DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARBARA BARNA BROWN, Plaintiff/Appellant, v. JOHN C. LINCOLN HEATH NETWORK, an Arizona non-profit corporation, Defendant/Appellee.	1 CA-CV 11-0230 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-019514

The Honorable Linda H. Miles, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Barbara Barna Brown, *In Propria Persona* — Phoenix

Olson, Jantsch & Bakker, PA — Phoenix
By Andrew E. Rosenzweig
and Dina M. Anagnopoulos
Attorneys for Defendant/Appellee

N O R R I S, Judge

¶1 Barbara Barna Brown timely appeals the superior court's orders granting summary judgment in favor of Defendant/Appellee John C. Lincoln Health Network ("JCL") and denying her new trial motion. As we explain, the superior court

properly dismissed Brown's medical malpractice claims grounded on lack of informed consent and inadequate patient care. But, the superior court should not have dismissed Brown's lack of consent -- that is, medical battery -- claim. Thus, we affirm in part, reverse in part, and remand for further proceedings on Brown's lack of consent claim.

FACTS AND PROCEDURAL BACKGROUND

¶2 On June 12, 2007, Brown's mother died while in the care of one of JCL's hospitals. On June 11, 2009, Brown sued JCL alleging medical malpractice relating to a feeding tube procedure it performed on her mother.

¶3 Brown subsequently disclosed the "preliminary expert opinion affidavit" of her mother's primary care physician, outlining the ways in which JCL and its staff had acted "in violation of the standard of care" and "the manner in which the negl[i]gent acts caused" her mother's death. At a pretrial conference, however, Brown advised the court she had decided not to rely on the physician as an expert witness at trial. In response, the superior court informed Brown, "[i]f you don't disclose a standard of care expert who provides an[] opinion that there has been some problem with respect to the care of your mother, then you don't have a case," and ordered deadlines for disclosing expert witnesses.

¶4 On July 30, 2010 -- the date the superior court had ordered Brown to file her "final expert witness disclosure" -- Brown asked the court to, first, extend her time for disclosure, second, appoint an expert under Arizona Rule of Evidence 706 with the parties sharing the cost, and third, allow her to "provisionally" rely on JCL's employees as "adverse expert" witnesses. JCL objected to her requests and moved for summary judgment, arguing that because the primary care physician was not a qualified expert and JCL's employees would not testify they had acted negligently, Brown lacked any expert testimony and, thus, had failed to prove a prima facie case JCL breached the applicable standard of care and caused Brown's damages. After hearing argument on the parties' motions (the "summary judgment hearing"), the superior court denied Brown's requests, and granted JCL's motion for summary judgment.

¶5 Brown then moved for a new trial arguing, as relevant here, the court improperly found an expert was necessary and should have appointed an expert. The superior court summarily denied the new trial motion.

DISCUSSION

I. Summary Judgment

A. Expert Testimony: Lack of Consent[1]

¶6 Brown argues the superior court should not have granted JCL's motion for summary judgment when she did not have a "retained testifying medical expert," because "no expert witness is required for an intentional tort, including battery." On the narrow issue of Brown's lack of consent claim, we agree.

¶7 As our supreme court has explained,

> claims involving lack of consent, i.e., the doctor's failure to operate within the limits of the patient's consent, may be brought as battery actions. In contrast, true "informed consent" claims, i.e., those involving the doctor's obligation to provide information, must be brought as negligence actions.

Duncan v. Scottsdale Med. Imaging, Ltd., 205 Ariz. 306, 310, ¶ 13, 70 P.3d 435, 439 (2003). Although negligence, or "lack of informed consent," claims require proof by expert testimony, battery, or "lack of consent," claims do not. *See id.* at 309, ¶ 10, 70 P.3d at 438.

¶8 Here, Brown argued a variety of claims, including lack of consent, lack of informed consent, and negligence in the care

[1]"We review de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003) (citation omitted).

of the feeding tube. JCL's motion for summary judgment focused on Brown's lack of informed consent claim. Brown, however, responded to and addressed both "lack of consent, (which requires no expert witness) and lack of informed consent." As Brown argued in her "Statement of Facts" in response to JCL's motion for summary judgment, "[Brown's] mother and [Brown] had . . . declined the [feeding tube] . . . [and Brown] was . . . subject[ed] to subsequent duress, misrepresentations and material omissions leading to lack of consent and lack of informed consent." *See Duncan*, 205 Ariz. at 311, ¶ 20, 70 P.3d at 440 ("[I]f a patient's consent is obtained by a health care provider's fraud or misrepresentation, a cause of action for battery is appropriate.").

¶9 We acknowledge that at the summary judgment hearing, despite the best efforts of the superior court to clarify the claims Brown intended to pursue, Brown described her lack of consent claim imprecisely. Nevertheless, in responding to JCL's summary judgment motion, Brown clearly advised the court she wished to pursue that claim and was entitled to do so without an expert. Because the record fails to show Brown had abandoned her lack of consent claim that, as a matter of law, she was entitled to pursue without an expert, the superior court should

not have dismissed that claim on summary judgment. *See Duncan*, 205 Ariz. at 310, ¶ 13, 70 P.3d at 439.

B. Expert Testimony: Negligence Claims

¶10 Brown's other claims -- lack of informed consent and negligence in the care of the feeding tube –- however, required expert testimony. *See id.*; *Barrett*, 207 Ariz. at 378, ¶ 12, 86 P.3d at 958.

¶11 Brown argues no expert testimony was required because she presented evidence JCL violated federal and state regulations regarding informed consent and the use of feeding tubes, and its own policies regarding informed consent. We disagree. Assuming without deciding the materials Brown presented constituted some evidence of the applicable standard of care, *see Peacock v. Samaritan Health Serv.*, 159 Ariz. 123, 127, 765 P.2d 525, 529 (App. 1988) ("the existence of a hospital protocol is nevertheless some evidence of the standard of care"; this "analysis does not compel the conclusion that a policy adopted by a health care provider will always equate with the standard of care"), to prove a prima facie case of medical negligence on either claim, Brown was nevertheless required to "prove the causal connection between [the] act[s] or omission[s] and the ultimate injury through expert medical testimony, unless the connection [was] readily apparent to the trier of fact."

Barrett, 207 Ariz. at 378, ¶ 12, 86 P.3d at 958. The record before us demonstrates the "causal connection" between the alleged acts and the ultimate injury was not "readily apparent." For example, Brown acknowledged her mother was "diabetic with various [co-morbidities]." Thus, because Brown did not present any admissible expert testimony on causation, the superior court properly dismissed these claims.

¶12 Brown nevertheless argues the superior court should not have granted summary judgment because she presented "substantial evidence in defense of summary judgment, including a comprehensive preliminary expert affidavit." We disagree.

¶13 At a pretrial conference, and again at the summary judgment hearing, Brown advised the court she had decided not to rely on her mother's primary care physician to testify as a medical expert at trial. Moreover, because the physician's affidavit was hearsay and not otherwise admissible, Brown was not entitled to rely on his affidavit in opposing summary judgment. *See* Ariz. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence."); *see also Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 47, ¶ 17, 50, ¶ 30, 262 P.3d 863, 868, 871 (App. 2011) (defendant permitted to rely on plaintiff's preliminary expert

opinion affidavit to establish prima facie proof of fault by nonparty because affidavit was admissible as an "admission by a party-opponent").

¶14 Brown also argues her "disclosure of adverse expert witnesses" was sufficient to survive summary judgment. Although a plaintiff may, in some cases, rely on the defendant's own testimony, *see Potter v. H. Kern Wisner, M.D., P.C.*, 170 Ariz. 331, 339, 823 P.2d 1339, 1347 (App. 1991), Brown's speculation as to what JCL's employees would say was incapable of creating a triable issue of fact.

C. Court-Appointed Expert

¶15 Brown also argues the superior court should not have granted JCL's motion for summary judgment simultaneously with its denial of her motion for a court-appointed expert, because it should have waited to determine whether the parties could agree to appoint an expert under Arizona Rule of Evidence ("Rule") 706 before dismissing the case. In pertinent part, Rule 706(c) provides appointment of an expert is "subject to the availability of funds or the agreement of the parties concerning compensation." Here, the superior court made it clear it did not have funds available to assist Brown with her claim. Further, although the court left open the possibility of the parties stipulating to a court-appointed expert, Brown agreed

she had no "money to pay for an expert, period. Not 50% of an expert; not 25% of an expert; zero." JCL's counsel argued Rule 706 did not "contemplate" stipulation to an expert, and gave no indication JCL would be willing to share the cost of an appointed expert. Thus, the court did not abuse its discretion in denying Brown's motion for a court-appointed expert at the same time it granted JCL's motion for summary judgment. *See State v. Chaney*, 141 Ariz. 295, 308, 686 P.2d 1265, 1278 (1984) ("Whether an expert is to be appointed is within the discretion of the trial judge.").

II. New Trial Motion

¶16 Finally, Brown argues the superior court abused its discretion in denying her motion for a new trial "in consideration of the above." We interpret this to incorporate the arguments Brown made in challenging the court's summary judgment order and, for the reasons discussed above, hold the court did not abuse its discretion in denying Brown's new trial motion. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 25, ¶ 5, 13 P.3d 763, 767 (App. 2000) (appellate court reviews ruling on new trial motion for abuse of discretion).

CONCLUSION

¶17 For the foregoing reasons, we reverse the superior court's dismissal of Brown's lack of consent claim on summary judgment and remand to the superior court for further proceedings on that and only that claim.[2] We affirm the superior court's grant of summary judgment on the rest of Brown's claims.

_____/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

_____/s/
PETER B. SWANN, Judge

_____/s/
DONN KESSLER, Judge

[2]Because we are remanding for further proceedings, we do not address Brown's argument regarding the superior court's "protective order," which was issued over a month after Brown's expert disclosure deadline and temporarily prevented the parties from taking depositions.