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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 12/16/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

LISA BOROWSKY,)
)
Plaintiff/Appellant,)
)
v.)
)
SCOTTSDALE HEALTHCARE)
CORPORATION, an Arizona)
corporation; MICHAEL W. EDER,)
M.D. AND JANE DOE EDER, husband)
and wife,)
)
Defendants/Appellees.)
)

1 CA-CV 10-0114
DEPARTMENT A
MEMORANDUM DECISION
(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-051480

The Honorable Robert H. Oberbillig, Judge

REVERSED AND REMANDED

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K E S S L E R, Presiding Judge

¶1 Appellant Lisa Borowsky ("Borowsky") appeals the trial court's decision granting summary judgment for Scottsdale Healthcare Corporation ("SHC").¹ Borowsky argues that the court erred in finding that there was insufficient evidence for a reasonable jury to find that SHC's nursing staff contributed to her injuries. We agree and reverse the court's order.

FACTUAL AND PROCEDURAL HISTORY²

¶2 In May of 2005, Borowsky went to a SHC hospital complaining of symptoms consistent with appendicitis. The emergency on-call surgeon, Dr. Eder, diagnosed Borowsky with acute appendicitis and performed an emergency appendectomy on her the next day.

¶3 In the days after the surgery, Borowsky experienced discomfort in her abdomen, blood in her stool, and a fever. Dr.

¹ Dr. Eder and his wife are named in the caption of this appeal; however, Borowsky and Dr. Eder reached a settlement before the trial court granted SHC's motion for summary judgment. Dr. Eder is no longer a party in this case.

² In her statement of facts, Borowsky does not cite the record on appeal, but instead exhibits attached to her opening brief. These are not references to the record on appeal. *Lansford v. Harris*, 174 Ariz. 413, 417 n.1, 850 P.2d 126, 130 n.1 (App. 1992). Pursuant to SHC's request, we disregard Borowsky's statement of facts and base our decision on the facts we found in the record. See ARCAP 13(a)(4); *Bird v. State*, 170 Ariz. 20, 20 n.2, 821 P.2d 287, 287 n.2 (App. 1991). Also, Borowsky cites documents not in the record. We do not rely on any statement made that is not found in the record. See *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990).

Eder ordered a CT scan of her abdomen and that the nurses report back to him if Borowsky's Hemocrit and Hemoglobin ("H&H") blood levels dropped below 10, which could indicate internal bleeding. On the day she was discharged, Borowsky's H&H levels dropped to 8.9. Dr. Eder testified during his deposition that he was not told of Borowsky's low H&H levels,³ and he discharged her from the hospital.

¶4 Later on that same day, Borowsky went to the Mayo Clinic hospital.⁴ The Mayo Clinic tested Borowsky's H&H levels, which had increased to 9.6. Borowsky underwent immediate tests, including a colonoscopy and laparoscopy, which revealed changes in the mucosal tissue and possible death of living tissue ("necrosis") in the intestinal area around the incision due to a

³ It is clear there is a factual dispute whether SHC nurses told Dr. Eder of the low 8.9 H&H levels. While Dr. Eder did not recall giving the order for the nurses to inform him if Borowsky's H&H levels were low, once shown the nurses' notes in Borowsky's chart, he agreed that he must have given the order. He then testified that the nurses never told him of the low levels. At oral argument, SHC read from previously undisclosed medical records indicating that nurses did speak to Dr. Eder about Borowsky's H&H levels, and later spoke with Dr. Yoon, the discharging doctor, specifically about the 8.9 H&H levels. The medical record as read indicated that Dr. Yoon then spoke with Dr. Eder and both agreed to discharge Borowsky.

⁴ The only facts in the record regarding Borowsky's treatment at SHC and Mayo Clinic are from the testimony of Borowsky's causation expert, Dr. Hiyama, and Dr. Eder. None of Borowsky's medical records are in the record. This Court presumes any missing documents support the trial court's order. *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996). Therefore, we presume Dr. Eder's and Dr. Hiyama's testimony is correct regarding what is in Borowsky's medical records.

loss of blood supply ("ischemia"). A surgeon operated on Borowsky to repair the damage caused from the first surgery, which was that Borowsky's cecum and ileocolic vessels (parts of the intestines) were "incorporated" into the "fascial closure" of Borowsky's incision.

¶15 Borowsky filed a complaint against SHC and Dr. Eder alleging medical malpractice. She supported her claim with two experts: one to testify about breach of standard of care, and the other, Dr. Hiyama, to testify about proximate causation as to the conduct of Dr. Eder and SHC's employees.

¶16 In his deposition, Dr. Eder testified that he did not recall receiving reports of Borowsky's H&H levels, but he knew for sure that he was not told her H&H levels fell to 8.9.⁵ Dr. Eder stated that he would not have discharged Borowsky had he known about her low H&H levels out of concern for internal bleeding.⁶ He further testified that someone suffering from ischemia should be operated on as soon as possible:

⁵ Despite not being told about Borowsky's low H&H levels, Dr. Eder testified that he was not aware "of anything that the nurses did or did not do which caused Ms. Borowsky harm."

⁶ Referring to the Mayo results that her H&H levels increased to 9.6, Dr. Eder testified that if Borowsky's levels were at 9.6 while under his care, he probably would have discharged Borowsky with an order to report to an outpatient facility for retesting in a few days. Alternatively, if he had refused to discharge Borowsky based on her H&H levels of 9.6, he would have observed her rather than perform any procedure because at those levels, she was "hemodynamically stable."

Q. [by Sandoval] We talked about ischemic colitis. I just want to make sure I'm getting my medical terms right. Colitis would reflect an inflammation of the colon?

A. [by Dr. Eder] Correct.

Q. And ischemic means it's due to insufficient blood flow?

A. Yes.

Q. Once there's a diagnosis of unresolving ischemic colitis, is there any timetable in which that operation needs to be done?

. . .

A. Usually as soon as possible.

Q. [] It's not something that you want to schedule a week after the diagnosis?

A. No.

Q. Again, because when blood is cut off to tissue, it can die and it's best to remedy that before that happens, right?

A. Right.

¶17 In his deposition, Dr. Hiyama testified that he believed he was hired to "serve as the surgical expert regarding the care that was delivered to Miss Borowsky by Dr. Eder." Dr. Hiyama's opinion was that:

Dr. Eder's refusal to authorize a gastrointestinal CAT scan as specifically requested by Miss Borowsky, cancellation of Miss Borowsky's scheduled consultation with another surgeon and ultimate discharge of Miss Borowsky from Scottsdale Healthcare created the delay that may have contributed to the resulting ischemia and necrosis of

Miss Borowsky's cecum, a portion of the terminal ileum and a portion of the colon.

Dr. Hiyama would not offer an opinion about whether SHC's nurses did anything to cause Borowsky harm during her hospital stay because he did not "know the information that was really conveyed to [Dr. Eder]." ⁷ He testified, however, that someone suffering from ischemia should be operated on as soon as possible, because, "the longer [ischemia] occurs or consists and is not reversed or corrected, the higher the chance that the tissue damage that occurs will increase." Dr. Hiyama also testified that it would be speculation for him to consider whether "the events that transpired at Mayo Clinic [would] have occurred at Scottsdale" if Borowsky had not been discharged.

¶8 SHC filed a motion for summary judgment, alleging that Borowsky "[did] not have admissible evidence to prove" that SHC's employees proximately caused Borowsky's injuries. SHC cited Dr. Hiyama's refusal to testify that the nurses' actions or failure to act caused Borowsky harm. SHC argued that Dr. Hiyama was Borowsky's only causation witness and the time had passed for disclosure of other expert witnesses.

⁷ Dr. Hiyama also stated that he would like to review Dr. Eder's and Borowsky's depositions. At the request of defense counsel, he agreed to disclose if his opinions changed or if he developed new ideas after reading the depositions. However, Dr. Hiyama did not later amend his opinions or report.

¶9 Borowsky urged the trial court to consider that Dr. Eder testified that no one told him about Borowsky's low 8.9 H&H levels, and if they had, he would not have discharged her. She further argued that it was Dr. Hiyama's opinion that the discharge of Borowsky from SHC caused a delay that may have contributed to her injuries. Borowsky argued that "it [was] axiomatic that any breach that contributed to the delay . . . would also be a contributing factor to the resulting necrosis," and "[a]ssuming Dr. Eder's testimony to be true, it is clear that SCH's nurses and staff directly contributed to the delay" that led to Borowsky's injuries. Thus, she asserted "[a]t the very least, genuine issues of material fact remain as to how much of the delay was caused by the failure of SHC's nurses and staff to follow Dr. Eder's orders . . . [and] [s]uch fault is properly apportioned by a jury and not resolved on summary judgment by the [c]ourt."

¶10 At oral argument, the trial court noted its concern that Borowsky lacked expert testimony that the nurses' actions caused or contributed to the premature discharge of Borowsky, which delayed her treatment and resulted in necrosis of her intestinal tissue. The court granted summary judgment for SHC, holding that under *Orme School*, there was not enough evidence "for a reasonable juror to find in favor of [Borowsky] as to the issue of causation against the hospital." Borowsky timely filed

her notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

STANDARD OF REVIEW

¶11 We review *de novo* a trial court's grant of summary judgment "on the basis of the record made in the trial court," applying "the same standard as that used by the trial court." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). In doing so, we determine whether any genuine issues of material fact exist and whether the trial court correctly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). Summary judgment is appropriate when the evidence presents no genuine issue of material fact, and the movant is entitled to a judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). A trial court must not grant summary judgment unless "the facts produced in support of the claim or defense have so little probative value . . . that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. We review the facts in the light most favorable to the party against whom summary judgment was granted. *Riley, Hoggatt & Suagee, P.C., v. English*, 177 Ariz. 10, 12-13, 864 P.2d 1042, 1044-45 (1993).

DISCUSSION

¶12 On appeal, Borowsky argues that the trial court erred in granting summary judgment after it determined that there was insufficient evidence for a reasonable jury to find that SHC's nursing staff contributed to Borowsky's injuries. We agree.

¶13 Pursuant to A.R.S. § 12-563 (2003), a party suing a healthcare provider for medical malpractice must prove that the healthcare provider failed to exercise the relevant degree of care and that failure proximately caused the injury, "increased the risk of harm," or "deprived plaintiff of some significant chance of . . . better recovery." *Thompson v. Sun City Cmty. Hosp., Inc.*, 141 Ariz. 597, 606, 688 P.2d 605, 614 (1984); see also *Evans v. Bernhard*, 23 Ariz. App. 413, 415, 533 P.2d 721, 723 (App. 1975). Proximate cause must ordinarily be established by expert medical testimony unless a causal relationship is readily apparent to the trier of fact. *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985). A court should not direct judgment based on lack of proximate causation when the jury can find causation based upon "the most favorable portions" of witnesses' testimony. See *Nichols v. City of Phx.*, 68 Ariz. 124, 139, 202 P.2d 201, 211 (1949) (quoting *Dieterle v. Yellow Cab Co.*, 93 P.2d 171, 173 (Cal. Dist. Ct. App. 1939)).

¶14 The parties do not dispute that there was a delay in diagnosing the injury Borowsky sustained during her appendectomy. Nor do the parties dispute that Borowsky suffered ischemia and necrosis as result of Dr. Eder's surgery. Both Dr. Hiyama and Dr. Eder testified that someone suffering from ischemia should be operated on as soon as possible because, as Dr. Hiyama stated, "the longer [ischemia] occurs or consists and is not reversed or corrected, the higher the chance that the tissue damage that occurs will increase."

¶15 Here, the dispute is whether Dr. Hiyama's testimony that he could not say whether the nurses' inaction contributed to Borowsky's further injury was sufficient to preclude Borowsky's case from going to the jury. We conclude that the testimony of Dr. Hiyama and Dr. Eder together was enough to create a genuine dispute that the nurses' failure to report Borowsky's low 8.9 H&H levels to Dr. Eder caused the premature discharge from SHC, which created a delay in diagnosing Borowsky's injury, resulting in her further injury.⁸

⁸ SHC argues that this Court cannot consider whether proximate cause was "readily apparent" in this case because Borowsky did not argue it below. We disagree. "On appeal from summary judgment, the appellant may not advance new theories or raise new issues to secure a reversal." *Lansford*, 174 Ariz. at 419, 850 P.2d at 132 (refusing to consider new argument because there was no instance in the record indicating that the appellant argued the issue to the trial court); see also *Sereno v. Lumbermens Mut. Cas. Co.*, 132 Ariz. 546, 549, 647 P.2d 1144, 1147 (1982) (holding that the trial court must have been given a

¶16 Dr. Hiyama testified that Borowsky's discharge created the "delay that may have contributed to" the resulting injuries to Borowsky. Dr. Eder's testimony that no one told him that Borowsky's H&H levels dropped to 8.9, and that he would not have discharged her if he had been told, is evidence that the nurses' possible failure to report Borowsky's H&H levels caused Dr. Eder to discharge Borowsky. While Dr. Hiyama did not say that the nurses may have caused Dr. Eder to prematurely discharge Borowsky, which resulted in Borowsky's further injury, Dr. Eder's testimony and the facts in the record were enough to create a genuine issue of material fact regarding whether the delay was caused by the nurses' conduct.

¶17 SHC points the Court to Dr. Hiyama's testimony that he could not say whether the nurses did anything wrong. While Dr. Hiyama testified that he could not offer an opinion that the SHC nurses caused Borowsky's harm, he later clarified that this was because he could only speculate as to what would have occurred had Borowsky not been discharged from SHC:

Q. [by Mr. Jones] Doctor, my question was are you going to offer any opinions that anything that the nurses at Scottsdale

chance to rule on an issue raised before the appeals court). Borowsky's argument on appeal is the same as in the trial court. While Borowsky has not used the words "readily apparent," that was the essence of her arguments below and on appeal. We will not find a waiver simply because Borowsky did not use the exact words "readily apparent."

Healthcare did or didn't do caused Miss Borowsky harm?

A. [by Dr. Hiyama] At this time given that I have not reviewed any other depositions and only the records that I've stated that have been provided to me, the answer would be no.

. . .

A. Dr. Eder's refusal to authorize a gastrointestinal CAT scan as specifically requested by Miss Borowsky, cancellation of Miss Borowsky's scheduled consultation with another surgeon and ultimate discharge of Miss Borowsky from Scottsdale Healthcare created the delay that may have contributed to the resulting ischemia and necrosis of Miss Borowsky's cecum, a portion of the terminal ileum and a portion of the colon.

Q. [by Mr. Bradford] And that is still your opinion, is it not, Doctor?

A. It still is, yes.

Q. And it is still a matter of possibility, not probability, isn't it?

A. I believe that's correct.

Q. There's no way for us to really know today that her ultimate course would not have been essentially the same had she stayed in Scottsdale as opposed to going a few miles north and east to the Mayo Clinic?

A. Just clarification. What you're asking is would the events that transpired at Mayo Clinic have occurred at Scottsdale given that she continued her hospitalization there?

Q. Yes.

A. I believe, again, it would be speculation not knowing different outcomes, but I would

say it's possible. But I would add one issue.

It is fair that Dr. Hiyama could only speculate as to facts that caused the delay and what would have happened if Borowsky had not been discharged from SHC.

¶18 Furthermore, Dr. Hiyama clarified that regardless of whether Borowsky had been discharged, delayed treatment of the ischemia would increase damage to the intestinal tissue:

The issue is when you're dealing with a question of ischemia . . . the general rule of thumb is the longer it occurs or consists and is not reversed or corrected, the higher the chance that the tissue damage that occurs will increase.

¶19 Therefore, to determine proximate causation, a jury could believe "the most favorable portions" of Dr. Eder's testimony that he was not told about Borowsky's 8.9 H&H levels and would not have discharged her had he been told, and Dr. Hiyama's expert testimony that the delay in treatment caused undiagnosed ischemia and necrosis. See *Nichols*, 68 Ariz. at 139, 202 P.2d at 211. The jury could conclude that the nurses contributed to the delay in diagnosing Borowsky as having ischemia by not reporting the low H&H levels and that the delay resulted in her experiencing necrosis of her intestinal tissue. The combined testimony of Dr. Hiyama and Dr. Eder was sufficient to create a genuine issue of material fact regarding whether the nurses contributed to Borowsky's further injury.

CONCLUSION

¶20 For the foregoing reasons, we conclude that the trial court erred in granting SHC's motion for summary judgment. Accordingly, we reverse and remand to the trial court for further proceedings consistent with this decision.

/s/
DONN G. KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge