# 04/05/94 JOHN PAULOS v. HARRY A. JOHNSON

1994 | Cited 0 times | Court of Appeals of Minnesota | April 5, 1994

SCHUMACHER, Judge

Appellant John Paulos challenges the district court's order denying his motion for a new trial based on newly discovered evidence. We affirm.

FACTS

Paulos' nose was injured when he was assaulted. In early 1990, he went to respondent Harry A. Johnson, Jr., M.D. for corrective surgery. Dissatisfied with the results, Paulos sued Dr. Johnson on March 10, 1992.

Paulos' summons and complaint did not include an affidavit of expert review as required by Minn. Stat. § 145.682 (1990). Instead, Paulos attached a personal affidavit, stating he could not obtain expert review before bringing suit because of the impending statute of limitations.

After Paulos failed to produce an affidavit of expert review and to respond to discovery, Dr. Johnson moved for dismissal. At the hearing, Paulos still could not identify an expert witness, and the district court dismissed his suit with prejudice.

Paulos appealed. This court affirmed, concluding that it is proper for a plaintiff to submit an affidavit for delayed filing of the expert review affidavit, but the plaintiff must then file the required affidavit within 90 days from service. Paulos never obtained an affidavit and thus was not permitted to go forward without expert testimony.

Paulos moved for a new trial on the basis of newly discovered evidence. The district court denied Paulos' motion.

DECISION

1. Minn. R. Civ. P. 60.02 (b) provides that a court may relieve a party from final judgment and may order a new trial because of

Newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03.

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A trial court's denial of a motion for a new trial will not be disturbed on appeal absent an abuse of discretion or a violation of a clear legal right. Regents of Univ. of Minn. v. Medical Inc.,405 N.W.2d 474, 478 (Minn. App. 1987), pet. for rev. denied (Minn. July 15, 1987), cert. denied, 484 U.S. 981, 98 L. Ed. 2d 494, 108 S. Ct. 495 (1987).

Paulos' motion is based on evidence consisting of letters from various medical groups and other pieces of evidence drawing into question Dr. Johnson's representation of his credentials. Paulos contends that this evidence is proof of negligent nondisclosure and supports an assault and battery claim.

Diligence means a party must use available discovery techniques and conduct a reasonable investigation. Id. at 479. Paulos has not shown why he could not have obtained this information in an investigation prior to trial. Besides not adequately investigating the case, Paulos also failed to conduct any discovery. Paulos may have been able to obtain this same information through interrogatories or by deposing Dr. Johnson. See Brown v. Bertrand, 254 Minn. 175, 184-85, 94 N.W.2d 543, 550-51 (1959) (plaintiff not entitled to new trial where "newly discovered evidence" could have been found before trial using customary discovery techniques).

In addition, the newly discovered evidence must be relevant and admissible at trial, and cannot be simply collateral, impeaching, or cumulative. Regents of Univ. of Minn., 405 N.W.2d at 478. The question here is whether the newly discovered evidence is relevant to any legal theory raised by Paulos.

Paulos melds battery and negligent nondisclosure into one legal theory. They are, however, two distinct legal theories. Kohoutek v. Hafner, 383 N.W.2d 295, 299 (Minn. 1986). Paulos' complaint does not include a claim for battery, nor was battery raised below; therefore, the evidence is not relevant. See Ericksen v. Wilson, 266 Minn. 401, 404, 123 N.W.2d 687, 689 (1963) (plaintiff not permitted to seek recovery for assault where complaint sounded solely in negligence); Nelson v. Nicollet Clinic, 201 Minn. 505, 510-12, 276 N.W. 801, 803-04 (1937) (recovery not allowed for medical assault where assault theory raised for first time on motion for new trial).

Paulos also did not argue negligent nondisclosure at the district court level. See Paulos v. Johnson, 502 N.W.2d 397, 400 (Minn. App. 1993) (appellant claims for first time on review that this is not malpractice claim subject to statute, but is one for negligent nondisclosure), pet. for rev. denied (Minn. Sept. 10, 1993). Newly discovered evidence is not admissible to argue a new legal theory. See Midway Nat. Bank of St. Paul v. Bollmeier, 462 N.W.2d 401, 405 (Minn. App. 1990) (motion to reconsider properly denied where purpose was to submit evidence pertaining to theories not raised during declaratory judgment action), aff'd. 474 N.W.2d 335 (Minn. 1991).

2. Paulos argues that it was error for the court to accept Dr. Johnson's reply memo to his motion for a new trial because it was improperly served. He also asserts that the court improperly made its

decision before he had submitted a reply memorandum.

Minn. R. Gen. Pract. 115.06 provides that a district court may refuse to take oral argument, or allow attorney fees or take other actions for failure to properly serve response papers. The rule is clearly discretionary. See Minn. R. Gen. Pract. 115.06 cmt. (permissive language included to make it clear court retains discretion to hear matters even if rules have been ignored) Therefore, the court's refusal to strike Dr. Johnson's reply memo was not an abuse of discretion.

Pursuant to Minn. R. Gen. Pract. 115.03, the moving party may submit a reply memorandum "limited to new legal or factual matters raised by an opposing party's response to a motion. " Paulos has not stated what he intended to show in his reply memo; thus, any error in refusing Paulos the opportunity to do so was harmless error. Minn. R. Civ. P. 61. In addition, according to the district court's memo to the file entered September 2, 1993, the court did consider Paulos' affidavit and audio tape, but the materials did not alter the decision.

3. Dr. Johnson seeks costs on appeal, noting Paulos' motions and attempt to have a videotape admitted as evidence to this court. Dr. Johnson has not shown how this appeal was brought in bad faith or that the appeal was frivolous. We therefore refuse to award costs. Graupmann v. Rental Equipment and Sales, 438 N.W.2d 711, 713 (Minn. App. 1989.)

Affirmed.

ROBERT H. SCHUMACHER

3/30/94