erred. This appeal is neither frivolous nor without foundation and attorney fees should not be awarded to Respondent.

CONCLUSION

For each of the foregoing reasons, the trial court erred. The trial court should be reversed and the case remanded for proceedings.

Respectfully submitted this 11 day of March, 2014.



Todd S. Richardson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of March, 2014, I caused true and correct copies of the foregoing REPLY BRIEF to be served via U.S. Mail, postage pre-paid, to the following:

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