

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANYA S. DUKE,
Appellant,

vs.

ROGER M. SIMON, M.D. INDIVIDUALLY,
AND AS AGENT FOR RETINA
CONSULTANTS OF NEVADA, A NEVADA
CORPORATION,
Respondents.

No. 36716

FILED

MAY 06 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER REVERSING AND REMANDING

This is a proper person appeal from a district court order granting an oral motion to dismiss in a medical malpractice case.

FACTUAL BACKGROUND

In August 1991, appellant Anya Duke visited Dr. Marietta Nelson, a general ophthalmologist, complaining of decreased vision in her right eye. Dr. Nelson referred Duke to Retina Consultants of Nevada (Retina Consultants). At Retina Consultants, Dr. Roger Simon and Dr. R. Jeffrey Parker examined Duke. Dr. Simon concluded that Duke suffered from a retinal detachment, and Dr. Parker concurred.

Dr. Simon performed a pneumatic retinopexy on Duke's right eye. When Duke returned for a post-operative visit to seal the retinal tear, Dr. Simon noted that he could not seal it because the retina had not entirely flattened. Duke's vision deteriorated, and a follow-up examination revealed that Duke could only make out hand movement with her right eye. Dr. Simon arranged for her to see Dr. Richard Ober of the Estelle Doheny Eye Clinic in California. Subsequently, Dr. Ober performed further surgery, but Duke could still only detect hand movement with her right eye.

On December 7, 1994, Duke filed a complaint for medical malpractice against Dr. Simon, Dr. Parker, Retinal Consultants, Dr. Ober, and the Estelle Doheny Eye Clinic.¹ Duke alleged that the defendants negligently diagnosed and treated her, and negligently failed to obtain her informed consent. Duke sought general damages, medical expenses, loss of earnings, punitive damages, and her attorney fees and costs. Duke secured favorable deposition testimony from Dr. William Thornton, an ophthalmologist specializing in ophthalmic plastic surgery.

Prior to trial, the district court granted several of defendants' motions for summary judgment. Consequently, the district court disposed of Duke's claims against Dr. Parker, her cause of action for negligent failure to obtain informed consent, and her cause of action for negligent diagnosis. The district court also granted motions to dismiss Duke's request for punitive damages and loss of earning capacity, and excluded portions of her expert witness's deposition testimony. Thus, at the time of trial, Dr. Simon and Retinal Consultants were the only remaining defendants, and the only remaining cause of action was for negligent treatment.

Trial began on August 9, 2000, with Duke representing herself in proper person. At the conclusion of Duke's opening statement, Dr. Simon's counsel orally moved to dismiss the case, arguing that Duke failed

¹Duke never served Dr. Ober or the Estelle Doheny Eye Clinic. Thus, Ober and the clinic never became parties to this case. See Rae v. All American Life & Cas. Co., 95 Nev. 920, 605 P.2d 196 (1979) (holding that an individual named as a co-defendant is not a party unless he has been served).

in her opening statement to articulate that the evidence would establish a prima facie case of medical negligence. After the court heard argument on the issue and questioned Duke, it granted the motion. The district court entered judgment on August 23, 2000, dismissing Duke's case with prejudice. Duke appeals, challenging the district court order dismissing her case, and several of the district court's interlocutory orders.

DISCUSSION

Duke asserts that the district court erred by granting summary judgment on several issues prior to trial.

In a medical malpractice action, a plaintiff confronted with a motion for summary judgment must establish: (1) the accepted standard of medical care or practice, (2) that the doctor's conduct departed from the standard, (3) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury, and (4) that the plaintiff suffered damage.² The plaintiff must do this through the use of expert medical testimony.³

This court reviews a district court's decision to grant a summary judgment motion de novo.⁴ Summary judgment is appropriate when, after a review of the record viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact and the

²See Prabhu v. Levine, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996).

³NRS 41A.100.

⁴Walker v. American Bankers Ins., 108 Nev. 533, 836 P.2d 59 (1992).

moving party is entitled to judgment as a matter of law.⁵ In determining whether summary judgment is proper, the nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true.⁶

Summary judgment dismissing Dr. Parker

Eighth District Court Rule (EDCR) 2.20(b) requires a party to file any written opposition to a motion within ten days after the motion is served.⁷ The district court may construe the opposing party's failure to file a written opposition as an admission that the motion is meritorious and should be granted.⁸ Here, defendants served the motion for summary judgment on Duke's former counsel on December 18, 1997. Duke's former counsel did not file an opposition to this motion. The district court granted the defendants' summary judgment motion on June 19, 1998. The district court acted within its authority to deem Duke's failure to respond as an admission and to grant summary judgment.

Duke, in proper person, filed a motion for reconsideration on this issue on February 4, 1999. EDCR 2.24(b) requires a party seeking

⁵See Medallion Dev. v. Converse Consultants, 113 Nev. 27, 31, 930 P.2d 115, 118 (1997).

⁶Id.

⁷NRCP 83 grants the district courts rule-making power. District court rules are valid if they do not conflict with the Nevada Rules of Civil Procedure. See Western Mercury, Inc. v. The Rix Co., 84 Nev. 218, 222-23, 438 P.2d 792, 795 (1968).

⁸EDCR 2.20(b).

reconsideration to file a motion within ten days after service of written notice of the judgment or order. The order granting summary judgment was served on June 26, 1998. The district court properly denied Duke's motion as untimely.

Summary judgment on the issue of negligent failure to obtain informed consent

Duke argues that the district court erred by granting the defendants' motion for summary judgment on the issue of negligent failure to obtain informed consent.

Nevada follows the "professional standard" for informed consent. A doctor has a duty to disclose information that a reasonable practitioner in the same field of practice would disclose.⁹ The standard, and violation of the standard, must be established by expert testimony regarding the custom and practice of the particular field of medical practice.¹⁰ To establish malpractice for negligent failure to obtain informed consent, the plaintiff must demonstrate: (1) that the doctor failed to inform the patient orally or in writing of the material risks; (2) an unrevealed risk actually materialized; (3) the patient would have refused the surgery if she had been informed of the unrevealed risk; and (4) the patient's assertion that she would have refused the treatment is reasonable under the circumstances.¹¹

⁹Smith v. Cotter, 107 Nev. 267, 272, 810 P.2d 1204, 1207 (1991).

¹⁰Id.

¹¹Id. at 274, 810 P.2d at 1208-09.

When a motion for summary judgment is made and supported, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.¹² Duke failed to do this.

At the time of the summary judgment motion, Duke's only expert witness testimony on the issue of informed consent came from Dr. Thornton. Dr. Thornton's deposition discusses what he would have told Duke prior to a pneumatic retinopexy if she had been his patient. He does not discuss whether Dr. Simon's conduct violated the standard of care. Further, Duke's opposition to the summary judgment motion did not contain any evidence to establish the elements of a claim for negligent failure to obtain informed consent; rather, her opposition only put forth bare assertions that she did not give informed consent. Therefore, the district court correctly granted summary judgment on the issue of negligent failure to obtain informed consent.

Summary judgment on issue of misdiagnosis

Duke contends that the district court erred by granting Dr. Simon's motion for partial summary judgment on the issue of negligent diagnosis. She alleges that the deposition testimony of Dr. Thornton did not address Dr. Simon's alleged misdiagnosis because Dr. Simon's counsel never asked about misdiagnosis at the deposition.

¹²Pegasus v. Reno Newspapers, Inc., 118 Nev ___, ___, 57 P.3d 82, 87 (2002).

Duke's argument is meritless. Duke's former counsel questioned Dr. Thornton during the deposition. Accordingly, she had an opportunity to ask about Dr. Simon's diagnosis. Further, Dr. Thornton's deposition testimony indicates that he disagreed with Dr. Simon's choice of procedure, not the diagnosis of a retinal detachment. He specified that he felt a pneumatic retinopexy was an improper procedure given Duke's past history of chronic uveitis and the difficulty Dr. Simon had viewing the retina. Nothing in his deposition demonstrates that he believed Dr. Simon misdiagnosed Duke with a retinal detachment.

Duke also claims that under NRS 41A.100(1) she could have used recognized medical text and treatises to establish that Dr. Simon misdiagnosed her. However, her opposition to the summary judgment motion did not reference any specific medical text or treatise. In short, her opposition rests on general allegations and conclusions, without any factual support. Duke did not put forth anything on the issue of negligent diagnosis that created a genuine issue of material fact.

Dr. Parker's attorney fees and costs

After the district court dismissed Dr. Parker from the case, he moved for attorney fees and costs pursuant to NRS 41A.056(2).¹³ The district court granted the motion and awarded Dr. Parker \$65,382.80.

¹³The Nevada Legislature repealed NRS 41A.056 along with the medical-dental screening panels in the 2002 special session. See 18th Spec. Sess., c. 3, § 69, eff. Oct. 1, 2002.

NRS 41A.056(2) requires the district court to award attorney fees and costs to a defendant in a medical malpractice action if the decision of the medical-dental screening panel and the court's judgment are not in favor of the plaintiff.¹⁴ Here, the screening panel found "no reasonable probability of medical malpractice," and the district court granted summary judgment for Dr. Parker. NRS 41A.056(2) required the district court to award Dr. Parker reasonable attorney fees. The district court did not err in granting Dr. Parker his costs and fees, as substantial evidence in the record supports the reasonableness of the award.

Dismissal based on Duke's opening statement

Duke's case proceeded to trial on the negligent treatment cause of action. At the conclusion of Duke's opening statement, the district court dismissed her case upon an oral motion by Dr. Simon's counsel. The district court's written order states that it dismissed Duke's claim because she "failed to articulate potential evidence to support a prima facie case of medical negligence, particularly with respect to causation and damages[, and] during oral argument, [p]laintiff admitted that she had no evidence concerning causation of damages and did not know if she could produce evidence to establish causation and damages during trial." Although courts allow dismissal of a case after the opening statement in limited circumstances, we conclude that the district court erred in dismissing Duke's case at this stage.

¹⁴See Barrett v. Baird, 111 Nev. 1496, 908 P.2d 689 (1995).

In Best v. District of Columbia,¹⁵ the United States Supreme Court held that the trial court may direct a verdict upon the opening statement of the plaintiff when the statement establishes the plaintiff has no right to recover. The Court stated that the plaintiff is entitled to the benefit of all inferences drawn from his opening statement, and it is not enough that the statement lacks definiteness, but it must clearly appear that no cause of action exists.¹⁶ Further, the Court cautioned that dismissal at this stage is not proper if the opening statement leaves doubt as to the facts, or permits conflicting inferences.¹⁷

Other jurisdictions have expanded on Best. The majority of jurisdictions agree that dismissal based on the opening statement should be exercised with great restraint,¹⁸ and the practice is unsafe, disfavored, and not to be encouraged.¹⁹ Generally, courts have held that the mere failure to state facts sufficient to constitute a prima facie case in the opening statement should not result in dismissal.²⁰ Rather, dismissal is proper only when 1) counsel affirmatively admits that he is unable to

¹⁵291 U.S. 411 (1934).

¹⁶Id. at 415-16.

¹⁷Id. at 415.

¹⁸Morfeld v Kehm, 803 F.2d 1452, 1454 (8th Cir. 1986).

¹⁹De Vito v. Katsch, 556 N.Y.S.2d 649, 652 (App. Div. 1990).

²⁰See Annotation, Dismissal, Nonsuit, Judgment, or Direction of Verdict on Opening Statement of Counsel in Civil Action, 5 A.L.R. 3d. 1405, 1432 (1966).

prove facts essential to recovery,²¹ or 2) it affirmatively appears that the opening statement fully and completely sets forth the plaintiff's entire case, and as a matter of law, proof of the facts recited, together with all reasonable inferences in favor of the plaintiff, would not result in a submissible case.²² And, either way, counsel should be given an opportunity to supplement the opening statement to correct any deficiency.²³

²¹See Chalet Apartments v. Farm & Home Sav., 658 S.W.2d 508, 509 (Mo. Ct. App. 1983) (dismissal should not be granted because of a "mere failure to state facts sufficient to constitute a submissible case unless counsel affirmatively admits that no additional facts will be shown by the evidence") (quotations omitted); Hays v. Missouri Pacific Railroad Company, 304 S.W.2d 800, 803 (Mo. 1957) (a directed verdict on an opening statement is proper if counsel makes an admission which affirmatively demonstrates as a matter of law that his client has no cause of action or is not entitled to recover on his cause of action); Riley v. Hornbuckle, 366 S.W.2d 304, 305 (Ky. Ct. App. 1963) (stating that dismissal at the end of opening statements is "never based on the mere insufficiency of the opening statement to support a case, but always upon the presence of admissions that are fatal to the case").

²²Hays, 304 S.W.2d at 804.

²³See Johnson v. Larson, 49 N.W.2d 8, 11 (Minn. 1951) (holding that when the opening statement deliberately concedes facts which, if proved, would not entitle the plaintiff to a verdict, counsel should be given an opportunity to qualify, explain, and amplify his opening statement); Chalet Apartments, 658 S.W.2d at 509 (dismissal at the conclusion of plaintiff's opening statement should be done only after the plaintiff has been given an opportunity, after the motion for dismissal has been made, to correct or add to his opening statement); see also Hays, 304 S.W.2d at 804-805.

If all inferences are viewed in Duke's favor, her opening statement does not justify dismissal. First, Duke did not affirmatively admit facts that were fatal to her case. In her opening statement, she asserted, albeit without specificity, that she would prove that Dr. Simon deviated from the standard of care, and that he caused her injury by improperly choosing and performing the pneumatic retinopexy. This assertion covered the required elements of medical malpractice. Dr. Simon, in his answering brief, argues that Duke admitted that she could not establish either causation or damages, and thus, could not prevail at trial. In response to the district court's questioning about how she intended to show causation and damages, Duke initially responded: "I don't know exactly what witness . . . but each of the witnesses are [sic] my treating physician also." After a follow-up question, Duke stated that she would show damages by "showing inappropriate procedure . . . and . . . that the procedure was improperly performed, which Dr. Thornton will testify to." From Duke's argument it can be inferred that she was aware that she needed to prove causation and damages, and that she hoped to do so by questioning Dr. Nelson, Dr. Parker, and Dr. Simon on the witness stand. Contrary to Dr. Simon's assertion, she did not affirmatively admit any fact that would preclude her from establishing causation or damages.

Moreover, it cannot be said that Duke's opening statement fully and completely set forth her entire case, so that it was clear as a matter of law that she could not recover based on the facts. Duke's opening statement was not comprehensive enough to infer that she presented her entire case, and that based on the facts presented she could


not recover. In fact, her opening statement contained few facts, and consisted more of conclusory statements.

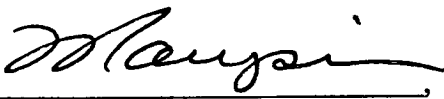
CONCLUSION

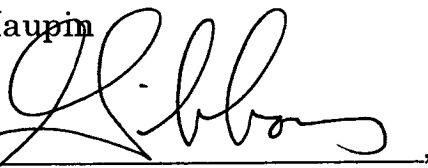
The district court erred by dismissing Duke's case after her opening statement. Duke's other claims of error are without merit.²⁴

Accordingly we reverse the district court's order and remand this matter to the district court for further proceedings.

It is so ORDERED.²⁵


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Nancy M. Saitta, District Judge
Alverson Taylor Mortensen Nelson & Sanders
Anya S. Duke
Clark County Clerk

²⁴Duke's opening brief also contends that the district court failed to accommodate her disability under the Americans with Disabilities Act and violated her right to due process. The record does not support these claims.

²⁵Appellant was granted leave to file an opening brief and reply brief in proper person. Although she was not granted leave to file additional papers in proper person, see NRAP 46(b), we have considered the additional proper person documents received from her.