

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TOI-YA D. FOSTER, INDIVIDUALLY,  
Appellant,

vs.


RUDOLPH CARLO KING, M.D.,  
INDIVIDUALLY; AND WELLHEALTH  
MEDICAL GROUP (VOLKER), P.C., A  
NEVADA PROFESSIONAL  
CORPORATION,

Respondents.

No. 78957-COA

FILED

MAY 26 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

TOI-YA D. FOSTER, INDIVIDUALLY,  
Appellant,

vs.

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INDIVIDUALLY; AND WELLHEALTH  
MEDICAL GROUP (VOLKER), P.C., A  
NEVADA PROFESSIONAL  
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No. 79653-COA

*ORDER REVERSING (DOCKET NO. 78957-COA), VACATING (DOCKET  
NO. 79653-COA) AND REMANDING*

These are consolidated appeals from a district court order granting summary judgment in a professional negligence action and a post-judgment award of attorney fees and costs. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

In June of 2014, respondent Rudolph King, M.D., performed a hysterectomy on appellant Toi-Ya Foster.<sup>1</sup> Five days postoperatively and two days after discharge from the hospital, Foster was not improving and presented to the emergency room with complaints of severe abdominal pain. She was discharged and readmitted to the hospital several more times in

<sup>1</sup>We do not recount the facts except as necessary to our disposition.

the following weeks with similar complaints. During this time, she underwent an unsuccessful stent placement, which appeared to be related to a transected left ureter. She also had CT scan, which showed an edematous left kidney, a fluid collection on the left side of the pelvis, later diagnosed as an urinoma, but with no visible injury to the bladder. Ultimately, Foster was diagnosed with a left ureteral transection, which was documented in multiple medical records to have occurred during her hysterectomy and consistent with certain post-operative findings. Eventually, Foster underwent a second surgery to repair the left ureter.

Foster subsequently filed a complaint against Dr. King and his employer, WellHealth Medical Group (WellHealth), alleging medical malpractice, breach of contract, and vicarious liability.<sup>2</sup> Foster's complaint was supported by Dr. Richard Boothby's affidavit, in which he opined that Dr. King breached the standard of care by "failing to identify and protect [Foster's] left ureter" and "caused a direct injury to the ureter" and "upon finishing the hysterectomy [ ] failed to be sure that there was no ureteral injury." In his supplemental report, Dr. Boothby opined that Dr. King fell below the standard of care by "transecting her left ureter" and "by not recognizing the injury at the time of the initial surgery."

Following the deposition of Foster's expert, Dr. Boothby, Dr. King moved for summary judgment, in which WellHealth joined, asserting that Foster failed to establish that Dr. King had breached the standard of care by failing to prove that his actions caused the injury. The motion for summary judgment was supported in part by excerpts from Dr. Boothby's deposition, Dr. King's affidavit attached to his motion, and the assistant

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<sup>2</sup>The breach of contract claim was dismissed via stipulation prior to the filing of the summary judgment motion.

surgeon Dr. William Lloyd's affidavit attached to a supplement to the motion, as well as the deposition testimony of subsequent treating physicians Drs. Robert Futoran and Victor Grigoriev.

In his affidavit, Dr. King explained that at the end of the hysterectomy, he "inspected the operative field" and "no urine was visible and there was no indication of any leakage or spillage of urine," which, if present, would have assisted the surgeon in identifying a ureteral transection.<sup>3</sup> Dr. King further testified that a "careful inspection did not reveal any form of injury to Ms. Foster's left ureter, particularly frank transection . . . ." Dr. Lloyd in his affidavit testified that he "[a]long with Dr. King . . . inspected the operative field . . . looking for any sign of urine or pooling of fluid in the operative field and . . . did not see any. . . . Additionally, a careful inspection did not reveal any form of injury to Ms. Foster's left ureter." Therefore, Dr. King argued that he had not breached the standard of care in treating Foster and was therefore entitled to summary judgment.

After a hearing on Dr. King's motion, the district court agreed with Dr. King and granted summary judgment, concluding that Foster's medical malpractice claim failed as a matter of law. The court found that Foster could not prove Dr. King transected her left ureter during the hysterectomy, or even the precise cause of the injury to the ureter, and therefore, could not prove that Dr. King should have identified the injury

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<sup>3</sup>It should be noted that Dr. Futoran during his deposition explained that even if the ureter had been transected during the hysterectomy, this may not have necessarily resulted in urine being present in the surgical field, although the presence of urine would help a surgeon identify that the ureter was leaking so that it could be repaired.

intraoperatively to ensure its repair. Because the respondents were the prevailing parties, the district court also awarded Dr. King and WellHealth the majority of their attorney fees and costs pursuant to a separate motion.<sup>4</sup> These consolidated appeals turn on one issue: whether the district court erred in granting summary judgment.

Foster argues that the district court erred because there are two genuine disputes of material fact: (1) whether Dr. King in fact transected Foster's left ureter during the hysterectomy, and (2) whether Dr. King failed to undertake appropriate measures in identifying the left ureteral injury and ensuring its repair before closing. Respondents argue that the district court properly granted summary judgment because Foster failed to meet her burden of proof that Dr. King breached the standard of care by either transecting the left ureter during surgery or failing to diagnose the ureteral injury intraoperatively. Because genuine disputes of material fact remain with respect to these two issues, we agree with Foster.<sup>5</sup>

"We review a district court's decision to grant summary judgment de novo." *Schueler v. Ad Art, Inc.*, 136 Nev., Adv. Op. 52, 472 P.3d 686, 689 (Ct. App. 2020). Summary judgment is proper if the pleadings and

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<sup>4</sup>On appeal, neither party disputes the validity of the district court's award of attorney fees and costs. Based on our disposition, we need not address the specifics of the award as it is necessarily vacated.

<sup>5</sup>We note that respondents moved for summary judgment after the new Nevada Rules of Civil Procedure were in effect. Therefore, NRCP 56(a), and not NRCP 56(c), is the properly cited rule. The difference being that the pre-2019 language is "no genuine issue of material fact" and the NRCP 56(a) language is "no genuine dispute as to any material fact." However, the standard of review remains the same, and therefore, this revision to the language has no legal effect on the resolution of these consolidated appeals. See Advisory Committee Note (2019).

all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). “A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting her claims. *Wood*, 121 Nev. at 732, 121 P.3d at 1031; NRCP 56(e). And all evidence must be viewed in the light most favorable to the nonmoving party. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Further, “the summary judgment procedure is not available to test and resolve the credibility of opposing witnesses to a fact issue.” *Aldabe v. Adams*, 81 Nev. 280, 285, 402 P.2d 34, 37 (1965), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (1998). Nor is summary judgment warranted if the district court primarily relies on a self-serving affidavit without valid supporting documentation. *See Clauson v. Lloyd*, 103 Nev. 432, 434-35, 743 P.2d 631, 633 (1987) (holding that a conclusory, factually unspecific affidavit was not itself sufficient to support summary judgment); *see also Dennison v. Allen Grp. Leasing Corp.*, 110 Nev. 181, 185, 871 P.2d 288, 291 (1994) (reversing a summary judgment that was “premised upon a bare record and unsupported affidavits”).<sup>6</sup>

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<sup>6</sup>We note *Clauson* has been cited with approval by the Nevada Supreme Court on a number of occasions in challenging the reliance on self-serving affidavits. While *Clauson* does not use the term “self-serving” affidavit it does refer to the allegations in an affidavit as being self-serving,

Relevant to a medical malpractice case, “the plaintiff must establish the following: (1) that the doctor’s conduct departed from the accepted standard of medical care or practice; (2) that the doctor’s conduct was both the actual and proximate cause of the plaintiff’s injury; and (3) that the plaintiff suffered damages.” *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Generally, a plaintiff must use expert testimony in order to establish medical malpractice, including a doctor’s standard of care and a deviation of such care as well as causation. NRS 41A.100; *Prabhu*, 112 Nev. at 1544, 930 P.2d at 107-08; see also *Jain v. McFarland*, 109 Nev. 465, 474, 851 P.2d 450, 456 (1993). Further, causation must be proven within a reasonable degree of medical probability. *Prabhu*, 112 Nev. at 1544, 930 P.2d at 107; see also *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 6, 805 P.2d 589, 592 (1991). Finally, whether a party has proven causation by sufficient evidence is usually determined by the jury. *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981); see also *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 665 (1998) (providing that “causation is generally an issue of fact for the jury to resolve”).

In this case, there are at least two genuine disputes of material fact which remain, particularly when viewing the evidence in the light most

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recognizing that if the court were to hold differently doctors could file a motion with a generalized affidavit stating that they did not breach the standard of care (which is by definition “self-serving”). Further, the supreme court in *Dennison*, which expanded *Clauson*, used the term “self-serving” stating that “[i]n *Clauson* . . . [t]he doctor was granted summary judgment on the basis of his own self-serving affidavit . . .” *Dennison*, 110 Nev. at 185, 871 P.2d at 290; see also *Serrett v. Kimber*, 110 Nev. 486, 493, 874 P.2d 747, 751 (1994) (citing *Clauson* for the proposition that a self-serving affidavit will not support summary judgment).

favorable to Foster. The first dispute concerns whether Dr. King transected Foster's left ureter during the hysterectomy. Multiple references in the medical records support that a transection of the left ureter occurred during Dr. King's surgery, including Dr. King's post-operative medical records,<sup>7</sup> a CT scan taken postoperatively that showed fluid build-up in the abdominal cavity, and a failed stent placement in the left ureter.

In their depositions, the surgeons who eventually repaired the left ureter testified that based on the condition of the ureter at the time of the surgical repair, they could not definitively state that Dr. King transected the left ureter during the hysterectomy. Dr. Futoran indicated that there was "no way of knowing" the precise cause of the injury. Dr. Grigoriev, who was the assistant surgeon, testified that he could not "say whether the ureter was completely intact or what kind of damage might have been done to it" because "we are dealing with about a month or two months' period from the time of the initial surgery." He also testified that "[the left ureter] was not completely cut" and was "more or less in the normal path of the ureter." Dr. King, who was also present at the repair surgery, noted in his operative report that the left ureter was "disconnected," thereby creating a factual dispute regarding the nature of the injury to the left ureter, as well as the extent of ureteral damage that had actually occurred during the hysterectomy.

Despite the foregoing, it appears that the district court in granting summary judgment may have disproportionately relied on Dr.

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<sup>7</sup>We note that in his affidavit attached to the summary judgment motion Dr. King indicated that his use of the word "transection merely describes a disruption of the ureter" and not "the process by which it became transected." Nevertheless, Dr. King used the word "transection" and not "disruption" in his contemporaneous medical documentation.

Boothby's answer to a hypothetical question posed during his deposition in making its decision. Specifically, Dr. Boothby testified that, although he was unaware of the testimony provided by the surgeons who repaired the left ureter, "if [the surgeons] were there, they did the surgery, and they testify that they did not think this was a transection, that it was another mechanism of injury that the doctor has no control over," then he would change his standard of care opinion. Dr. Boothby conceded that under these circumstances he would not find fault with Dr. King.

However, there are several genuine disputes of material fact underlying the hypothetical question asked of Dr. Boothby, as noted above in part, rendering his answer to the hypothetical, which contained conditions that were not necessarily present, an insufficient basis for granting summary judgment.<sup>8</sup>

Based on the foregoing, we conclude that genuine disputes of material fact remain as to whether Dr. King transected or otherwise injured the left ureter during the hysterectomy resulting in a breach of the standard of care. Thus, the district court erred in granting summary judgment based on Foster's purported inability to prove that Dr. King caused the transection to the ureter when contemporaneous medical records and Dr. Boothby's

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<sup>8</sup>As emphasized by Foster during oral argument, Dr. Boothby's standard of care opinions were more expansive and not confined to his answer given to hypothetical questions posed during his deposition. Dr. Boothby's initial affidavit in support of Foster's complaint, his supplemental report and subsequent declaration, as well as the contemporaneous medical records, raise genuine disputes of material fact as to the type of left ureter injury that occurred, the extent of that injury, and Dr. King's compliance with the standard of care in treating Foster. Thus, the scope of Dr. Boothby's opinions are well beyond a singular answer to a hypothetical question.



expert opinions arguably support otherwise, particularly when viewing the facts in a light most favorable to Foster.<sup>9</sup>

The second genuine dispute of material fact is whether Dr. King failed to diagnose and repair the transection or other injury to Foster's left ureter before closing. Testimony in the record supports that if the left ureter had been completely transected, there would have been a pooling of urine in the abdominal cavity visible during the hysterectomy, thereby alerting the surgeons to the presence of the ureteral injury. On the other hand, if the injury was latent, or one that was not immediately visible during surgery, then the issue is whether Dr. King performed an adequate inspection of the operative field following surgery to have either ruled out or diagnosed a ureteral injury in order to have complied with the standard of care. Dr. Boothby opined that due to the difficult nature of the surgery, the surgeons should have carefully inspected the ureters before closing to ensure that no ureteral damage occurred during surgery, and should have contemporaneously documented these efforts in the operative note. However, there is a genuine dispute regarding what efforts should have been undertaken in light of Drs. King's and Lloyd's testimony that they did

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<sup>9</sup>A genuine dispute also exists not only as to what type of injury to the left ureter occurred, but also as to the extent of injury necessary to have resulted in a breach of the standard of care. Notwithstanding certain inconsistencies, Dr. Boothby testified during his deposition that an actual transection or a "sharp-cut injury" by "cutting part or all of the ureter" was a breach of the standard of care. Dr. Boothby also maintained in his declaration attached to Foster's opposition to the motion for summary judgment that either a "through-and-through or partial transection" of the ureter could constitute a breach of the standard of care. Of course, other physicians' testimonies suggest otherwise. Hence, the existence of a genuine dispute.

not see a pooling of urine in the operative field prior to closing, which would have alerted them to a ureteral injury.

Further, in his second declaration attached to the opposition to the summary judgment motion, which Dr. King characterizes as a “sham” affidavit,<sup>10</sup> Dr. Boothby clarifies that in order for him to believe that another mechanism was the cause of the injury to the left ureter, he would have to be assured that Dr. King made efforts to identify the ureters intraoperatively and protect them from being transected during surgery. Dr. Boothby also initially opined that if Dr. King was unable to make a visual inspection, he should have ordered an intravenous dye test to ensure that the ureters were functioning properly and not leaking urine before

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<sup>10</sup>To the extent that Dr. King argues that Dr. Boothby’s second declaration, attached to Foster’s opposition to summary judgment, is a “sham,” this court will not address this issue as it was presented for the first time on appeal and the district court did not address this issue in the first instance. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”). Nevertheless, we note that the general rule is that even when there is an apparent contradiction between an affidavit and deposition, which one is credible is for the jury to decide, and therefore, a “court should not reject the content of an affidavit even if it is at odds with [an earlier] statement [].” See *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 295 n.7, 357 P.3d 966, 988 n.7 (Ct. App. 2015) (quoting *Kennett–Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980)). Furthermore, before excluding a sham or inconsistent affidavit, “the district court must make a factual determination that the contradiction was actually a ‘sham’ [and not] the result of an honest discrepancy, a mistake” or an attempt to explain previous testimony. *Id.* (alteration in original) (quoting *Kennedy v. Allied Mut. Ins.*, 952 F.2d 262, 267 (9th Cir. 1991)). Here, the district court did not address whether Dr. Boothby’s declaration attached to the opposition was a sham, and therefore, we cannot conclude that the district court would have made such a determination.

closing, and documented his efforts. Dr. Boothby did acknowledge that failure to document in and of itself is not a breach of the standard of care.

Nevertheless, the only documentation supporting that Dr. King specifically checked for any injury to the ureters was contained in Dr. King's affidavit attached to his summary judgment motion and not in Dr. King's contemporaneous operative note, potentially giving rise to Foster's argument that Dr. King's affidavit, as well as Dr. Lloyd's setting forth their efforts, were merely "conclusory and self-serving." *See Clauson*, 103 Nev. at 434-35, 743 P.2d at 633. Because of our disposition, we need not address this issue in any detail.

We do acknowledge, however, that Drs. King and Lloyd submitted affidavits because Foster failed to conduct their depositions. Nevertheless, the district court should not have granted summary judgment. This is because a genuine dispute remains as to the condition of the intraoperative field before closing, including whether there was any evidence to support a ureteral injury, such as the presence of urine. Another related dispute is whether Dr. King undertook the necessary steps, as identified by Dr. Boothby, to have either ruled out or diagnosed the ureteral injury (whatever its etiology) in order to have ensured its repair before closing, thus complying with the standard of care. It does not appear that the district court fully considered these genuine disputes in its decision-making.

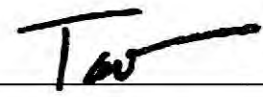
Accordingly, due to the conflicting medical evidence, and taking all inferences in favor of Foster, we agree that genuine disputes of material fact exist as to the condition of the operative field following the hysterectomy, and the precautions Dr. King either undertook intraoperatively to protect the ureters, or should have undertaken,

rendering summary judgment inappropriate. *See Prabhu*, 112 Nev. at 1544, 930 P.2d at 107-08; *see also Perez*, 107 Nev. at 7-8, 805 P.2d at 592-93.

Therefore, we conclude that the district court erred in granting summary judgment. Accordingly, we

ORDER the judgment of the district court REVERSED (Docket No. 78957-COA), VACATED (Docket No. 79653-COA), AND REMAND this matter to the district court for proceedings consistent with this order.<sup>11</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Linda Marie Bell, Chief Judge, Eighth Judicial District Court  
Department XIX, Eighth Judicial District Court  
Israel Kunin, Settlement Judge  
Iqbal Law, PLLC  
John H. Cotton & Associates, Ltd.  
McBride Hall  
Barbara Buckley  
Anne R. Traum  
Kelly H. Dove  
Eighth District Court Clerk

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<sup>11</sup>Due to the disposition in this case, we necessarily vacate the district court's order awarding attorney fees and costs.