



**In the Missouri Court of Appeals
Eastern District**

DIVISION TWO

SOHRAB DEVITRE,) No. ED93366
)
Plaintiff/Appellant,)
)
v.) Appeal from the Circuit Court
) of St. Louis County
)
THE ORTHOPEDIC CENTER OF)
SAINT LOUIS, LLC,)
)
Defendant,) Honorable Steven H. Goldman
and)
)
MITCHELL B. ROTMAN, M.D.,)
Defendant/Respondent.) Filed: February 23, 2010

Introduction

Sohrab Devitre (Appellant) appeals from the circuit court's judgment dismissing his claim against Dr. Mitchell B. Rotman (Dr. Rotman), alleging that Dr. Rotman intentionally assaulted and battered him during a medical examination. We affirm.

Factual and Procedural Background

On April 13, 2009, Appellant filed a Petition against The Orthopedic Center of St. Louis, LLC (the Center) and Dr. Rotman (collectively Defendants), alleging he was injured during an independent medical examination performed by Dr. Rotman on August 21, 2006 at the Center. The exam was conducted in connection with a dispute over Appellant's physical condition arising from Appellant's pending automobile personal

injury action against a third party. During the examination, Dr. Rotman touched Appellant, moving parts of Appellant's body for passive range of motion testing, and requested that Appellant move parts of his own body with Dr. Rotman's assistance for active range of motion testing. In his petition, Appellant alleged that Dr. Rotman "while in the course and scope of the business of [the Center] intentionally assaulted and battered [Appellant] by forcing [Appellant] to go through ranges of motions during the independent medical examination" thereby causing a myriad of injuries.

On June 5, 2009, Dr. Rotman filed an Answer to Appellant's Petition which included notice that Dr. Rotman, as a health care provider, intended to rely upon and obtain the benefits of Chapters 537 and 538 of the Missouri Revised Statutes.¹ On June 17, 2009, Appellant filed a Motion to Strike Dr. Rotman's defenses relying upon these chapters asserting that Appellant was never a patient of either of the Defendants.

On June 15, 2009, the Center filed a Motion to Dismiss for improper service pursuant to Supreme Court Rule 55.27. On July 10, 2009, the Defendants filed a joint Motion to Dismiss Appellant's Petition for failing to file a health care affidavit pursuant to Section 538.225. On July 20, 2009, the circuit court granted the Center's Motion to Dismiss for insufficient service and entered its Final Judgment (Judgment) denying Appellant's Motion to Strike Dr. Rotman's Defenses, and sustaining, with prejudice, the Defendants' Motion to Dismiss for Failure to File a Health Care Affidavit. This appeal follows.

Point Relied On

On appeal, Appellant argues the trial court abused its discretion and committed reversible, prejudicial error in denying his Motion to Strike Dr. Rotman's defenses

¹ All statutory references are to RSMo 2006, unless otherwise indicated.

relying on Chapters 537 and 538 because Appellant was not a patient of Dr. Rotman, but was only seen by Dr. Rotman for an independent medical examination. Appellant further argues the court abused its discretion and committed reversible, prejudicial error when it dismissed his Petition with prejudice for failing to file a health care affidavit within the time prescribed by statute.

Standard of Review

This Court reviews a circuit court's order granting a motion to dismiss *de novo*. Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667, 669 (Mo. 2007). The interpretation of a statute and the application of a statute to specific facts are also reviewed *de novo*. Boggs ex rel. Boggs v. Lay, 64 S.W.3d 4, 23 (Mo. App. E.D. 2005).

Discussion

On appeal, Appellant does not dispute the circuit court's dismissal of his claim against the Center for insufficient service, but instead contests its denial of his Motion to Strike and the granting of Dr. Rotman's Motion to Dismiss for failure to file a health care affidavit.

Section 538.225 provides:

In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.

Appellant does not dispute that Dr. Rotman is a health care provider. Instead, Appellant argues that Section 538.225 is inapplicable because an independent medical examination does not result in the administration of “health care services” to a patient.

“Health care services” is defined as “any services that a health care provider renders to a patient in the ordinary course of the health care provider’s profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized.” Section 538.205(5).

Missouri courts have held that a health care affidavit is required if “the relationship of the parties is that of health care provider and recipient and if the ‘true claim’ relates only to the provision of health care services.” Vitale v. Sandow, 912 S.W.2d 121, 122 (Mo. App. W.D. 1995) citing St. John’s Regional Health Ctr. v. Windler, 847 S.W.2d 168, 171 (Mo. App. S.D. 1993) and Jacobs v. Wolff, 829 S.W.2d 470, 472 (Mo. App. E.D. 1992).

Appellant alleged in his Petition that Dr. Rotman was hired to perform an independent medical examination on Appellant, and that “Dr. Rotman while in the course and scope of the business of [the Center] intentionally assaulted and battered [him] by forcing [Appellant] to go through ranges of motions during the independent medical examination....” Appellant alleged that Dr. Rotman’s “acts of examining” him caused his injuries, thus entitling him to damages. However, Appellant asserts that he was not a “patient” of Dr. Rotman and did not seek medical treatment from Dr. Rotman.

Appellant’s complaints arise from Dr. Rotman’s alleged actions during the independent medical examination. Dr. Rotman’s actions were related to performing an independent medical examination on Appellant to provide a medical opinion, a medical

service he rendered as a health care provider in the ordinary course of his profession. The independent medical examination performed by Dr. Rotman was, by definition, a health care service. Section 538.205(5); See also Jacobs, 829 S.W.2d at 473 (finding the defendants' activities at a rehabilitation center were related to providing rehabilitative services, a form of health care).

Despite Appellant's characterization of his claim as an assault and battery, Appellant's "true claim" is based upon an allegation that Appellant was injured because Dr. Rotman's actions during the medical examination were in some way substandard. See Windler, 847 S.W.2d at 170-71; Vitale, 912 S.W.2d at 122. Whenever the recipient's allegations arise out of the relationship of a health care provider and recipient, and the provision of a health care service, a health care affidavit is required. Vitale, 912 S.W.2d at 122. Accordingly, we find the circuit court did not err in denying Appellant's Motion to Strike Dr. Rotman's defenses and in granting Dr. Rotman's Motion to Dismiss Appellant's Petition for failing to file a health care affidavit as required by Section 538.225.

Conclusion

The judgment of the circuit court is affirmed.

Sherri B. Sullivan, J.

Robert G. Dowd, Jr., J., and
Patricia L. Cohen, J., concur.