IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JULIE MIZELL, *Plaintiff/Appellant*,

v.

ESTATE OF WILLIAM D. LEIGHTON, M.D., et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0044
FILED 4-7-2020

Appeal from the Superior Court in Maricopa County
No. CV2015-008112
The Honorable Margaret R. Mahoney, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

APPEARANCES

Julie Mizell, Fountain Hills
Plaintiff/Appellant

Jennings, Strouss & Salmon, P.L.C., Phoenix
By John J. Egbert, R. Ryan Womack, Jay A. Fradkin
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Chief Judge Peter B. Swann joined.

W I L L I A M S, Judge:

¶1 Julie Mizell ("Mizell") appeals the superior court's order granting summary judgment for the Estate of William D. Leighton, M.D., et al. ("Leighton"), on Mizell's claims for medical malpractice, battery and related claims arising from a breast implant exchange surgery Leighton performed. For the following reasons, we affirm the court's order on all claims except battery; as to that claim we vacate and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mizell, a breast cancer survivor, underwent a mastectomy in 2000. Between 2002 and 2014, Mizell underwent other surgeries to correct breast rippling and breast asymmetry. Leighton performed multiple procedures on Mizell during those years.

¶3 In January 2014, Mizell met with Leighton to discuss and finalize a surgery in which Leighton would replace her current right implant with another to correct ongoing rippling. Up to this point, Mizell's implant had remained a size 700-cc. In her deposition, Mizell testified that Leighton was to replace her current implant with another of the same size. Leighton's medical notes, however, indicated the implant would be replaced with a smaller size 480-cc implant. During this visit, Mizell initialed each page and signed the final page of a fourteen-page consent form.

¶4 During the surgery a week later Leighton determined a size 480-cc implant would not resolve the rippling problems. He then attempted to place a size 530-cc implant, but determined that would not suffice either. Ultimately, Leighton replaced Mizell's existing 700-cc implant with a 775-cc implant.

¶5 The following month, Mizell developed an infection that Leighton treated with Cipro, an antibiotic. Leighton performed a

debridement and replaced the 775-cc implant with a 640-cc implant. Mizell continued to experience post-operative issues. In April 2014, Mizell told Leighton she wanted to do everything possible to avoid replacing the new implant. Nevertheless, in May 2014, Leighton removed it after determining it could not be saved.

¶6 Mizell filed a complaint against Leighton alleging that Leighton's actions fell below the standard of care in several ways relative to the breast implant exchange procedure performed in January 2014, and that Leighton committed battery by increasing the size of Mizell's implant.

¶7 Leighton died before being deposed, and the personal representative of his estate was substituted as a party in his place.

¶8 Wesley G. Schooler, M.D. ("Schooler"), Mizell's expert witness on standard of care and causation, submitted a preliminary affidavit on March 14, 2016, opining that Leighton breached the standard of care in treating Mizell. When Schooler was deposed eight months later, however, he contradicted his earlier affidavit, testifying Leighton's treatment of Mizell did not fall below the standard of care and did not cause Mizell's injuries. Leighton then moved for summary judgment, and Mizell filed a cross-motion for partial summary judgment on her claims of lack of informed consent and battery. With her response to Leighton's motion, Mizell submitted a "supplemental affidavit" by Schooler that reversed course again affirming the opinion of his preliminary affidavit of a year before.

¶9 The superior court granted summary judgment in favor of Leighton on all claims and dismissed Mizell's complaint with prejudice. Mizell timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶10 Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). On appeal, we review a grant of summary judgment *de novo*. *Dreamland Villa Cmty. Club, Inc. v. Rainey*, 224 Ariz. 42, 46, ¶ 16 (App. 2010). "[W]e view the facts and reasonable inferences in the light most favorable to the non-prevailing party," *Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160, 163, ¶ 11 (2017), but "will affirm a grant of summary judgment if the trial court was correct for any reason." *Dreamland*, 224 Ariz. at 46, ¶ 16.

I. Schooler's Affidavits and Deposition Testimony

¶11 In a medical malpractice action, a plaintiff must prove both that "[t]he health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances" and that "[s]uch failure was a proximate cause of the injury." A.R.S. § 12-563; *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 48-49, ¶ 23 (App. 2011).

¶12 Typically, the standard of care "must be established by expert medical testimony." *Seisinger v. Seibel*, 220 Ariz. 85, 94, ¶ 33 (2009); *Ryan*, 228 Ariz. at 49, ¶ 23; *see also Phillips v. Stillwell*, 55 Ariz. 147, 149 (1940) ("Evidence as to what constitutes the proper degree of skill . . . can only be given by expert witnesses . . . ."). "Similarly, unless a causal relationship is readily apparent to the trier of fact, expert medical testimony is normally required to establish proximate cause." *Ryan*, 228 Ariz. at 49, ¶ 23; *see also Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, 419, ¶ 16 (App. 2010).

¶13 The negligence claim of lack of informed consent "concerns the duty of the physician to inform his patient of risks inherent in the surgery or treatment to which [s]he has consented," *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 319-20, ¶ 11 (2003) (quoting *Mink v. Univ. of Chi.*, 460 F. Supp. 713, 716 (N.D. Ill. 1978)), and must also "'be established by expert testimony in accordance with the applicable standard of care,'" *id.* at 319-20, ¶ 11 (quoting *Hales v. Pittman*, 118 Ariz. 305, 311 n.4 (1978)).

¶14 Mizell certified in writing that expert opinion testimony was required to prove her claims. *See* A.R.S. § 12-2603(A).

¶15 In Schooler's preliminary affidavit, he opined that Leighton's conduct, actions and omissions fell below the requisite standard of care, and that deficient performance was the cause of Mizell's injuries. Specifically, Schooler stated:

> 1. "The standard of care was violated by Dr. Leighton who negligently, recklessly or intentionally, improperly and inappropriately utilized and implanted memory gel 755 cc implants (which were too large for this patient), bilaterally."
>
> 2. "Placement of a larger implant is not within the standard of care for this patient given the inherent risks for her, versus benefits of a larger implant . . . ."

3. "Keeping the implant in place with ongoing infection for three months between February 20 and [M]ay 15th is below the standard of care unless it is well documented that the patient insisted on attempting to save her implant over that period of time, which does not appear to have been the case."

4. "To a reasonable degree of medical certainty, it is likely and probable that Ms. Mizell would not have had difficulty with poor healing tissues and ultimately loss of her implant if she had not been increased to the extremely larger implant and if her infection had been more aggressively and appropriately treated early on, which was not done."

¶16 In his deposition, however, Schooler contradicted his preliminary affidavit in at least the following instances:

[DEFENSE COUNSEL:] **Now, was it at least within the realm of reasonable care and within the standard of care for Dr. Leighton to place the 775 MENTOR MemoryShape in this lady's right breast in January, 2014?**

[SCHOOLER:] I -- we don't make opinions on shaped versus unshaped in general, but I don't think it would have been the best choice.

[DEFENSE COUNSEL:] Okay. But **do you think it still would have been within the standard of care**, even though you don't believe it would have been the optimal, best choice?

[SCHOOLER:] I -- you know, it's hard to say. I would say -- I would generally say -- it's hard to say. It's a really wide implant, so 17 -- I mean her chest would have to be 34 centimeters across the front which is a lot, you know. So it seems like it would be -- I don't even know how you would fit that in.

[DEFENSE COUNSEL:] So where do you fit --

[SCHOOLER:] So if she's got a 34 -- if she wears a 34, I just don't know if -- 17 centimeters wide, that wide an implant I don't think would have been an appropriate choice. But, again, I wouldn't say -- **I guess I wouldn't say it's below standard of care -- that part of this case was below standard of care, no.**

. . . .

[SCHOOLER:] **[I]f you're doing a procedure and they already have a certain size, going up or down by 50 or a hundred ccs is still, I think within standard.**

[DEFENSE COUNSEL:] Okay. So you've got a hundred-cc leeway, typically, if you're exchanging implants?

[SCHOOLER:] If you're exchanging implants.

. . . .

[DEFENSE COUNSEL:] Okay. Well, in February of 2014 **you note that Dr. Leighton put the patient on Cipro;** true?

[SCHOOLER:] Yes.

[DEFENSE COUNSEL:] **Was that appropriate and within the standard of care?**

[SCHOOLER:] **Yes.**

. . . .

[DEFENSE COUNSEL:] And hypothetically, had the implants **-- had the implant been removed in February or March, are you in a position to say that her ultimate outcome would have been any different?**

[SCHOOLER:] At this point hard to say. I -- you know, the longer she's got the implant in there, if there is infection around it, it may have created more scarring and more capsule contracture, but it's really hard to say. It may have --

[DEFENSE COUNSEL:] Speculation?

[SCHOOLER:] **She would have probably ended up with about the same outcome . . .**

(Emphasis added.)

¶17 Mizell does not contest that there are "contradictory statements" in Schooler's deposition testimony and his preliminary affidavit. When a witness's deposition testimony contradicts his prior

affidavit, the deposition testimony is generally deemed to be more trustworthy. *See Ariz. Real Estate Dep't v. Ariz. Land Title & Tr. Co.*, 14 Ariz. App. 509, 511 (1971) (reasoning that "[b]ecause the affidavit lacks the confrontation aspect of the deposition and is a one-sided proposition, we believe that when an affidavit and deposition by the same person contradict each other, a deposition taken when the deponent is subject to cross-examination by the adverse party, normally should be held to be the more trustworthy of the two"). Here, because the preliminary affidavit and Schooler's deposition testimony are contradictory, the superior court properly disregarded Schooler's preliminary affidavit and relied instead on his deposition testimony concerning standard of care and causation.

¶18 For the same reason, the superior court did not err in disregarding Schooler's supplemental affidavit contradicting his deposition testimony. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990) ("[A]ffidavits . . . that tend to contradict the affiant's sworn testimony at deposition . . . may . . . still be insufficient to withstand a motion for summary judgment."). More than three months after his deposition, and after Leighton filed a motion for summary judgment, Schooler provided a supplemental affidavit in which he "reiterate[d] and confirm[ed] the contents of [the preliminary] affidavit, dated March 14, 2016."

¶19 Arizona has long held "parties cannot thwart the purposes of Rule 56 by creating issues of fact through affidavits that contradict their own depositions." *Wright v. Hills*, 161 Ariz. 583, 588 (App. 1989), *abrogated on other grounds by James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316 (App. 1993). "A party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." *Id.* at 587.[1] Because Schooler's supplemental affidavit contradicted his own prior deposition testimony and was executed only after Leighton's motion for summary judgment was filed, the superior court properly disregarded the supplemental affidavit.

¶20 Schooler's deposition testimony provided no support for Mizell's claim that Leighton fell below the standard of care or that his acts were the proximate cause of any resulting injuries. Therefore, the superior

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[1] The rule may not apply when "the affiant was confused at the deposition and the affidavit explains those aspects of the deposition testimony or if the affiant lacked access to material facts and the affidavit sets forth newly discovered evidence." *Wright*, 161 Ariz. at 588. Mizell does not contend either exception applies here.

court correctly entered judgment in Leighton's favor on Mizell's claims for medical malpractice, negligence and lack of informed consent.

II. Battery

¶21 In granting Leighton's motion for summary judgment, the superior court cited A.R.S. § 12-562(B), which provides: "A medical malpractice action brought against a licensed health care provider shall not be based upon . . . battery." Although A.R.S. § 12-562(B) precludes such a claim, our supreme court has held "this subsection of the statute unconstitutional under Article 18, Section 6 of the Arizona Constitution as an abrogation of the right to bring an action in battery to recover damages for injuries." *Duncan*, 205 Ariz. at 314, ¶ 35. Notwithstanding the language in A.R.S. § 12-562(B), Mizell is not barred from making a claim of battery.

¶22 A "lack of consent" or "battery" claim is different from the "negligence" claim of "lack of informed consent." *Duncan*, 205 Ariz. at 310, ¶ 13. In Arizona, claims involving "lack of consent," including where a doctor "fail[s] to operate within the limits of [a] patient's consent," "may be brought as battery actions." *Id.* "[W]hen a patient gives limited or conditional consent, a health care provider has committed a battery if the evidence shows the provider acted with willful disregard of the consent given." *Id.* at 311, ¶ 18. Whether a healthcare provider's particular conduct is within the scope of a patient's consent is "an issue for the trier of fact to determine." *Id.* at ¶ 16 (citing Restatement (Second) of Torts § 892A(2)(b)).

¶23 The relevant question here is not whether Mizell consented to the breast implant exchange surgery performed on January 27, 2014; instead, the pertinent issue is whether Mizell consented to receive a larger implant than she had before.

¶24 According to Mizell, Leighton agreed that he would replace her then-current implant with the same size implant, and that there would be no increase in size. According to Leighton's medical notes, he intended to replace the implant with a smaller size 480-cc. Either way, because we view disputed facts in the light most favorable to Mizell, evidence supports her contention that she did not consent to an increase in implant size, creating a genuine issue of material fact as to whether Leighton committed battery. We therefore reverse the superior court's grant of summary judgment on that claim. We make no determination as to the "scope" of Mizell's consent, as that is an issue left for the trier of fact to determine.

III. Punitive Damages

¶25 Punitive damages are appropriate "only in the most egregious of cases," where a defendant's "reprehensible conduct" and "evil mind" are proven by "clear and convincing evidence." *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 498, ¶ 81 (App. 2008) (internal quotation marks omitted) (quoting *Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 424, ¶ 17 (2002)). "Summary judgment dismissing a punitive damages claim is appropriate in the absence of facts sufficient to show by clear and convincing evidence that the defendant acted with the requisite evil mind," meaning "proof of intent to injure or acts that are in conscious disregard of an unjustifiable substantial risk of significant harm to another." *SWC Baseline & Crismon Inv'rs, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, 289, ¶¶ 74-75 (2011); *see also Rawlings v. Apodaca*, 151 Ariz. 149 (1986).

¶26 Mizell's only remaining claim is that she did not consent to Leighton increasing the size of her implant. She failed to offer sufficient evidence for a jury to find by clear and convincing evidence that Leighton "inten[ded] to injure" Mizell or that Leighton's acts were "in conscious disregard of an unjustifiable substantial risk of significant harm to [Mizell]." *See id.* We therefore affirm the superior court's grant of summary judgment as to punitive damages.

CONCLUSION

¶27 For the foregoing reasons we affirm the superior court's judgment except that we vacate and remand the dismissal of Mizell's claim of battery.

AMY M. WOOD • Clerk of the Court
FILED: AA