HELFFERICH V. CORRECTIONS MED. SERVS.

JA' WAYNE HELFFERICH,
Plaintiff-Appellant,
v.
CORRECTIONS MEDICAL SERVICES,
CORIZON,
Defendant-Appellee.

No. 32,749

COURT OF APPEALS OF NEW MEXICO

December 9, 2013

APPEAL FROM THE DISTRICT COURT OF UNION COUNTY, John M. Paternoster, District Judge

COUNSEL

JA' Wayne Helfferich, Chaparral, NM, Pro se Appellant

Simone, Roberts & Weiss, PA, Albuquerque, NM, for Appellee

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: LINDA M. VANZI, Judge, M. MONICA ZAMORA, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Plaintiff appeals the district court's grant of summary judgment in this dental-malpractice case. We issued a calendar notice proposing to reverse, and Defendant has filed a memorandum in opposition. We have carefully considered the arguments

raised in the memorandum in opposition, and are not persuaded that the proposed reversal is incorrect. Therefore, as discussed below, we reverse the summary judgment granted in this case and remand for a trial on the merits.

{2} Plaintiff's claim of malpractice is premised not on the dental treatment that Defendant provided to him, but on Defendant's failure to provide treatment for a period of time exceeding a year. In support of Plaintiff's claim, the record reveals the following evidence: (1) a verified complaint indicating Plaintiff saw a dentist in February 2011, and was informed he had three cavities that could not be filled at that time but would be filled in a "couple" months [RP 2]; (2) a statement in the same verified complaint indicating that as of April 26, 2012, the date the complaint was filed, Plaintiff's cavities had yet to be treated, and Plaintiff was suffering pain and infection as a result [RP 3]; (3) copies of medical records submitted by Defendant in support of its motion for summary judgment, evidencing a number of requests by Plaintiff, over a period of many months, to have his teeth fixed as they continued to cause him pain [RP 79-82]; (4) copies of multiple grievances filed by Plaintiff, based on Defendant's failure to treat his teeth for many months [RP 126-131]; and (5) copies of grievance documents acknowledging that Plaintiff's assertions of non-treatment are correct **[**RP 126-27]**.**[1]

{3} On the basis of the above evidence, we proposed to find that Plaintiff raised genuine issues of material fact as to Defendant's breach of the applicable standard of care and as to causation of at least some damages suffered by Plaintiff. We therefore proposed to reverse the summary judgment granted to Defendant. *See Alberts v. Schultz*, 1999-NMSC-015, ¶ 17, 126 N.M. 807, 975 P.2d 1279 (stating elements of a medical-malpractice cause of action). In the memorandum in opposition Defendant takes issue with the proposed reversal, arguing strenuously that Plaintiff presented no expert testimony regarding either a breach of the standard of care or causation of any harm suffered by Plaintiff. [MIO 10-18] Defendant points out that it presented the affidavit of Dr. Jackson, an expert in dental care, who opined that to a reasonable degree of medical probability, all dental care provided to Plaintiff met the applicable standard of care, and no act or omission by any of Defendant's employees caused Plaintiff to suffer injuries, complications, or damages. [RP 65]

{4} As Defendant argues, the crux of this case is whether expert testimony was required to allow Plaintiff to meet his burden of sustaining a dental-malpractice cause of action. We agree with Defendant that in most medical-malpractice cases expert testimony is required to create an issue of fact as to either breach of the standard of care or causation of any damages suffered by the plaintiff. *See, e.g.*, *Toppino v. Herhahn*, 1983-NMSC-079, ¶ 14, 100 N.M. 564, 673 P.2d 1297. However, that is not true in every situation. Where a medical provider's negligence can be determined "by resort to common knowledge ordinarily possessed by an average person, expert testimony as to standards of care is not essential." *Id.* ¶ 14 (quoting *Pharmaseal Laboratories, Inc. v. Goffe*, 1977-NMSC-071, ¶ 17, 90 N.M. 753, 568 P.2d 589).

{5} In this case, as we noted above, Plaintiff is not attacking the quality of care he was provided; instead, his claim is based simply on Defendant's failure to treat his

cavities for a period of over a year, despite his consistent complaints of pain and requests for treatment. Defendant's failure to provide any treatment at all, for an extended period of time, is not a matter that is exclusively within the ken of an expert medical provider. *Cf. Eis v. Chesnut*, 1981-NMCA-040, ¶¶ 9, 10, 96 N.M. 45, 627 P.2d 1244 (holding that where claim was not based on negligent performance of surgery but on negligent failure to diagnose cause of pain, and where evidence of cause was not complicated, expert testimony was not required to raise a genuine issue of fact as to defendant's negligence). Rather, a reasonable lay person could determine that Defendant's inaction fell below the applicable standard of care for a dentist providing care to an individual. We hold that Plaintiff raised a genuine issue of material fact as to Defendant's breach of the applicable standard of care, by presenting evidence that his painful cavities were left untreated for a period of more than a year.

{6} Similarly, expert testimony was not needed to raise a genuine issue of fact as to at least some of Plaintiff's damages. As detailed above, Plaintiff presented evidence that his teeth were painful for many months, while he was awaiting treatment for his cavities. In this situation, a reasonable lay person could conclude that the pain Plaintiff suffered during the delay in treatment was proximately caused by that delay, because earlier treatment of the cavities would have terminated Plaintiff's suffering at an earlier date. This common-sense conclusion is akin to the types of conclusions lay persons have been allowed to draw in other cases. *See, e.g.*, *Toppino,* 1983-NMSC-079, ¶ 15 (finding that it is in the realm of common knowledge of the average person that a breast implant should be balanced in size and location). We do note, however, that certain aspects of Plaintiff's claimed damages may be subject to the requirement that they be supported by medical testimony. For example, there is a suggestion in the record that Plaintiff appears to maintain he would not have lost certain of his teeth if his cavities had been treated earlier. [RP 32] We leave it to the trial court to determine, based on the evidence, whether expert testimony is required to support that element of damages, but at first blush it does not seem to be a conclusion that a lay person could draw on the basis of that person's general knowledge.

{7} In reaching the conclusion that reversal is appropriate in this case, we have not ignored the evidence submitted by Dr. Jackson, Defendant's expert. However, we do point out that his affidavit is quite conclusory and does not address many of the specific facts of this case, such as the long delay in treating Plaintiff's cavities and the pain Plaintiff allegedly suffered during that delay. In the face of those facts, a genuine issue of material fact remains as to Plaintiff's cause of action for dental malpractice.

{8} We emphasize that our discussion in this opinion does not mean Plaintiff should or will prevail on his claim. At the summary judgment stage all of the evidence is viewed in the light most favorable to Plaintiff. *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. At trial, however, the evidence will be evaluated and weighed, and evidence that was sufficient to overcome summary judgment may not be found as persuasive as other, contrary evidence.

{9} Finally, we note that Defendant's memorandum in opposition suggests that Defendant should be entitled to partial summary judgment even if the district court's decision is reversed. [MIO 12-13] That question was not addressed by the district court and it would be premature for us to venture an opinion on it. *Cf. City of Sunland Park v. Harris News, Inc.,* 2005-NMCA-128, ¶ 50, 138 N.M. 588, 124 P.3d 566 (noting that this Court does not issue advisory opinions). Of course, Defendant remains free to raise the issue below with the district court after remand.

{10} On the basis of the foregoing discussion, we reverse the summary judgment granted to Defendant and remand for further proceedings.

{11} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge

---

1 We point out that the statements made in the verified complaint are suitable for consideration at the summary-judgment stage because, as sworn statements based on personal knowledge, they are equivalent to an affidavit. *See Deer Mesa Corp. v. Los Tres Valles Special Zoning Dist. Comm'n*, 1985-NMCA-114, ¶ 5, 103 N.M. 675, 712 P.2d 21.