

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A. BRUNWASSER

Appellant

v.

JEFFREY K. COHEN

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1792 WDA 2012

Appeal from the Order August 28, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): G.D. No. 10-6268

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and MUSMANNO, J.

MEMORANDUM BY OTT, J.:

FILED JANUARY 30, 2014

Allen Brunwasser appeals *pro se*¹ from the order entered on August 28, 2012, in the Court of Common Pleas of Allegheny County, that granted the motion for summary judgment filed by defendant, Jeffrey K. Cohen in this medical battery action. Based upon the following, we affirm.

The trial judge, the Honorable Alan David Hertzberg, has aptly summarized the background of this case as follows:

In April of 2008 [Brunwasser] was admitted to Allegheny General Hospital for the purpose of undergoing emergency surgery to repair an incarcerated right inguinal hernia. [Brunwasser]

¹ As noted in the trial court's opinion, Brunwasser is an attorney who has been practicing law for approximately 65 years, and has been a self represented litigant throughout these proceedings. Trial Court Opinion, 1/14/2013, at 1.

signed a Consent to Surgical/Invasive Procedures form consenting to the procedure. While [Brunwasser] was anesthetized, Dr. Atkinson, the surgeon operating on the hernia, called a urology consult for the purpose of placing a Foley catheter to drain [Brunwasser's] bladder prior to commencing the hernia surgery. In response to the request for a urology consult, Jeffrey K. Cohen, M.D. ("Defendant") appeared, placed the Foley catheter without incident and Dr. Atkinson was able to complete the hernia surgery.

On June 1, 2010, [Brunwasser] initiated the instant litigation by filing a Complaint against [Cohen]. ... Though somewhat difficult to discern, [Brunwasser's] Original Complaint stated claims for assault, battery, and punitive damages. [Cohen] filed Preliminary Objections on July 22, 2010 and [Brunwasser] filed an Amended Complaint on July 26, 2010. [Cohen] again filed Preliminary Objections on July 29, 2010 and [Brunwasser] filed his Second Amended Complaint on August 16, 2010 adding a claim for abuse of process. [Cohen] filed Preliminary Objections to [Brunwasser's] Second Amended Complaint. Preliminary Objections were heard before the Honorable Robert J. Colville, who entered an Order on November 1, 2010. Judge Colville's Order dismissed [Brunwasser's] abuse of process claim. Judge Colville's order further provided that the remainder of [Cohen's] Preliminary Objections were overruled and that "[t]his is not a professional negligence case."

On July 17, 2012 [Brunwasser] presented a Motion to Determine Necessity of Certificate of Merit before the Honorable R. Stanton Wettick. Judge Wettick issued an Order on July 17, 2012 that stated, *inter alia*, that "... plaintiff has advised the court that he is pursuing only claims for which the testimony of a licensed professional is unnecessary and that he does not intend to offer at trial expert testimony of a licensed professional ..." and ordered that "... all claims for which the expert testimony of an appropriate licensed professional is required are dismissed and that [Brunwasser] may pursue any claims against [Cohen] for which expert testimony is unnecessary for the prosecution of these claims against [Cohen]." However, Judge Wettick's Order did not specify which claims in [Brunwasser's] Second Amended Complaint necessitated the testimony of a licensed professional and therefore were dismissed, nor did it specify which claims were permitted to stand.

On April 30, 2012 [Cohen] filed a Motion for Summary Judgment, which was argued before [the trial court] on August 27, 2012. On August 28, 2012, [the trial court] entered an Order of Court granting [Cohen's] Motion for Summary Judgment and held that "... all claims against [Cohen] are dismissed." On September 28, 2012 [Brunwasser] filed his Notice of Appeal, however, on October 3, 2012 [Brunwasser's] appeal was returned by the Superior Court due to Appellant error. On November 16, 2012 [Brunwasser] filed his Amended Notice of Appeal appealing [the] August 28, 2012 Order of Court.

Trial Court Opinion, 1/14/2013, at 1–3.

In this appeal, Brunwasswer raises seven issues, which are set forth in his brief as follows:

- I. Did Judge Hertzberg commit reversible error by relying on authority that does not support granting summary judgment for [Cohen?]
- II. If [Brunwasser's] sworn to and undenied testimony, published as Exhibit L in [Cohen's] summary judgment motion and its fact challenge to [Cohen's] Exhibit C^[2] consent motion is taken as true and all doubts resolved in its favor, did Judge Hertzberg commit reversible error in considering said Exhibit C valid and enforceable and using it to grant [Cohen's] motion because [Brunwasser] failed to comply with said Exhibit's obligations[?]
- III. Did Judge Hertzberg commit reversible error by refusing [Brunwasser's] request he apply the "Nanty-Glo" line of authority to eliminate use of [Cohen's] oral testimony that a stricture in [Brunwasser's] urethra prevented insertion of a Foley Catheter which oral testimony was [Cohen's] sole reason he was consulted and hired by Dr. Atkinson to solve the problem[?]

² The trial judge, in his opinion, identifies Exhibit "C" as Brunwasser's signed consent. **See** Trial Court Opinion, 1/14/2013, at 4–5. The consent form is titled "Consent to Surgical/Invasive Procedures," and was signed by Brunwasser on April 3, 2008.

- IV. When the case record contains no statement or testimony that Doctor Atkinson told [Cohen] he relied on the former's Exhibit C as his consult-hire authority and [Cohen] nowhere claims he was so told or acted in reliance of said Exhibit C, did Judge Hertzberg commit reversible error in using Exhibit C provisions as a factor in his decision[?]
- V. After Judge Hertzberg ruled that [Brunwasser's] second amended complaint established a prima facie case that he suffered an uncontested offensive touching at the hands of [Cohen] did [the trial court] commit reversible error by granting [Cohen] summary judgment because [Brunwasser] could not supply expert medical evidence that the obvious emotional distress and inconvenience and embarrassment which he claimed followed were caused by [Cohen's] conduct[?]
- VI. Did Judge Hertzberg commit reversible error by sua sponte dismissing [Brunwasser's] Count 7, 8, 9 supplement contained in his response to [Cohen's] summary judgment motion even though [Cohen] filed no objection to the supplement[?]
- VII. Did Judge Hertzberg commit reversible error when he sua sponte terminated [Brunwasser's] ongoing discovery which that jurist specifically allowed when [Brunwasser] requested it and [Cohen] did not request that discovery terminate[?]

Brunwasser's Brief at 2-3.

Motions for summary judgment are governed by Pennsylvania

Rule of Civil Procedure 1035.2, which states:

After relevant pleadings are closed, but within such time so as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial

has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

When we review an order granting or denying summary judgment, we keep in mind the following standard of review:

A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.

In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Ruspi v. Glatz, 69 A.3d 680, 684 (Pa. Super. 2013) (citation omitted), *appeal denied*, ___ A.3d ___ (Pa. December 9, 2013).

Brunwasser first challenges the authority cited by the trial court in support of its determination that expert testimony was required in this case, specifically: **McSorley v. Deger**, 905 A.2d 524 (Pa. Super. 2006), *appeal denied*, 919 A.2d 958 (Pa. 2007); **Moure v. Raeuchle**, 604 A.2d 1003 (Pa. 1992), and **Smith v. Yohe**, 194 A.2d 167 (Pa. 1963). Brunwasser argues

that the cases cited by the trial court “do not support the judge’s decision which ignores [Brunwasser’s] ... claim exhibit C [the signed consent form] was invalid.” Brunwasser’s Brief at 21. We are not persuaded by this argument.

In a medical battery action, the burden is on the plaintiff to prove that the operation performed was not authorized by him or her. ***Moure v. Raeuchle, supra*** at 1008, citing ***Smith v. Yohe, supra***. Permission or consent is a defense to a charge of battery. ***Chandler v. Cook***, 265 A.2d 794 (Pa. 1970). Therefore, to demonstrate medical battery, Brunwasser must prove that Cohen’s contact exceeded the scope of the consent given by Brunwasser. ***Moure, supra; see also DiCenzo v. Berg***, 16 A.2d 15, 16 (Pa. 1940). Moreover, expert testimony is generally required when the subject matter is beyond the knowledge of the average layperson. ***See McSorley v. Deger, supra*** (upholding summary judgment in favor of doctor who ordered consultation based on plaintiff’s failure to produce expert testimony; battery claim required expert testimony regarding scope of patient’s consent since necessity for consult would not be within the knowledge of the average layperson).

Brunwasser’s signed consent form, titled “Consent to Surgical/Invasive Procedures,” authorized “Dr. Atkinson and/or those associates or assistants selected by the physician to perform ... [right] inguinal hernia repair + Dr. Kasza to assist ...”; provided that the identities of who will participate in the

surgery and in what manner will be decided at the time of surgery and will depend on the availability of individuals with the necessary expertise on my/the patient's condition;" and further authorized "additional or different procedures that are necessary or advisable ..." in the event of "unforeseen conditions."³ In light of Brunwasser's battery claim, we agree with the trial court that the central issue in this case is whether Cohen, who was called in by Dr. Atkinson as a consult for purposes of placing a Foley catheter, acted within the scope of Brunwasser's consent. In this regard, we agree with the trial court that "it would not be within the knowledge of the average layperson to identify when the need for a consult would arise in a surgical procedure ..." and "... expert testimony was required to assess whether [the doctors/defendants] acted in accordance with ... the consent form" Trial Court Opinion, ***supra at 5***, citing ***McSorley, supra***, at 531, 532.

While Brunwasser relies on ***Gray v. Grunaggle***, 223 A.2d 663 (Pa. 1966), in support of his argument that his consent was a question for the jury to decide, we find that ***Gray*** is inapposite. In ***Gray***, a patient signed consent form while under care of one doctor, and was then transferred as a patient to the care of a second doctor, who subsequently operated on Gray. The ***Gray*** Court found that "certainly under these circumstances, [the second doctor] could not or should not have assumed that this consent was

³ Consent to Surgical/Invasive Procedures, 4/3/2008, ¶¶1, 4. **See also** Trial Court Opinion, ***supra***, at 4 & 9, citing Exhibit "C."

intended for him.” *Id.* at 674. Brunwasser also cites ***Grabowski v. Quigley***, 684 A.2d 610 (Pa. Super. 1996), *appeal dismissed*, 717 A.2d 1024 (Pa. 1998), which, like ***Gray***, is inapposite. In ***Grabowski***, expert testimony was not necessary to prove a battery where a surgeon different from the surgeon to whom plaintiff had given consent performed most of the surgery.

Here, in light of the consent signed by Brunwasser, neither ***Gray*** nor ***Grabowski*** are controlling.⁴ Therefore, we find no error in the determination of the trial court that Brunwasser’s allegations required the support of an expert opinion in order to prevail before a fact-finder. Accordingly, we reject Brunwasser’s first argument.

Secondly, Brunwasser argues that his consent cannot be considered because the consent form is a contract of adhesion, he was not wearing his glasses when he signed the consent form, and as he was being wheeled into the operating room he told an unspecified person that only Dr. Atkinson and Dr. Kasza, his assistant, could perform the procedure. These arguments are unavailing.

⁴ Brunwasser also relies on ***Grabowski v. Quigley***, 684 A.2d 610, 615 (Pa. Super. 1996), which, like ***Gray***, is vastly different from the present case. In ***Grabowski***, expert testimony was not necessary to prove a battery where a different surgeon from whom plaintiff had given consent performed most of the surgery.

Although Brunwasser contends that the consent form was a contract of adhesion, Brunwasser's claim against Cohen does not sound in contract. Furthermore, even though Brunwasser was not wearing his glasses, he does not dispute that he signed the consent form. Finally, Brunwasser's deposition testimony that, at the time he signed the consent form, he "specifically told the young doctor who was wheeling me to the OR that nobody but Dr. Atkinson was to operate on me,"⁵ is consistent with the authorization he signed for "Dr. Atkinson and/or those associates or assistants selected by the physician to perform ... [right] inguinal hernia repair + Dr. Kasza to assist..."⁶ Therefore, in response to Brunwasser's battery claim, Cohen was entitled to present a defense based on

⁵ Brunwasser's Brief at 28, citing Brunwasser's Deposition, 6/29/2011, at 24. In his deposition, Brunwasser testified:

As I was laying in the gurney, I signed [the consent form]. That is my recollection. I don't remember signing it, but I can see my signature there. I did not have my glasses and I did not read it.

I specifically told the young doctor who was wheeling me to the OR that nobody but Dr. Atkinson was to operate on me. They did mention that he had an assistant, Dr. Kasza, or whatever his name is, said that's okay; but nobody else. The reason I did that was my experience with my heart sac where they substituted this incompetent doctor.

Brunwasser's Deposition, 6/29/2011, at 24.

⁶ Consent to Surgical/Invasive Procedures, 4/3/2008, ¶1.

Brunwasser's signed consent form. Accordingly, Brunwasser's second argument fails.

Thirdly, Brunwasser claims that the trial court erred:

[B]y refusing [Brunwasser's] request he apply the '**Nanty-Glo**' line of authority to eliminate use of [Cohen's] oral testimony that a stricture in [Brunwasser's] urethra prevented insertion of a Foley Catheter which oral testimony was [Cohen's] sole reason he was consulted and hired by Dr. Atkinson to solve the problem.

Brunwasser's Brief at 39. Essentially, Brunwasser argues the trial court cannot consider the oral testimony of an adverse witness when ruling on a summary judgment motion. **See Nanty-Go v. American Surety Co. of New York**, 163 A. 523 (Pa. 1932) (holding that a court may not summarily enter a judgment where the evidence depends upon oral testimony because the testimony is still a matter of credibility for the jury to decide).

The trial court rejected Brunwasser's contention, stating: "In the instant case, [the trial court] granted summary judgment not on the basis of any testimony, but instead because [Brunwasser] had no expert to testify on the lack of consent issue or causation. Therefore, the '**Nanty-Glo** rule' is inapplicable[.]" Trial Court Opinion, **supra** at 7. However, according to Brunwasser, "without the stricture testimony, the only reason for calling in [Cohen] – the expert required to remedy the urethra-stricture problem was eliminated from the summary judgment motion." Brunwasser's Brief at 42.

Having carefully reviewed Brunwasser's argument, we conclude no relief is due. Contrary to Brunwasser's claim that the trial judge relied solely

on oral testimony in granting summary judgment, the trial judge made no credibility finding based upon Cohen's deposition testimony. Rather, the trial judge's ruling was predicated on his determination that Brunwasser could not meet his *prima facie* burden of proof without expert testimony regarding the scope of consent. Therefore, we reject Brunwasser's third claim.

Fourthly, Brunwasser claims that the trial judge erred in using the consent form as a factor in his decision where "Doctor Atkinson nowhere states that he told [Cohen] he hired him on the authority of Exhibit C or any other written consent and [Cohen] nowhere states or pleads he was told that Dr. Atkinson told him Exhibit C or any other written consent was authority to obtain [Cohen's] services." This claim does not appear to have been included in the Pa.R.A.P. 1925(b) statement and may be deemed waived.

In any event, whether Dr. Atkinson ever stated he expressly told Cohen that he consulted with him on the basis of the authority contained in Brunwasser's consent, or whether Cohen ever stated he was expressly informed by Dr. Atkinson that he was consulted on the basis of Brunwasser's consent, is immaterial to the central issue of this case, namely, whether Cohen acted within the scope of the signed consent given by Brunwasser. Therefore, Brunwasser's fourth argument fails on the merits, too.

Nor is there merit in Brunwasser's next claim that, because another judge ruled that there was a *prima facie* case, the trial court's decision to

grant summary judgment constitutes reversible error. The trial court aptly explained:

Presenting a prima facie case and the ability of a case to survive summary judgment are not legally identical, as insinuated by [Brunwasser]. Black's Law Dictionary defines a prima facie case as "establishment of a legally required rebuttable presumption." (9th edition, 2009)[.] Whereas Summary Judgment is a judgment "granted on a claim ... about which there is no genuine issue of material fact." (Black's Law Dictionary 9th edition, 2009). A battery is "an unconsented touching that is either harmful or offensive." ***Cooper ex rel. Cooper v. Lankenau Hosp.***, 51 A.3d 183, 191 (Pa. 2012), *citing C.C.H. v. Philadelphia Phillies, Inc.*, 596 Pa. 23, 940 A.2d 336 (2008). [Brunwasser] is correct that his Second Amended Complaint establishes a prima facie case in that he creates a rebuttable presumption by pleading that he suffered an uncontested offensive touching at the hands of [Cohen]. However, Cohen rebutted [Brunwasser's] claim by arguing that the procedure performed by [Cohen] was within the scope of [Brunwasser's] Consent to Surgical/Invasive Procedures. [Brunwasser] will be prohibited from admitting expert testimony at trial because he certified that no expert testimony was necessary to prosecute his claim. [Brunwasser's] signed consent authorizes "additional or different procedures that are necessary or advisable ..." in the event of unforeseen conditions (see exhibit C to [Brunwasser's] Brief in Support filed on July 17, 2012 at Document 57). I determined that no genuine issue of fact existed because [Brunwasser] would be unable to prove that the procedure performed by [Cohen] was unnecessary or inadvisable, and therefore outside the scope of his consent, without the testimony of a medical expert. My determination is supported by case-law, which states that "... it would not be within the knowledge of the average layperson to identify when the need for a consult would arise in a surgical procedure ..." and "... expert testimony was required to assess whether [the doctors/defendants] acted in accordance with ... the consent form ..." ***[S]ee McSorley v. Deger***, 2006 Pa.Super. 200, 905 A.2d 524[, *appeal denied*, 919 A.2d 958 (Pa. 2007)]. Therefore, I did not err by granting [Cohen's] Motion for Summary Judgment despite the fact that [Brunwasser] initially plead a prima facie case.

* * * *

I have no quarrel with [Brunwasser's] point that there is a difference between a case based on lack of informed consent and a case for battery based on a complete lack of consent. **See *Montgomery v. Bazaz-Sehgal***, 742 A.2d 1125 (Pa. Super. 1999)[, *affirmed*, 798 A.2d 742 (Pa. 2002)]. However, the central question in this case is whether consent existed within the scope of Paragraph 4 of the Consent to Surgical/Invasive Procedures, which authorized additional procedures necessary or advisable in the professional judgment of Dr. Atkinson. I determined that [Brunwasser] would be unable to prove whether the placement of the Foley catheter was necessary or advisable without expert testimony. Thus if [Brunwasser] could not demonstrate that the procedure was unnecessary or inadvisable, he would be unable to prove that there was no consent and that a battery had occurred. **See *McSorely v. Deger***, 2006 Pa. Super. 200, 905 A.2d 524, 529. Therefore, I did not ignore the difference between a claim for defective informed consent and a claim for battery due to a complete lack of consent. I just determined that [Brunwasser] would be unable to prove the latter claim without expert testimony. Therefore, I committed no error.

Trial Court Opinion, ***supra***, at 4–5, 8–9. As the trial judge has provided a sound analysis regarding the distinction between the finding of a *prima facie* case and the standard for summary judgment as it applies to the present case, we reject Brunwasser's fifth claim.

Brunwasser, in the penultimate issue in this appeal, argues that the trial judge erred "by sua sponte dismissing [Brunwasser's] Counts 7, 8, 9 Supplement contained in his response to [Cohen's] summary judgment motion even though [Cohen] filed no objections to the Supplement." Brunwasser's Brief at 52. We summarily dismiss this claim as we agree with the trial court, as follows:

Counts 7, 8, and 9 do not appear in [Brunwasser's] Complaint, Amended Complaint or Second Amended Complaint; these Counts instead are appended to a Motion [Brunwasser] served two weeks before the summary judgment argument, without first requesting leave to amend. Therefore, they were not properly raised. [The trial court] did not make a sua sponte decision to dismiss all of [Brunwasser's] claims and there was no error.

Trial Court Opinion, ***supra*** at 7. Therefore, no relief is due based on Bruwasswer's sixth claim.

Finally, Brunwasser contends that the trial judge committed reversible error "when he sua sponte terminated [Brunwasser's] ongoing discovery which that jurist specifically allowed when [Brunwasser] requested it and [Cohen] did not request that discovery terminate." Brunwasser's Brief at 54 (reproduced record citation omitted).

Our review confirms that this argument is meritless, and we adopt the trial judge's discussion as dispositive of this issue:

[Brunwasser's] argument is premised on a ruling ... made after summary judgment was granted and all of [Brunwasser's] claims had been dismissed. The purpose of discovery is to help parties ascertain the evidence that will be needed to prove their case at trial. Summary judgment is granted to save the parties and the court the time and expense of proceeding to trial. Therefore, once summary judgment has been granted and no trial will occur there is no need for discovery.

Trial Court Opinion, ***supra***, at 7. Therefore, we reject Brunwasser's final contention.

Accordingly, having carefully examined the claims presented by Brunwasser, and having detected no basis upon which to disturb the decision of the trial court, we affirm.

Order affirmed. Brunwasser's emergency motion is denied.⁷

⁷ On July 18, 2013, less than one week before oral argument, Brunwasser filed an "emergency motion to return appellee supplemental reproduced record to his counsel, strike appellee Exhibit N plus brief references from appellee brief, reverse entry of summary judgment and requesting leave to amend" in this Court.

However, Brunwasser had previously filed, on January 29, 2013, an "emergency motion to physically remove Exhibit N which contains his medical records and other medical information from the case certified record because it was published in violation of the orders of two separate trial judges," and this Court had granted Brunwasser relief.

Specifically, by Order dated January 31, 2013, this Court granted Brunwasser's motion as follows:

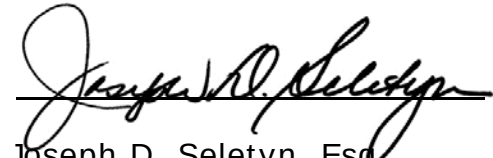
- (1) The record is **REMANDED** to the lower court for a period not to exceed thirty (30) days. The instant motion is **REFERRED** to the lower court – specifically to the Honorable Alan David Hertzberg.
- (2) Judge Hertzberg shall, before ordering the return of the record to this court, review the instant motion and insure that any materials that Judge Hertzberg believes are improperly included in the record are removed from the record. To the extent that Judge Hertzberg believes that the record is proper as presently constituted, Judge Hertzberg shall return the record to this court as is.

Per Curiam Order, 1/31/2013.

On February 6, 2013, Judge Herzberg entered an order that directed the Allegheny County Court of Common Pleas, Department of Court Records to:

(Footnote Continued Next Page)

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/30/2014

(Footnote Continued) -----

1. Delete from its internet posting the entire Motion for Summary Judgment filed on April 30, 2012 and rescan it with the Motion for Summary Judgment that does not contain the medical records that the undersigned has removed;
2. Place under seal the medical records removed by the undersigned, which are attached to this Order; and
3. Thereafter return the Record to the Superior Court of Pennsylvania.

Order, Hertzberg, J., 2/6/2013.

Following the trial court's February 6, 2013, order, the certified record was again transmitted to this Court, and Cohen filed a Supplemental Reproduced Record with a copy of the summary judgment motion in the same form as in the certified record returned by Judge Hertzberg to this Court.