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DIAGNOSING THE CHANGING

STATE OF MEDICAL MALPRACTICE & NURSING HOME LIABILITY

Expert's affidavit in opposition to dispositive motion may not contradict earlier deposition testimony

By: MaryEllen McLeod

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SECRET WARDLE NOTES

The case is *Goedker vs. Schram*, No. 324074, an unpublished decision, decided May 10, 2016. This case follows a long line of cases holding that a party may not contrive a factual issue simply by asserting the contrary in an affidavit after damaging deposition testimony.

* * * *

On September 27, 2010, the plaintiff underwent laparoscopic gastric bypass surgery. She developed a post-surgical bowel obstruction, which went undiagnosed until September 30, 2010. During emergency laparoscopic surgery to remove the obstruction, plaintiff's bowel was perforated, which led to sepsis, additional complications, and an extended hospital stay. Plaintiff did not dispute that her bowel obstruction would have required surgery regardless of when it was diagnosed. Rather, plaintiff alleged that the failure of the defendant health care professionals to timely diagnose her post-surgical bowel obstruction increased her risk of bowel perforation during the emergency surgery to eliminate the obstruction.

During the course of discovery, defendants took the depositions of two of plaintiff's expert witnesses, Dr. David Winston and Dr. Kenneth Krause. Neither offered opinions to conclusively support plaintiff's theory that earlier diagnosis would have led to less risk of bowel perforation during surgery to correct the obstruction.

Defendants moved for summary disposition, arguing that plaintiff could not prove that earlier diagnosis would have made her injury less likely or would have allowed her a greater than 50% opportunity to achieve a better result.

In opposition to defendants' motion, plaintiff submitted an affidavit from another expert, Dr. John Baker, provided after his deposition was taken. Dr. Baker's affidavit was unequivocal; he opined that plaintiff certainly had a bowel obstruction on September 29, 2010 and that a radiological scan would have discovered

it. But his deposition testimony was not so definitive. In deposition, Dr. Baker testified that radiological testing on September 29th would probably have shown dilated small bowel and colon, consistent with an ileus, a common post-operative disruption of the intestinal tract. He did not testify that defendants' failure to order a radiological scan on September 29th led to a significantly increased risk that plaintiff's bowel would perforate during the emergency surgery.

On appeal from the trial court's denial of defendants' dispositive motion, the Court of Appeals ruled that plaintiff could not offer the affidavit of Dr. Baker in opposition to defendants' motion, when same was contrary to his deposition testimony relative to causation. It directed the trial court to enter summary disposition in favor of defendants.

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We welcome your questions -

Please contact MaryEllen McLeod at

mmcleod@secrestwardle.com

or (248) 539-2833





Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secretwardle.com

CONTRIBUTORS

Professional Liability Practice Group Chair
Mark E. Morley

Medical Malpractice Practice Group Chair
John G. Mitchell

Nursing Home/Assisted Living Practice Group Chair
Lisa Anstess

Editors
Linda Willemsen
Sandie Vertel

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