

No. 1-13-0225

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TERRI S. DALEY, as Independent Administrator)	Appeal from the Circuit
for the Estate of REGINA RUFF, Deceased;)	Court of Cook County.
HENRY LEE RUFF; and JACQUELINE KEY,)	
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 08 L 011573
)	
ADVOCATE HEALTH AND HOSPITALS)	Honorable
CORPORATION d/b/a ADVOCATE SOUTH)	Deborah Mary Dooling ,
SUBURBAN HOSPITAL; SHARON SMITH, M.D.;)	Judge Presiding.
SUBURBAN EMERGENCY PHYSICIANS GROUP,)	
S.C.; KRISTINE SHIELDS, R.N.; STEVEN KLEPAC,)	
M.D.; and RADIOLOGY IMAGING CONSULTANTS,)	
S.C.,)	
)	
Defendants-Appellees.)	

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Rochford concurred in the judgment.

ORDER

HELD: Trial court correctly directed verdicts in favor of defendants in medical malpractice action where plaintiff failed to elicit expert evidence of proximate causation.

¶ 1 This appeal arises from the grant of directed verdicts in a medical malpractice action filed by plaintiff Terri S. Daley, independent administrator of the estate of Regina Ruff, deceased, Henry Lee Ruff and Jacqueline Key. For the reasons that follow, we affirm.

¶ 2 The record reveals the following facts and procedural history. Plaintiff filed a third amended medical malpractice action against defendants Advocate Health and Hospitals Corporation d/b/a Advocate South Suburban Hospital ("Advocate Hospital"); Sharon Smith, M.D., and her professional corporation, Suburban Emergency Physicians Group, S.C.; Kristine Shields, R.N.; and Steven Klepac, M.D., and his professional corporation, Radiology Imaging Consultants, S.C. The lawsuit alleged that medical negligence in the diagnosis and treatment of Regina Ruff's congestive heart condition and/or pneumonia caused her death.

¶ 3 At approximately 10:30 a.m., on the morning of July 14, 2007, thirty-two year old Regina Ruff arrived at the emergency room at Advocate Hospital complaining of shortness of breath. Ms. Ruff had a history of congestive heart failure and hypertension. Kristine Shields, an emergency-room nurse conducted an assessment of Ms. Ruff's vital signs. Ms. Ruff informed Nurse Shields that she had not been sleeping well and that while she had taken one of her medications for congestive heart failure (Lasix), she had not taken her other medications for congestive heart failure (Digoxin) or for her hypertension (Metoprolol). Nurse Shields determined that Ms. Ruff was alert and oriented, however her blood pressure was elevated, she had an elevated pulse rate, she was sweating and was experiencing moderate respiratory distress. Ms. Ruff was placed on oxygen. Doctor Sharon Smith became Ms. Ruff's treating physician in the emergency room. Dr. Smith examined Ms. Ruff and learned that she had not been eating and was experiencing symptoms similar to those she experienced five years earlier when she suffered congestive heart failure.

¶ 4 Dr. Smith ordered tests which included a chest x-ray. The chest x-ray was ordered at about 12:00 in the afternoon and completed by 12:15. The doctor evaluated the x-ray and determined that the images showed possible pneumonia and congestive heart failure. The x-ray was also independently evaluated by Doctor Steven Klepac, a radiologist. At approximately 12:30 that afternoon, Dr. Klepac made a written report suggesting that the x-ray images showed possible pneumonia, but did not mention the presence of congestive heart failure.

¶ 5 After receiving Dr. Klepac's report, Dr. Smith and Nurse Shields continued to assess Ms. Ruff in the emergency room. Upon receiving Ms. Ruff's lab results at approximately 1:55 p.m., Dr. Smith ordered Lasix to treat Ms. Ruff's congestive heart failure and an antibiotic, Rocephin, to treat pneumonia. Dr. Smith evaluated Ms. Ruff at approximately 2:20 p.m. Ms. Ruff was stable and receiving oxygen through a ventilation mask.

¶ 6 Dr. Smith called cardiologist, Doctor Looyenga, who was selected by Ms. Ruff's family physician. Dr. Smith anticipated that the cardiologist would take over Ms. Ruff's care and admit her to the hospital. Dr. Looyenga came to emergency room at about 2:38 p.m., to assess Ms. Ruff's condition. At approximately 3:00 p.m., a nurse started the medicine for congestive heart failure intravenously. Immediately following, she was started on the antibiotic Rocephin, to treat the pneumonia. Shortly after that, at about 3:15 p.m., Ms. Ruff's breathing became labored, she vomited and went into respiratory arrest. A code was called. She was resuscitated but never regained consciousness. She was declared brain dead and eventually taken off life support. Ms. Ruff died four days later.

¶ 7 Plaintiff filed suit against the named defendants. Plaintiff alleged that Dr. Smith was negligent in failing to timely treat Ms. Ruff's congestive heart failure and pneumonia and for choosing not to order any medications to treat her until more than four hours after she arrived in

the emergency room and that Advocate Hospital was responsible as the doctor's apparent principal. Plaintiff alleged that Nurse Shields was negligent in the nursing care she provided to Ms. Ruff and was negligent for failing to communicate her observations to Dr. Smith and for failing to initiate a chain of command to ensure that Ms. Ruff received care from a reasonably careful physician and that Advocate Hospital was responsible as the nurse's apparent principal. Plaintiff further alleged that Dr. Klepac was negligent in failing to include the presence of congestive heart failure in his radiology report and that his employer Radiology Imaging Consultants, S.C., was also liable, as well as Advocate Hospital as an apparent principal.

¶ 8 Dr. Klepac admitted he was employed by Radiology Imaging Consultants, S.C., but denied he was an actual or apparent agent of Advocate Hospital. Nurse Shields admitted she was employed by Advocate Hospital. Advocate Hospital denied that Drs. Smith or Klepac were actual or apparent agents of the hospital.

¶ 9 During discovery, pursuant to Supreme Court Rule 213(f)(3) (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)), the plaintiff disclosed affidavits of several expert witnesses she anticipated calling at trial. Disclosures regarding radiology expert Doctor Richard Mintzer indicated he would testify that Dr. Klepac's failure to suggest congestive heart failure in his radiology report concerning the chest x-ray was a deviation from the standard of care. The doctor's disclosures contained no opinions with respect to proximate cause. Dr. Mintzer confirmed during his discovery deposition that he had no causation opinions.

¶ 10 Disclosures regarding emergency room physician expert Doctor Kenneth A. Corre indicated he would opine that Dr. Smith failed to act as a reasonably careful emergency room physician would act and that her negligence caused and contributed to Ms. Ruff's arrest and anoxia to the brain that caused her death. Dr. Corre maintained that Dr. Smith was required to

treat Ms. Ruff's congestive heart failure regardless of the content of Dr. Klepac's radiology report. Dr. Corre disclosed no opinions regarding causation or the standard of care with respect to Dr. Klepac or Nurse Shields.

¶ 11 Disclosures regarding Nurse Vicki Keough, Ph.D., indicated she would opine that Nurse Shields failed to act as a reasonably careful emergency room nurse would act and that her failure to observe and report Ms. Ruff's abnormal and alarming findings to Dr. Smith, and if necessary to her supervisor, constituted nursing negligence which was a proximate cause of Ms. Ruff's death.

¶ 12 Prior to trial, Dr. Klepac and Radiology Imaging Consultants, S.C., filed motion *in limine* No. 4, seeking to bar plaintiff from eliciting or attempting to elicit any opinion testimony of purported deviations from the applicable standard of care unless plaintiff also presented expert testimony that such deviations proximately caused plaintiff's injuries. These defendants withdrew motion *in limine* No. 4 pending testimony at trial. The trial court granted defendants' motion *in limine* No. 11, barring Dr. Mintzer from offering opinion testimony at trial concerning proximate cause. The court also granted defendants' motion *in limine* No. 12, barring Dr. Corre from offering opinion testimony at trial that Dr. Klepac's conduct caused or contributed to Ms. Ruff's injuries or that he deviated from the standard of care. Plaintiff did not object regarding motion *in limine* No. 11, and after some discussion, there was no objection to motion *in limine* No. 12.

¶ 13 A couple of days later, the trial court granted Advocate Hospital and Nurse Shields' motion *in limine* No. 12, barring Nurse Keough from offering proximate cause opinions and opinions regarding the failure to initiate congestive heart failure protocol. The trial court also

granted these defendants' motion *in limine* No. 15, barring Dr. Corre from opining that any nurse deviated from the standard of care.

¶ 14 Following Dr. Smith's trial testimony as an adverse witness during plaintiff's case-in-chief, Dr. Klepac renewed his motion *in limine* No. 4. Plaintiff objected, arguing that Dr. Smith had testified that she would have treated Ms. Ruff differently with a report of congestive heart failure from Dr. Klepac. The trial court reviewed the transcript of Dr. Smith's testimony, and disagreed with plaintiff's characterization of the testimony. The court determined that Dr. Smith's testimony had not established proximate cause concerning Dr. Klepac. The court then granted Dr. Klepac's motion *in limine* No. 4, barring Dr. Minter's testimony.

¶ 15 Advocate Hospital and Nurse Shields then moved to bar any testimony concerning alleged deviations from the standard of care unrelated to Ms. Ruff's injuries. The trial court reserved ruling on the motion.

¶ 16 After the close of plaintiff's case, several defendants moved for directed verdicts. Dr. Klepac moved for a directed verdict, arguing that plaintiff had not presented any evidence establishing a causal connection between the information allegedly omitted from his radiology report and Ms. Ruff's cardiac arrest and death. The trial court agreed and found that plaintiff had failed to provide testimony establishing that Dr. Klepac's conduct was a proximate cause of plaintiff's injuries. The court granted the motion and directed a verdict in favor of Dr. Klepac and his professional group, Radiology Imaging Consultants, S.C.

¶ 17 The trial court also granted a directed verdict in favor of Nurse Shields, finding there had been no proximate cause testimony concerning her conduct. In addition, the court granted a directed verdict in favor of Advocate Hospital in regard to allegations of actual agency concerning Dr. Smith.

¶ 18 The trial proceeded against the remaining defendants, Dr. Smith, and her professional corporation, Suburban Emergency Physicians Group, S.C., and against Advocate Hospital on an apparent agency theory. The basis of the apparent agency theory was that although Dr. Smith was not an employee of Advocate Hospital, in the view of Ms. Ruff, the doctor's presentation appeared to make it look as though she was an employee and/or working for the hospital. On August 2, 2012, the jury returned a verdict in favor of Dr. Smith, her professional corporation, and Advocate Hospital. The jury answered "yes" to a special interrogatory that asked, "Was Dr. Smith the apparent agent of Advocate?" On the same date, the trial court entered judgment on the jury's verdict.

¶ 19 On December 5, 2012, the trial court entered an order denying plaintiff's request for a new trial against all defendants, as well as her request to vacate the directed verdicts and the judgment entered on the jury's verdict. This appeal followed.

¶ 20 On appeal, plaintiff challenges the directed verdicts in favor of Dr. Klepac, Nurse Shields, and their apparent or actual principals, but does not challenge the judgment entered on the jury's verdict. Plaintiff takes no issue with respect to the general verdict rendered by the jury in favor of Dr. Smith, her actual principal, Suburban Emergency Physicians Group, S.C., and her alleged apparent principal, Advocate Hospital. As a result, plaintiff has forfeited the right to challenge the jury's verdict in favor of these defendants. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Wilson v. County of Cook*, 2012 IL 112026, ¶ 25.

¶ 21

ANALYSIS

¶ 22 A directed verdict is proper where all of the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Scardina v. Nam*, 333 Ill. App. 3d 260, 268 (2002). "In

directing a verdict, the trial court determines as a matter of law that there are no evidentiary facts out of which the jury may construe the necessary fact essential to recovery." *Jones v. O'Young*, 154 Ill. 2d 39, 47 (1992). "A plaintiff must present at least some evidence on every essential element of the cause of action or the defendant is entitled to judgment in his or her favor as a matter of law." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 123 (2004). Accordingly, the standard of review is *de novo*. *Id.* at 112.

¶ 23 In a medical malpractice action, a plaintiff must establish: (1) the relevant standard of care; (2) the defendant's deviation from that standard of care; and (3) the deviation from the standard of care proximately caused the plaintiff's injuries. *Reed v. Jackson Park Hospital Foundation*, 325 Ill. App. 3d 835, 842 (2001). In this appeal, the element of proximate causation is the only element at issue.

¶ 24 "Proximate cause in a medical malpractice case must be established by expert testimony to a reasonable degree of medical certainty." *Ayala v. Murad*, 367 Ill. App. 3d 591, 601 (2006). To establish proximate cause, a plaintiff must prove that the defendant's negligence more probably than not caused the plaintiff's injuries. *Hemminger v. LeMay, M.D.*, 2014 IL App (3d) 120392, ¶ 15. The "causal connection must not be contingent, speculative, or merely possible." *Ayala*, 367 Ill. App. 3d at 601.

¶ 25 Proximate cause is generally a factual matter for a jury to decide. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). "However, if the plaintiff fails to prove proximate cause, the plaintiff has not sustained the burden of making a *prima facie* case and a directed verdict is proper." *Susnis v. Radfar*, 317 Ill. App. 3d 817, 827 (2000). Applying these standards, we find the trial court was correct in granting directed verdicts in favor of defendants.

¶ 26 Plaintiff first contends the trial court erred in directing a verdict in favor of Nurse Shields and her principal Advocate Hospital. Plaintiff claims that Nurse Keough's and Dr. Corre's respective trial testimony provided the causal link between Dr. Smith's conduct and Ms. Ruff's cardiac arrest and death. We must disagree.

¶ 27 At trial, Nurse Keough initially testified as to two deviations by Nurse Shields. She claimed that Nurse Shields should have charted and informed Dr. Smith about Ms. Ruff's vital signs, physical assessment, oxygen saturation level and how much oxygen she was being administered. Nurse Keough opined that if Nurse Shields felt like the patient was not receiving the proper care, then she should have started the chain of command of notification. However, Nurse Keough conceded during cross-examination that there was no need for Nurse Shields to go up the chain of command, in light of the care that Dr. Smith had provided Ms. Ruff, which included ordering a rainbow of blood tests, an electrocardiogram (EKG), and an x-ray.

¶ 28 Nurse Keough also conceded that all of the information regarding Ms. Ruff's physical condition, which plaintiff claimed Nurse Shields neglected to share with Dr. Smith, was available to Dr. Smith when she personally evaluated Ms. Ruff, and reviewed her monitor, medical chart, and lab results.

¶ 29 In regard to Dr. Corre, he was never questioned whether Nurse Shields' alleged failures to inform Dr. Smith as to Ms. Ruff's vital signs or go up the chain of command proximately caused Ms. Ruff's injuries. No medical expert testified that any failure on Nurse Shields' part proximately caused Ms. Ruff's injuries.

¶ 30 In addition, contrary to plaintiff's contention, the trial court did not weigh the evidence prior to granting the directed verdicts in favor of Nurse Shields and Advocate Hospital. Our review shows the record is devoid of expert testimony from which a jury could conclude that any

of the conduct alleged on the part of Nurse Shields was a proximate cause of Ms. Ruff's injuries, so there was no evidence for the trial court to weigh as to the element of proximate cause. In the absence of such expert testimony, Nurse Shields and her principal, Advocate Hospital, were entitled to a directed verdict.

¶ 31 Finally, we reject plaintiff's contention that the trial court erred in granting a directed verdict in favor of Dr. Klepac and his professional corporation, Radiology Imaging Consultants, S.C. Plaintiff argues she would have been able to establish Dr. Klepac's medical negligence through the trial testimony of Dr. Mintzer if the trial court had not erred in granting Dr. Klepac's motion *in limine* No. 4, barring Dr. Mintzer from testifying. Plaintiff claims that Dr. Mintzer's trial testimony would have provided a causal link between Dr. Klepac's conduct and Ms. Ruff's cardiac arrest and death. Plaintiff contends the trial court's decision to grant the motion *in limine* runs afoul of the decision in *Silverstein v. Brander*, 317 Ill. App. 3d 1000 (2000). *Silverstein* does not support plaintiff's challenge to the motion *in limine* because the facts in that case are materially distinguishable from those in this case.

¶ 32 In *Silverstein*, on the day of trial, defendants jointly made an oral motion *in limine* seeking to bar the plaintiff's expert from testifying. *Id.* at 1003. The trial court took the oral motion under advisement. The next day, plaintiff filed a written response to the oral motion *in limine* and the trial court ruled on the motion, granting it. *Id.* Once the oral motion *in limine* was granted, defendants made an oral motion for summary judgment. The trial court insisted on a written motion for summary judgment. The next day, defendants brought their written motion for summary judgment. Plaintiff objected to the lack of proper notice of the motion. The trial court denied plaintiff's request for time to respond to the motion and set the motion for hearing

less than one day after defendants presented it. *Id.* at 1003-04. The trial court subsequently granted defendants' motion for summary judgment. *Id.* at 1004.

¶ 33 On appeal, the reviewing court determined that the defendants had mistitled their summary judgment motion as a motion *in limine* to avoid the notice requirements of Cook County Circuit Court Rule 2.1(e) (eff. July 1, 1976), which prohibits a hearing on a motion for summary judgment until 10 days after service of the motion. *Id.* at 1003-06. The reviewing court held the trial court abused its discretion by finding good cause for defendants' failure to comply with the Rule 2.1(e), and accordingly reversed the decision granting summary judgment. *Id.* at 1006.

¶ 34 Unlike in *Silverstein*, the motion *in limine* at issue in this case was not converted into a dispositive motion for summary judgment. Moreover, unlike *Silverstein*, the defendants in this case initially withdrew the motion *in limine* pending testimony at trial and only renewed the motion after they determined that Dr. Smith's trial testimony failed to provide a causal link between Dr. Klepac's conduct and Ms. Ruff's injuries.

¶ 35 Prior to trial, defendants Dr. Klepac and Radiology Imaging Consultants, S.C., filed motion *in limine* No. 4, seeking to bar plaintiff from eliciting or attempting to elicit any opinion testimony of purported deviations from the applicable standard of care unless plaintiff also presented expert testimony that such deviations proximately caused plaintiff's injuries. These defendants withdrew the motion *in limine* pending testimony at trial. In the meantime, the trial court granted defendants' motion *in limine* No. 11, barring Dr. Mintzer from offering opinion testimony at trial concerning proximate cause. Plaintiff did not object to this motion. The court also granted defendants' motion *in limine* No. 12, barring Dr. Corre from offering opinion testimony at trial that Dr. Klepac's conduct caused or contributed to Ms. Ruff's injuries or that he

deviated from the standard of care. After some discussion, there was no objection to motion *in limine* No. 12.

¶ 36 Given these rulings, Dr. Smith was the only trial witness who could provide a causal link between Dr. Klepac's care of the patient and the injuries sustained. Following Dr. Smith's trial testimony as an adverse witness during plaintiff's case-in-chief, defendants renewed their motion *in limine* No. 4. Plaintiff objected, arguing that Dr. Smith had testified that she would have treated Ms. Ruff differently with a report of congestive heart failure from Dr. Klepac. The trial court reviewed the transcript of Dr. Smith's testimony and disagreed with plaintiff's characterization of the testimony. The court determined that Dr. Smith's testimony had not established proximate cause concerning Dr. Klepac. The court then granted defendants' motion *in limine* No. 4, barring Dr. Minter's testimony. Under the circumstances, we do not find that the trial court abused its discretion in granting defendants' motion *in limine* No. 4.

¶ 37 After all of the evidence available on the issue of proximate cause with respect to Dr. Klepac was admitted into evidence, then and only then did the trial court determine that the doctor and Radiology Imaging Consultants, S.C., were entitled to a directed verdict. We find the directed verdict was proper because neither the evidence at trial nor evidence that plaintiff argues was erroneously excluded demonstrated the required element of proximate causation.

¶ 38 For the foregoing reasons, we affirm the trial court orders of July 30, 2012, directing verdicts in favor of: Advocate Hospital in regard to allegations of actual agency concerning Dr. Smith; Dr. Klepac and his professional corporation, Radiology Imaging Consultants, S.C.; and Nurse Shields. We also affirm the trial court's August 2, 2012, judgment entered on the jury's verdict in favor of Dr. Smith, her professional corporation, and Advocate Hospital. Finally, we affirm the trial court's order entered on December 5, 2012, denying plaintiff's request for a new

trial against all defendants, her request to vacate the directed verdicts and the judgment entered on the jury's verdict.

¶ 39 Affirmed.