DA 20-0515

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 106N

ESTATE OF DARLINE A. BRAGER, through DOUGLAS BRAGER, Personal Representative for the Estate of Darline A. Brager,

Plaintiff and Appellant,

v.

ANNE M. WEINBERGER, A.P.R.N., an individual,

Defendant and Appellee.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DV-2019-231
Honorable Howard F. Recht, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

James P. O'Brien, O'Brien Law Office, P.C., Missoula, Montana

For Appellee:

Elizabeth L. Hausbeck, Justin K. Cole, Luc Lemoine Brodhead, Garlington, Lohn & Robinson, PLLP, Missoula, Montana

Submitted on Briefs: March 31, 2021

Decided: May 4, 2021

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of non-citable cases published in the Pacific Reporter and Montana Reports.

¶2 Plaintiff Estate of Darline A. Brager (Estate) appeals from the September 23, 2020 Order of the Twenty-First Judicial District Court, Ravalli County, granting Defendant Anne M. Weinberger's (Weinberger) Motion to Strike and Motion for Summary Judgment, and denying the Estate's Cross-Motion for Partial Summary Judgment. We affirm.

¶3 According to the summary judgment record, Darline A. Brager (Darline), ninety years of age, transferred her primary medical care in November 2017 to Bitterroot Physicians Clinic, owned and operated by Marcus Daly Memorial Hospital (MDMH) in Hamilton, Montana. On November 14, 2017, after examining Darline for the first time, Weinberger, an Advanced Practice Registered Nurse (APRN or APN) and employee of MDMH, gave Darline a prescription for 5 milligrams of Warfarin, commonly called Coumadin, an increase from the 1-2 milligram prescription that Darline's previous primary care physician had prescribed. On December 25, 2017, Darline was taken by ambulance to MDMH where she was diagnosed with severe anemia. Darline was transferred to Providence St. Patrick Hospital, where her treatment included the discontinuance of Warfarin. Darline was transferred to a nursing home and then discharged to her home on

January 23, 2018. On January 29, 2018, Darline suffered a heart attack caused by a blood clot, and unfortunately passed away.

¶4 The Estate filed this action in the District Court on June 24, 2019, naming only Weinberger. The complaint alleged Weinberger was negligent by prescribing and failing to monitor Darline's Warfarin use, and that Weinberger had violated the Montana Consumer Protection Act (MCPA) by engaging in prohibited sale tactics, unfair methods of competition, and unfair or deceptive acts and practices in the conduct of trade. Weinberger responded to the complaint with a combined motion to dismiss and motion for summary judgment on August 6, 2019. The Estate filed a response opposing Weinberger's motion and cross-moving for partial summary judgment. In support of its response, the Estate attached copies of pages of purported advertising by the Bitterroot Physicians Clinic and MDMH that referenced Weinberger. The parties also filed reply briefs.

¶5 On October 2, 2019, Weinberger filed a Motion to Stay upon learning the Estate had initiated a separate proceeding before the Montana Medical Legal Panel (MMLP) against MDMH, arising from the same allegations as stated herein against Weinberger, to permit joinder of the proceedings to prevent waste of judicial resources upon the conclusion of the MMLP proceedings. The Estate filed a response to the Motion to Stay that offered, without leave, new theories of liability against Weinberger, as well as the affidavit of Dr. Rhonda Damschen, all of which were unresponsive to the question of a stay. Weinberger moved to strike the Estate's filings. On November 13, 2019, the District Court

ordered the matter stayed pending completion of the Estate's MMLP proceeding, recognizing that the allegations in the two proceedings were identical.

¶6 Following conclusion of the MMLP proceedings, on March 12, 2020, the District Court issued an Order on Pending Motions and Setting Hearing on Motions for Summary Judgment. The court lifted the stay, set a hearing upon determining that the summary judgment motions should be adjudicated, and struck the Estate's nonresponsive filings to Weinberger's Motion for Stay. Shortly before the summary judgment hearing, the Estate filed a Request for Judicial Notice of Law and Supplemental Filing, asking the court to declare as a matter of law that the legal authority cited therein—statutes and administrative rules pertaining to the Board of Nursing's regulation of the nursing profession not referenced in the prior summary judgment briefing—rendered Weinberger directly personally liable to consumers of her professional nursing services. Weinberger filed a motion to strike the supplemental material. After argument on the motions, the District Court entered an Order on the motions on September 23, 2020, granting Weinberger's Motion for Summary Judgment while denying the Estate's Cross-Motion for Partial Summary Judgment. The District Court concluded that Weinberger was protected by the "corporate shield" of her employer under § 28-10-602, MCA, reasoning that "the Estate has failed to meet its burden to present evidence of any such conduct that might trigger the exception to the liability shield."[1] On the MCPA claim, the District Court concluded the

[1] Though so holding, the District Court expressed concerns about this result in the medical care context, stating that it was "concerned that undermining this imperative"—what it described as the "ethical obligation and imperative of care" in the provision of medical services—could

Estate had only supported the claim with hearsay evidence and that the complaint had failed "to make out a CPA claim against Weinberger." The District Court struck the Estate's Judicial Notice of Law and Supplemental Filing and denied the Estate's argument therein that, as a matter of law, Weinberger was directly liable to consumers receiving of her professional nursing services under the professional licensing statutes and regulations. The Estate appeals.

¶7 We conduct de novo review of a district court's grant of summary judgment and apply the same criteria as the district court contained in Rule 56 of the Montana Rules of Civil Procedure. *Sherner v. Nat'l Loss Control Servs. Corp.*, 2005 MT 284, ¶ 23, 329 Mont. 247, 124 P.3d 150. Summary judgment is appropriate if the movant successfully carries its burden to establish that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law as confirmed by a review of "the pleadings, the discovery and disclosure materials on file, and any affidavits[.]" Mont. R. Civ. P. 56(c)(3).

"jeopardize[] the intended relationship of trust. Where there is no personal liability there may be no incentive to conform to and provide the standard of care the patient is entitled to expect." However, given that "[t]he Court has not found, nor has plaintiff provided," authority to deviate from Montana precedent addressing the corporate shield, it felt compelled to apply that precedent upon this record.

The District Court also rejected the Estate's argument that "this is not a medical malpractice case," reasoning that "[d]espite the Estate's attempt to characterize this lawsuit as a garden variety negligence action pursuant to § 27-1-701[, MCA,] or a 'nursing malpractice action' pursuant to § 37-8-102(9)[, MCA,] (a cause of action not recognized under Montana law), the gravamen of the allegations stated in the complaint plainly sounds in medical malpractice," subjecting this matter to the procedures, time limitations, substantive standards and damages applicable thereto, including that "health care providers are liable for the acts or omissions of their employees. *See* § 27-1-738, MCA." The Estate acknowledged it had framed the case in ordinary negligence in an attempt to avoid the statutory cap on medical malpractice general damages.

If the movant satisfies her burden, the burden then shifts to the nonmovant, who is tasked with setting forth particularized facts—not merely "rely[ing] upon their pleadings, nor upon speculative, fanciful, or conclusory statements"—in opposition of summary judgment. *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990) (citation omitted). A district court's legal determinations are reviewed for correctness. *Sherner*, ¶ 23 (citation omitted).

¶8 A principal is generally responsible to "third persons for the negligence of the principal's agent in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of business, and for the agent's willful omission to fulfill the obligations of the principal." Section 28-10-602(1), MCA. An agent may be personally liable in limited circumstances: when credit is given to the agent personally in the transaction; when the agent proceeds without a good faith belief that the agent has the authority to act; and "when the agent's acts are wrongful in their nature." Section 28-10-702, MCA. Whether an act or omission is wrongful in its nature is a question of law. *Williams v. DeVinney*, 259 Mont. 354, 361, 856 P.2d 546, 550-51 (1993) (holding that "the District Court did not err when it concluded that, as a matter of law, [the Defendant's] actions created personal liability" because they were "wrongful in their nature"). We have interpreted "acts [] wrongful in their nature" to those acts: committed for private or pecuniary benefit; committed out of personal feelings related to a third person; taken against the interest of the principal or not in furtherance of the principal's goals; committed with intent to harm; and committed outside the scope of the

agency relationship which may be properly categorized as independent wrongs. *Phillips v. Mont. Educ. Ass'n*, 187 Mont. 419, 425, 610 P.2d 154, 158 (1980) (agent cannot be personally liable if agent's objectionable acts were made "in good faith and for the best interests of the corporation," but personal liability may rise if agent "acts against the best interests of the corporation, acts for his own pecuniary benefit, or with the intent to harm the plaintiff"); *Little v. Grizzly Mfg.*, 195 Mont. 419, 424, 636 P.2d 839, 842 (1981) (reversing judgment against corporate officers because they did not "personally commit a tort" outside of the scope of the agency relationship); *Crystal Springs Trout Co. v. First State Bank*, 225 Mont. 122, 129-30, 732 P.2d 819, 823 (1987) (reversing trial court's refusal to hold agent personally liable because the agent's tortious actions were "intentional and very personal"); *Bottrell v. Am. Bank*, 237 Mont. 1, 25, 773 P.2d 694, 708-709 (1989) (affirming district court's summary judgment refusing to impose personal liability when individual acted within scope of agency, in furtherance of corporate interest, and was not driven by personal pecuniary gain or malice toward the third person); *Crane Creek Ranch v. Cresap*, 2004 MT 351, ¶ 13, 324 Mont. 366, 103 P.3d 535 (cannot be personally liable absent an allegation that the agent had engaged in an independent wrong outside of the scope of the agency); *Sherner*, ¶¶ 26-27 (noting that agents are shielded from personal liability unless their actions were personal in nature and not taken on behalf of the principal).

¶9 To meet its burden of demonstrating a material issue of fact on this agency issue, the Estate must show that an exception to the corporate shield under § 28-10-702, MCA,

applies, which for present purposes requires a showing that Weinberger's "acts [were] wrongful in their nature" as a matter of agency law. Section 28-10-702(3), MCA. The Estate argues the District Court impermissibly resolved a question of fact on summary judgment when determining that Weinberger's acts were not wrongful. However, the Estate did not proffer evidence that tended to demonstrate Weinberger's actions as an agent were wrongful. Rather, the Estate's case was that Weinberger's alleged *medical* acts and omissions—failing to inform Darline of the risks of increasing her Warfarin dosage, failing to perform a proper history and physical, failing to determine Darline's current Warfarin dosage, and failure to timely follow-up with additional appointments or labs—were also "wrongful" for purposes of § 28-10-702(3), MCA. However, this is clearly contrary to the meaning of "acts wrongful in their nature" as the term is employed in § 28-10-702, MCA, under our precedent. In order to be wrongful for that purpose, the alleged acts must have been effectuated contrary to the goals of the principal, for personal gain, or a result of the agent's personal disdain for the third party. *See, e.g.*, *Philips*, 187 Mont. at 425, 610 P.2d at 158. No evidence was offered that Weinberger's alleged actions were intentional or malicious, done for personal or pecuniary gain or pursuant to a fraud, facilitated pursuant to Weinberger's personal feelings toward Darline, or contrary to MDMH's interests. Without such supporting evidence, the Estate failed to establish Weinberger acted wrongfully for agency purposes and therefore the District Court did not err by concluding Weinberger was protected by the corporate shield.

¶10 The Estate attempts to avoid the effect of the corporate shield by arguing Weinberger is personally liable based upon a provision within the licensing statutes defining the "practice of professional nursing," which states that "[e]ach registered nurse is directly accountable and responsible to the consumer for the quality of nursing care rendered." Section 37-8-102(9), MCA. The Estate argues this provision imposes personal liability upon Weinberger that essentially bypasses the application of our agency law.

¶11 This is a large leap that the District Court, even with its concerns about the extent of the corporate shield, did not accept. Title 37, MCA, governs the regulation of certain professional occupations through the implementation of licensing processes and the creation of boards to oversee the professions. *See generally*, § 37-1-101, MCA, et. seq. Title 37, Chapter 8, MCA, provides for the regulation of the nursing profession and authorizes the Board of Nursing to oversee the licensing and regulation of nursing, which includes § 37-8-102(9), MCA, within the definitional section. Section 37-8-101(1), MCA, explains that the purpose of the chapter is "[t]o safeguard life and health" by ensuring those practicing professional nursing are qualified and properly licensed. These provisions make clear that the purpose of the phrase argued by the Estate is not to impose personal liability upon nurses, but rather to ensure that nurses are qualified and regulated by the Board of Nurses to be answerable should their care deviate from the appropriate standards of the profession.

¶12 The Estate's final claim is that Weinberger violated the MCPA by engaging in prohibited sale tactics, unfair methods of competition, and unfair or deceptive acts and

practices in the conduct of trade. The MCPA has been codified in Title 30, Chapter 14, MCA, and makes unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]" Section 30-14-103, MCA. "A consumer who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by [§] 30-14-103[, MCA,]" § 30-14-133, MCA, may hold liable "[a]ny person who . . . assists or aids, directly or indirectly, in a violation of" the MCPA to the same extent as "the person or business for whom or for which the person acts." Section 30-14-203, MCA. Importantly, as applied to healthcare providers, "'only those acts or practices in the conduct of the entrepreneurial, commercial, or business aspects of running a [medical practice] are actionable under [M]CPA'" and the actual practice of the profession is exempt. *Hastie v. Alpine Orthopedics & Sports Med.*, 2015 MT 346, ¶ 22, 382 Mont. 21, 363 P.3d 435 (quoting *Brookins v. Mote*, 2012 MT 283, ¶ 54, 367 Mont. 193, 292 P.3d 347); *Brookins*, ¶ 55 (differentiating MCPA's applicability to the actual practice of healthcare from entrepreneurial or business aspects of providing healthcare such as advertising).

¶13 In support of her Motion for Summary Judgment, Weinberger filed an affidavit wherein she stated "[i]n my capacity as an employee of MDMH, I am involved only with patient care at the clinic. I have no involvement in the marketing or other aspects of the clinic's business." In opposition to that motion, the Estate filed a series of screenshots that were timestamped more than one year after Weinberger had provided care to Darline. The

screenshots were from a website operated by MDMH that listed Weinberger as a healthcare provider at the Bitterroot Physicians Clinic. The Estate argues this evidence was "an admission against interest because allowing oneself to [be] published as a physician is deceptive if one is not." However, in the screenshots, Weinberger is not explicitly advertised as being a physician. In one, her name is followed by the initials "ANP." In another screenshot, eight "Physicians at Bitterroot Physicians Clinic" are listed, each followed by the designation "MD." Weinberger is listed but without an "MD" designation. Ignoring for the moment that it was not demonstrated that these advertisements were active prior to Weinberger treating Darline, there was also no evidence provided that Darline relied on such advertising to her detriment. Damages are available under the MCPA to a "consumer who suffers any ascertainable loss . . . *as a result of*" the unfair practices of another. *See* § 30-14-133(1), MCA (emphasis added). Nor did the Estate present evidence beyond speculation that Weinberger was involved in any of the marketing or advertising placed by her employer. We conclude the District Court did not err by granting summary judgment to Weinberger on the claim.

¶14 Finally, the Estate argues the District Court erred by striking its supplemental filing in support of its request to declare as a matter of law that Weinberger could be held personally liable to consumers of her professional nursing services. We will not overturn a district court's evidentiary ruling absent an abuse of discretion. *State v. Ditton*, 2006 MT 235, ¶ 18, 333 Mont. 483, 144 P.3d 783. The District Court noted that the filing was untimely, and that it was much more than a request for judicial notice. Rather, the court

considered the filing akin to an unscheduled supplemental brief addressing a theory or basis for liability concerning "binding duties and responsibilities imposed on [Weinberger] as a matter of law," despite the fact that summary judgment briefing had already been completed. We conclude the District Court did not abuse its discretion and, in any event, we have addressed herein the merits of the argument raised in the supplemental pleading.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review, including discretionary rulings for which the District Court did not abuse its discretion.

¶16 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR