

Summary of SC90835, *Sohrab Devitre v. The Orthopedic Center of Saint Louis, LLC, and Mitchell B. Rotman, M.D.*

Appeal from the St. Louis County circuit court, Judge Steven H. Goldman
Argued and submitted January 4, 2011; opinion issued June 28, 2011

Attorneys: Devitre was represented by James S. Collins II of the Law Offices of James S. Collins II in St. Louis, (314) 457-1710; and Rotman and the orthopedic center were represented by Robert J. Amsler Jr. and David I. Hares of David I. Hares Esq. & Associates in St. Louis, (314) 721-4033.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man who sued the doctor who conducted an independent medical examination for an unrelated personal injury case appeals the trial court's dismissal of his suit for failure to file a health care affidavit as required in medical malpractice cases. In a 6-1 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the trial court's judgment. The independent medical examination was a health care service and, therefore, created a limited physician-patient relationship with the man that triggers the requirement for the filing of a health care affidavit. Further, the man's petition actually states a claim for medical malpractice, not for the intentional tort of assault and battery. Judge Richard B. Teitelman dissents. He would hold that the man was not the doctor's "patient" and that the man's true claim is assault and battery, not medical negligence. He would hold, therefore, that the trial court erred in dismissing the suit for failure to file a health care affidavit.

Facts: After being involved in an automobile accident in August 2000 in Jefferson County, Sohrab Devitre sued the other driver in the accident. During discovery for that suit, the other driver requested that Devitre undergo an independent medical evaluation conducted by Dr. Mitchell Rotman of The Orthopedic Center of St. Louis LLC. Devitre secretly tape-recorded the August 2006 examination, during which Rotman moved Devitre's right arm through a range of motions to assess his injuries. In July 2008, Devitre sued Rotman and the orthopedic center for personal injuries caused during the independent medical examination. He stated he was not filing a medical negligence claim but instead alleged that Rotman intentionally assaulted and battered him by forcing him to move his arm and shoulder joints past their limited range of motion, causing him severe pain and physical injury. The circuit court ultimately dismissed the case because Devitre failed to file a health care affidavit pursuant to section 538.225, RSMo Supp. 2010. He appeals.

AFFIRMED.

Court en banc holds: The trial court did not abuse its discretion in dismissing Devitre's lawsuit for failure to file a health care affidavit. The independent medical examination conducted by Rotman was a health care service and, therefore, created a limited physician-patient relationship with Devitre that triggers the section 538.225 requirement for the filing of a health care affidavit. Section 538.225 provides in part that, in any action against a health care provider for damages

for personal injury from the rendering or failure to render a health care service, the plaintiff shall file an affidavit stating that he has obtained the written opinion of a legally qualified health care provider that the defendant health care provider failed to use the care that a reasonably prudent health care provider would have used under the circumstances and that failure to use such care directly or indirectly caused or directly contributed to cause the damages claimed in the petition. In an action for medical malpractice, the court must determine whether there was a physician-patient relationship between the parties. A physician who only provides an independent medical examination but does not treat the person being examined has a limited physician-patient relationship with the examinee that gives rise to limited duties to exercise professional care. Accordingly, Rotman and Devitre had a limited physician-patient relationship. A “patient” need not receive treatment by a physician for a medical condition. Although chapter 538, RSMo, does not define “patient,” the dictionary defines “patient” in part as “a client for medical service (as of a physician).” As a physician, Rotman is a health care provider, and an independent medical examination is a health care service that he provides to patients in the ordinary course of his business. Devitre was a client of this medical service provided by Rotman. Therefore, Devitre is Rotman’s patient. Rotman is not bound by his statement to the contrary because it called for a conclusion of law, not a conclusion of fact, and a party only can be bound by an admission that is a conclusion of fact.

Additionally, Devitre’s petition states a claim for medical malpractice, not for the intentional tort of assault and battery. A pleading is judged by its subject and substance, not its caption. Devitre’s petition shows that assault and battery are not his true claims; rather, his true claim involves medical malpractice. In the context of medical examinations, a battery occurs when a physician performs a medical procedure without valid consent. Here, Devitre did not plead that Rotman touched him without consent during the independent medical examination. Further, the transcript of the examination does not indicate that Devitre ever pulled his arm away or told Rotman to stop the examination. As such, he failed to plead a medical battery claim. He also failed to establish the necessary elements of assault because he failed to plead apprehension of bodily harm in the petition. Rather, the claimed injuries allegedly were caused by the health care service Rotman provided to Devitre, which is a medical malpractice or medical negligence claim. Accordingly, he was required to file a health care affidavit pursuant to section 538.225.

Dissenting opinion by Judge Teitelman: The author would hold that the trial court erred in dismissing Devitre’s petition for failure to file a health care affidavit, which he would hold is not applicable. Devitre was not Rotman’s “patient” because he was not under Rotman’s care and treatment, nor was he a client of Rotman. He had no real choice but to undergo the examination at the request of the defendant in the automobile accident case because the trial court could have ordered him to undergo it under Rule 60.01(a) or face litigation sanctions. There was no confidentiality or expectation of privacy in that examination, which was nothing but a discovery effort by the defendant. Further, the substance of Devitre’s petition is precisely what he alleged: assault and battery. The most plausible way to read his allegations is to conclude that Devitre told Rotman to stop the examination because it was hurting him, which reflects that he did not consent to further manipulation of his arm and that he was in apprehension of further harm.