FILED
United States Court of Appeals
Tenth Circuit

July 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EMILY ROSE LASALA,

Plaintiff - Appellant,

v.

MATTHEW B. BAKER, an individual; PHILLIPPE A. CAPRARO, M.D., P.C.,

Defendants - Appellees,

and

JOHN A. MILLARD, M.D., P.C., in his individual capacity,

Defendant.

No. 22-1351
(D.C. No. 1:19-CV-00857-RMR-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **MATHESON**, and **McHUGH**, Circuit Judges.

Dr. John Millard performed a cosmetic surgery on plaintiff Emily Rose LaSala. After a complication ensued, Dr. Millard referred her to a second doctor,

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Dr. Matthew Baker, who performed an additional surgery. Ms. LaSala later sued Dr. Millard for medical malpractice.[1] In a second amended complaint she added Dr. Baker to her suit, pursuing claims against him and his employer Phillippe A. Capraro, M.D., P.C. (collectively, the Baker Defendants)[2] for breach of fiduciary duty, invasion of privacy, and civil conspiracy, based on Dr. Baker's sharing of her confidential medical information with Dr. Millard. The district court dismissed the claims against the Baker Defendants prior to trial. The malpractice claims against Dr. Millard proceeded to trial, and a jury found in his favor. Ms. LaSala now appeals the dismissal of her claims against the Baker Defendants. We affirm the dismissal, but remand to the district court to apply the proper criteria to determine whether the dismissal should be with or without prejudice.

BACKGROUND

In March 2017, Dr. Millard performed sub-muscular breast augmentation surgery on Ms. LaSala. After the surgery she experienced discomfort and pain and she was eventually diagnosed with "capsular contracture," a detachment of her pectoral muscle. Dr. Millard referred her to Dr. Baker for additional treatment. He

[1] Ms. LaSala named both Dr. Millard individually and his professional corporation. For simplicity's sake, and because the claims against Dr. Millard and his professional corporation are not directly at issue in this appeal, we refer to Dr. Millard as the applicable defendant.

[2] Phillippe A. Capraro, M.D., P.C., operates under the trade name "Grossman Capraro Plastic Surgery." Ms. LaSala refers to this entity as "Grossman Capraro, MD, PC" and we will also do so when referring individually to the corporate entity.

performed a second surgery that stretched the atrophied muscle. Dr. Baker's view, initially at least, was that the capsular contracture likely resulted from the surgery.

After Ms. LaSala began working with Dr. Baker, Dr. Baker communicated with Dr. Millard about her treatment and surgery. Ms. LaSala argues that these communications went beyond the scope of her treatment and devolved into a collaboration between the two doctors about how to help Dr. Millard escape malpractice liability. She also contends that in furtherance of this collaboration Dr. Baker betrayed her trust by sharing her confidential medical records, including photographs, with Dr. Millard, at a time when she no longer had a treatment relationship with Dr. Millard.

After she filed this suit, Ms. LaSala filed a "certificate of review" to support her malpractice claim against Dr. Millard. Colorado law generally requires a plaintiff to file a certificate of review—an affidavit confirming that counsel has conferred with a qualified expert who believes the relevant legal claims do not lack substantial justification—to pursue a medical malpractice claim. *See* Colo. Rev. Stat. § 13-20-602. Ms. LaSala's counsel prepared the certificate of review based on his consultations with Dr. Baker. But during Dr. Baker's deposition, which was taken after Ms. LaSala added Dr. Baker as a defendant, Dr. Baker expressed doubts about whether Dr. Millard had been responsible for her injuries.

Ms. LaSala did not file a certificate of review to support her claims against the Baker Defendants. All defendants moved to dismiss her complaint, arguing that she had failed to adequately comply with § 13-20-602 for her claims against either

doctor. Specifically, the Baker Defendants contended that Ms. LaSala required a certificate of review to pursue her claims against Dr. Baker but had not filed one, and Dr. Millard argued her certificate based on counsel's initial consultation with Dr. Baker was defective. The Baker Defendants later moved for summary judgment based on the related ground that Ms. LaSala had not presented expert testimony as required to support her claim against Dr. Baker.

The district court entered an order that resolved the dispositive motions. It denied Dr. Millard's motions concerning the medical malpractice-related claims but required Ms. LaSala to file a new certificate to support those claims. The district court further held that Ms. LaSala required a certificate of review to pursue her breach-of-fiduciary-duty claim against Dr. Baker. Because that claim required expert testimony, and because Ms. LaSala had failed to file any certificate of review, the court dismissed the claim. It then granted summary judgment to the Baker Defendants on the invasion-of-privacy claim, reasoning that disclosure to a single other physician did not satisfy the element of public disclosure. Because Ms. LaSala's civil conspiracy claim was predicated on these two claims, the district court dismissed it as well; and because there were no remaining live claims against Dr. Baker, the court dismissed the claims against his employer.

The Court later clarified that the breach-of-fiduciary-duty-claims and breach of privacy claims against the Baker Defendants, and the civil conspiracy claim, had been dismissed with prejudice. The remaining claims against Dr. Millard proceeded

to trial. A jury rendered a verdict in favor of Dr. Millard. The district court then entered final judgment in favor of the defendants, and Ms. LaSala appealed.

DISCUSSION

1. We review the statutory basis for dismissal de novo.

Colorado's certificate of review statute applies in cases, like this one, that are brought under a federal court's diversity jurisdiction. *See Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1538-41 (10th Cir. 1996) (concluding that § 13-20-602 is substantive and applies in diversity cases). A dismissal under § 13-20-602 is not the same as a dismissal for failure to state a claim, because it rests on a separate, statutory ground. *See Barton v. Law Offices of John W. McKendree*, 126 P.3d 313, 314-15 (Colo. App. 2005). We review the district court's interpretation of the pertinent statute, § 13-20-602, de novo. *See Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1117 (10th Cir. 2004).

"Our objective when interpreting and applying state substantive law is to reach the same result that would be reached in state court." *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1223 (10th Cir. 2016). "If the state's highest court has interpreted a state statute, we defer to that decision." *Id.* "The decisions of lower state courts, while persuasive, are not dispositive." *Id.* (internal quotation marks omitted).

2. Ms. LaSala required a certificate of review to pursue her breach-of-fiduciary-duty claim against the Baker Defendants.

"The Colorado certificate of review statute requires plaintiffs' attorneys in professional negligence cases to certify, within sixty days of [serving] the complaint,

that an expert has examined their clients' claims and found them to have 'substantial justification'; failure to comply with this requirement results in dismissal." *Trierweiler*, 90 F.3d at 1537-38 (quoting § 13-20-602). Colorado's legislative declaration states that the certificate requirement applies "in civil actions for negligence brought against those professionals who are licensed by this state to practice a particular profession and regarding whom expert testimony would be necessary to establish a prima facie case." Colo. Rev. Stat. §13-20-601.

Ms. LaSala argues that because breach of fiduciary duty is an intentional tort, and not a negligence claim, no certificate of review is required. But the Colorado Supreme Court rejected a narrow reading of § 13-20-602 in *Martinez v. Badis*, 842 P.2d 245, 251-52 (Colo. 1992). There the court explained that "[t]he statute applies to all claims based upon alleged professional negligence. It does not apply only to negligence claims." *Id.* at 251 (internal quotation marks omitted). The court then stated that a breach-of-fiduciary-duty claim against a licensed professional "often requir[es] the plaintiff to establish the identical elements that must be established by a plaintiff in negligence actions," such as "the applicable standard of care and the defendant's failure to adhere to that standard of care." *Id.* at 252. The key is whether "expert testimony is required to establish the scope of the professional's duty or the failure of the professional to reasonably conduct himself or herself in compliance with the responsibilities inherent in the assumption of the duty." *Id.* The court concluded that § 13-20-602 applied to the plaintiffs' breach-of-fiduciary-duty claims against their erstwhile attorneys. *See id.*

Nor does the fact that the alleged breach of fiduciary duty involved an *intentional* sharing of Ms. LaSala's medical records necessarily exempt that claim from the certificate requirement. In *Woo v. Baez*, 522 P.3d 739 (Colo. App. 2022), *cert. denied*, 2023 WL 3587464 (Colo. May 22, 2023) (No. 22SC873), for example, the Colorado Court of Appeals, citing *Martinez*, determined that to prove his breach-of-fiduciary-duty claim that his attorney "intentionally deprived him of his case files and digital property" the plaintiff would need to establish the willful violation of fiduciary duty by "present[ing] testimony on the scope of that duty." *Id.* at 746-47 (emphasis omitted). Although the alleged tort was intentional and involved the client's case files and digital property, the court of appeals concluded that the state district court did not err in determining that a certificate of review was required. *Id.* at 747.

In the same way, the alleged intentional misuse of Ms. LaSala's medical records required expert testimony to establish the scope of the Baker Defendants' duties concerning those records. This is not an issue that would likely be within the purview of a typical layperson; it involves a physician's responsibilities concerning patient confidentiality and the duty of loyalty when discussing the patient's care with another physician who has also treated that same patient. *Cf. Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23, 27 (Colo. App. 2005) (stating that when a breach-of-fiduciary-duty claim asserted against a lawyer is based on breach of the duties of loyalty and confidentiality owed to the lawyer's client, "those duties are measured against standards applicable to attorneys").

Ms. LaSala contends, however, that her case falls within two exceptions to the rule in *Martinez*. First, she notes that *Martinez* excepted breach-of-fiduciary-duty claims that were "admitted by the defendant." *Martinez*, 842 P.2d at 252. She argues that the Baker Defendants admitted in various text messages to Dr. Millard that the disclosures of medical information were improper, and deleted or sought to have others delete relevant evidence. But according to *Martinez*, the exception exists where the breach-of-fiduciary-duty *claim* was admitted, *see id.*, not merely where a professional privately confessed that he made an improper disclosure or took actions to conceal it. While Dr. Baker's alleged "admissions" might provide grist for the mill at a jury trial, Ms. LaSala fails to show that they exempted her from filing a certificate of review.

Second, Ms. LaSala argues that where a professional defendant's "alleged breaches deviated from express statutory requirements," so that the plaintiff must merely ask a jury to compare the defendant's conduct to statutory language, expert testimony (and, hence, a certificate of review) are not required. Aplt. Opening Br. at 32. She contends that she could point the jury to "one of many ethical standards out there explaining a physician's duty of loyalty and confidentiality." *Id.* at 35. But other than a passing reference to duties described in the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104–191, 110 Stat. 1936 (Aug. 21, 1996), which she does not quote or analyze, Ms. LaSala does not cite any particular statute or regulation to show that the Baker Defendants violated a statutory duty that a

layperson could understand without expert testimony. We therefore find this argument unpersuasive.

Ms. LaSala also briefly argues that she could call the Baker Defendants themselves as experts to "confirm their ethical standards relating to loyalty and confidentiality." Aplt. Opening Br. at 35-36. She cites *Smith v. Hoffman*, 656 P.2d 1327, 1329 (Colo. Ct. App. 1982), where the Colorado Court of Appeals reversed the grant of summary judgment on a malpractice complaint based on the plaintiff's failure to produce a statement from an expert witness asserting that the defendant's conduct was negligent. The Court of Appeals noted that "[b]ecause any qualified expert witness can present evidence with respect to the applicable standard of professional care, [the medical] defendant himself could be called by plaintiff as an adverse witness to present such testimony in this case." *Id.*

The court in *Smith* did not purport to apply § 13-20-602 or to discuss its requirements. It seems obvious that if a plaintiff could *always* simply assert they would call the defendant to testify at trial as an adverse witness in lieu of filing a certificate of review, the certificate of review requirement would become meaningless. *Cf. Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623, 624 (Colo. 1999) (noting it is "improper" for a trial court to accept expert reports in place of a certificate of review). To make an effective argument along these lines, Ms. LaSala would therefore need at a minimum to show why, in her particular circumstances, the hypothetical testimony should excuse her from the certificate of

review requirement. To the extent she attempts to make such a showing by relying on arguments we have already rejected, her argument is unpersuasive.

3. Ms. LaSala fails to show the district court improperly dismissed the claims against Dr. Baker's employer, Grossman Capraro, MD, PC.

The district court dismissed the claims against Dr. Baker's employer for two reasons. First, there were no longer live claims against Dr. Baker, so Ms. LaSala could not predicate corporate liability on such underlying claims. *See* Aplt. App., vol. III at 106. Second even if there were live claims, they would fail because medical corporations cannot be held liable for a doctor's negligence under a respondeat superior theory. *See id.* Although Ms. LaSala challenges the district court's second reason for dismissing Grossman Capraro, *see* Aplt. Opening Br. at 36-38, she presents no argument concerning the district court's first reason. We will uphold the dismissal on this alternative, unchallenged ground. *See Eaton v. Pacheco*, 931 F.3d 1009, 1030 n.18 (10th Cir. 2019) (noting court could affirm on alternative ground that was not adequately challenged in an opening brief).

4. We remand with instructions to reconsider whether the dismissal of the breach-of-fiduciary claim should be with or without prejudice.

In a minute order issued over a year after it dismissed the claims against the Baker Defendants, the district court stated without explanation that the "breach of fiduciary claim against Dr. Baker in this matter was dismissed with prejudice." Aplt. App., vol. III at 140. Although we treat the certificate of review requirement as substantive in diversity cases, a dismissal under § 13-20-602 is based on the plaintiff's procedural failure to file a certificate of review rather than the viability of

her claims. *See Blackwood v. Thomas*, 855 F. Supp. 1205, 1207 (D. Colo. 1994). A dismissal with prejudice for failure to adhere to a procedural rule is a severe sanction justified only in extreme circumstances. *See, e.g.*, *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002). Ultimately, in deciding whether to dismiss a claim with prejudice as a sanction for procedural error "a district court must consider: (1) the degree of actual prejudice to [the opposing party]; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (10th Cir. 2007) (internal quotation marks omitted). "Only when these aggravating factors outweigh[ ] the judicial system's strong predisposition to resolve cases on their merits is outright dismissal with prejudice an appropriate sanction." *Reed*, 312 F.3d at 1195 (internal quotation marks omitted).

Here, the district court failed to provide any reasoning for its dismissal with prejudice of the breach-of-fiduciary-duty claim. We therefore remand so that the district court may redetermine, based on the appropriate factors, whether the dismissal should be with or without prejudice.[3]

[3] The Baker Defendants argue that we need not decide this issue, because "in the same order, the district court granted [their] motion for summary judgment on substantive grounds—Plaintiff's failure to disclose a qualified expert to establish the applicable standards of conduct, and breach of that standard, to support her claim of fiduciary breach." Aplee. Br. at 35. But the district court did not apply a summary-judgment standard to its dismissal of the fiduciary duty claim; instead, it dismissed

CONCLUSION

We affirm the district court's dismissal of Ms. LaSala's breach-of-fiduciary-duty claim, but remand to the district court to redetermine, based on the appropriate factors, whether the dismissal should be with or without prejudice.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

---

the claim for failure to file a certificate of review. *See* Aplt. App., vol. III at 102. We find the Baker Defendants' argument on this point unpersuasive.