2015 IL App (2d) 150368-U
No. 2-15-0368
Order filed December 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DOROTHY COLEMAN, Administrator of the Estate of Johnnie Russell, III, deceased,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 11L-421
PROVENA HOSPITALS d/b/a PROVENA MERCY MEDICAL CENTER,	)	Honorable Thomas E. Mueller,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in deeming admitted certain aspects of the affirmative defense and erred in granting judgment on the pleadings in favor of the defendant.

¶ 2 Shortly before the scheduled start of a jury trial on the plaintiff's wrongful death claim, the circuit court of Kane County entered an order finding that the plaintiff had judicially admitted the affirmative defense of comparative negligence by failing to file an answer to that affirmative defense three years earlier. The court then granted the defendant's motion for judgment on the pleadings. After the plaintiff's postjudgment motion was denied, she appealed. We reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 In November 2006, Johnnie Russell, III, was shot to death after he pulled a gun and engaged in a confrontation with police while being evaluated at Provena Mercy Medical Center. The plaintiff, Dorothy Coleman, who is the administrator of his estate, initially filed suit against both the Aurora police department and the defendant, Provena Hospital, in federal court, but later voluntarily dismissed that action as to the defendant. In 2011, the plaintiff filed a wrongful death action in the circuit court of Kane County against the defendant. The complaint alleged that the defendant's agents and employees were aware of Russell's "mentally defective condition and prior psychiatric history," but failed to conduct a reasonable search to determine whether Russell possessed any contraband that could cause harm to himself or others. In December 2011, the defendant filed its answer, asserting the affirmative defense of comparative negligence and alleging that one or more of Russell's acts "was the proximate cause of his death." The affirmative defense further alleged that, as a result of Russell's comparative negligence, the defendant was entitled to offset any judgment or verdict in favor of the plaintiff by "an amount commensurate with [Russell's] own degree of comparative negligence." The plaintiff did not file any answer to the affirmative defense.

¶ 5 During the pretrial proceedings, the defendant filed a motion for summary judgment, arguing that there was no evidence that its acts or omissions were a proximate cause of Russell's death. The trial court (Judge Keith Brown) denied the motion, noting the submission of evidence that the defendant's doctors and nurses had been aware that Russell was exhibiting "paranoid, psychotic, and aggressive behavior" and knew of his psychiatric history, which included a past report that he had threatened to kill his neighbors with his guns; the defendant's agents had already sedated Russell once after he became aggressive with staff and had decided to transfer him to the behavioral health unit; and the defendant's agents had had Russell remove his clothing and don a hospital gown, but failed to check his belongings for items that could cause harm to

Russell or others. The trial court found that this evidence presented a genuine dispute as to whether the conduct of the defendant's agents was a "substantial factor or a material element in bringing about" (*i.e.*, proximate cause of) Russell's death. The case was given a trial date of November 17, 2014, with a pretrial conference to be held on November 6.

¶ 6 During August 2014, the lead attorney for the plaintiff was appointed to the federal bench and her firm reorganized. On October 8, 2014, the firm filed a motion to continue the trial date. The motion stated that the lead attorney had taken the bench in late August 2014 and, although the plaintiff's case had been assigned to a different attorney in the firm, that attorney had been absent on maternity leave since early August and would not return to work until October 27, shortly before trial. The motion was noticed up for presentation on October 28.

¶ 7 On October 22, the defendant filed an "emergency motion" to deem its affirmative defense admitted, on the basis that the plaintiff had never filed an answer denying it. Although the motion did not identify any circumstances constituting an emergency, it was set for hearing the following day at 9 a.m. On October 23, the trial court (Judge Thomas Mueller) entered an order granting the defendant's motion to deem the affirmative defense admitted. The trial court also denied the plaintiff's motion to continue the trial date and reaffirmed the dates of the trial and pretrial conference.

¶ 8 On October 27, attorney Celestine Dotson filed an emergency motion to reconsider the denial of the motion to continue the trial date. The motion stated that the Law Office of Celestine Dotson was co-counsel for the plaintiff. On October 13, attorney Dotson first learned that the attorney from the primary firm who had been assigned to represent the plaintiff was on maternity leave, that no one else at the primary firm was preparing the case for trial, and that the motion to continue the trial date had been filed. Realizing that the primary firm did not intend to remain as lead counsel, Dotson obtained the file and began preparing for trial. After the trial

court denied the motion to continue, Dotson learned that the primary firm would be filing a motion to withdraw. (The firm did so the following day.) Further, when Dotson contacted the plaintiff's expert witness, she learned that he was not available on the trial date. Finally, Dotson stated that she would need time to secure the funds to pay the plaintiff's expert witness (an undertaking previously borne by the lead law firm). Dotson asked the court to deny the primary law firm's motion to withdraw and to reconsider its denial of the motion to continue the trial date. On October 29, the trial court heard and denied the motion to reconsider its denial of a continuance. It subsequently granted the motion to withdraw, leaving Dotson as the sole attorney for the plaintiff.

¶ 9 On October 31, the defendant filed a number of motions *in limine*, along with a "Motion *in Limine* No. 39 for Judgment on the Pleadings." This latter motion argued that, as the affirmative defense of comparative negligence had been deemed admitted, the plaintiff could not establish that any of the defendant's conduct was the proximate cause of Russell's death. Accordingly, the defendant argued, it was entitled to judgment on the pleadings. On November 6, the trial court granted the defendant's motion and entered judgment on the pleadings in favor of the defendant.

¶ 10 On November 24, the plaintiff filed a motion asking the trial court to reconsider its October 23 ruling on the defendant's motion to deem the affirmative defense admitted. The plaintiff argued that: the motion was not timely, as it was filed shortly before the trial date, almost three years after the plaintiff's failure to answer affirmative defense; no response to an affirmative defense is necessary where the substance of the complaint itself rebuts the defense; and the trial court erred to the extent that it had deemed admitted legal conclusions rather than factual allegations. The plaintiff also argued that there was no basis for hearing the motion as an

emergency, and the trial court should not have heard the motion as an emergency over her objection.

¶ 11 On December 8, the plaintiff filed another motion to reconsider (labeled a "motion to vacate"), this time seeking reconsideration of the trial court's order of November 6, granting judgment on the pleadings. She argued that, even if the affirmative defense were deemed admitted, there remained factual matters to be determined by a jury. She also attacked the procedure employed, including the filing of a dispositive motion under the title of a motion *in limine*, and filing such a motion less than 120 days before trial in contravention of a local circuit court rule. She asked the trial court to vacate its November 6 order and reset the case for trial.

¶ 12 On December 16, the plaintiff's motions were presented to the trial court. The defendant filed a motion to strike the latter motion, arguing that it was an improper second post-judgment motion. The trial court ordered briefing on all of the pending motions.

¶ 13 The report of the proceedings on March 11, 2015 (the oral argument on the pending motions), is confusing. The trial court first announced that it would grant the defendant's motion to strike the plaintiff's "motion to vacate" its ruling of November 6 granting judgment on the pleadings, and would proceed only on the plaintiff's motion to reconsider the October 23 ruling deeming the affirmative defense admitted, "[t]o make sure the record is clean." Accordingly, both parties argued primarily about the October 23 ruling deeming the affirmative defense admitted, although the issue of the judgment on the pleadings also arose. However, in announcing its ruling, the trial court appeared to address only the entry of judgment on the pleadings. It rejected the plaintiff's procedural arguments, noting that, when it deemed the affirmative defenses admitted, it invited the parties to prepare and submit any dispositive motions as motions *in limine* filed shortly before the trial date. As to the plaintiff's substantive arguments, the trial court stated that, "given the breadth of the allegations made in the

affirmative defenses which are deemed admitted, *** there was no set of facts[] that could be laid out before a jury *** that could result in a finding in favor of the Plaintiff. For that reason, judgment on the pleadings was granted." The trial court found no reason to reconsider its earlier rulings. The written order entered on March 11, 2015, was similarly confusing: it stated that the defendant's motion to strike was granted; the plaintiff's "motion to vacate" was stricken; and the plaintiff's "motion to reconsider[] judgment on the pleadings in favor of the defense entered on" November 6 was denied. The plaintiff filed a timely appeal from this order.

¶ 14 ANALYSIS

¶ 15 On appeal, the plaintiff argues that the trial court erred in (1) deeming the affirmative defense admitted and (2) entering judgment on the pleadings in favor of the defense. We take each contention in turn.

¶ 16 Pursuant to section 2-610(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-610(b) (West 2014)), the failure to deny any allegation contained in a pleading constitutes an admission of that allegation. This principle extends to affirmative defenses pled by defendants: a plaintiff who fails to file an answer to such defenses admits the allegations of those defenses. *State Farm Mutual Automobile Insurance Co. v. Haskins*, 215 Ill. App. 3d 242, 246 (1991). When an affirmative defense is admitted, only the facts alleged in the defense are admitted, not the legal conclusions. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769-70 (1993). Moreover, "such a failure to reply merely amounts to an admission of [the] truth of [the] new factual matter [alleged in the affirmative defense] and does not amount to an admission that such new matter constitutes a valid legal defense." *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill. App. 3d 574, 586 (1985).

¶ 17 There is no dispute that the plaintiff failed to answer the affirmative defense. The plaintiff argues that she was not required to file an answer because the allegations of her

complaint themselves constituted a response to, and denial of, the affirmative defense. See *Haskins*, 215 Ill. App. 3d at 246 ("if the complaint itself negates the affirmative defense, no reply is necessary").

¶ 18 Here, the affirmative defense alleged that: Russell came to the hospital "of his own accord," carrying a gun; Russell took hospital staff and patients hostage, "knowingly engaging in reckless and dangerous behavior"; and Russell was comparatively negligent in that he failed to follow medical orders and "willfully" engaged in "reckless and dangerous behavior" including taking staff and patients hostage, engaging in an armed confrontation with police, and failing to follow police orders. The affirmative defense further alleged that "[o]ne or more" of Russell's acts "was the proximate cause of his death" and also that Russell's comparative negligence "caused or contributed to cause" his death.

¶ 19 The plaintiff argues that, read liberally in her favor as it must be (*id.*), her complaint alleges that Russell was suffering from an impaired mental state at the time of the incident. We agree. The complaint alleges that when Russell was admitted to the hospital, he was "suffering from conditions including altered mental stability, *** speech and language deficits, paranoid personality and Dilantin toxicity." The complaint also alleges that Russell was in the process of being transferred from the emergency room to the psychiatric ward. These allegations of an impaired mental state controvert the affirmative defense's allegations that Russell was acting "knowingly" or "willfully" during the incident. They also raise a fair question as to whether Russell was able to appreciate the consequences of his actions at the time, the recklessness and dangerousness of those actions, and the need to follow the orders of medical personnel and the police. Thus, the trial court erred in finding that the allegations of the affirmative defense regarding Russell's mental state had been admitted. *Id.*

¶ 20 Further, to the extent that the affirmative defense alleges that Russell's actions amounted to comparative negligence and were "the proximate cause of his death," those allegations are conclusions that are not admitted by the failure to reply. *Andrews,* 256 Ill. App. 3d at 769-70; *Mitchell Buick,* 138 Ill. App. 3d at 586.

¶ 21 Nevertheless, when all of these aspects of the affirmative defense are put to one side, there remain certain factual allegations that were admitted because they were not denied. 735 ILCS 5/2-610(b) (West 2014). These include the allegations that Russell came to the hospital while carrying a gun on his person, and that he took hospital staff and patients hostage. Accordingly, the trial court did not err in finding that these allegations had been admitted through the plaintiff's failure to reply to them.

¶ 22 Pursuant to Supreme Court Rule 366(b), a reviewing court may "draw inferences of fact" and "make any order that ought to have been given or made, and make any other and further orders and grant any relief *** that the case may require." Ill. S. Ct. R. 366 (eff. Feb. 1, 1994). Accordingly, we modify the trial court's order of October 23, 2014, to deem admitted only those allegations of fact in the affirmative defense that do not relate to the defendant's mental state and are not conclusory, consistent with our discussion herein.

¶ 23 Having held that the trial court's order deeming the affirmative defense admitted was correct at least in part, we must now consider whether the admitted allegations were sufficient to support the entry of judgment on the pleadings in favor of the defendant. A motion for judgment on the pleadings brought under section 2–615(e) of the Code (735 ILCS 5/2–615(e) (West 2008)) is proper where the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Bennett v. Chicago Title & Trust Co.,* 404 Ill. App. 3d 1088, 1094 (2010). We review *de novo* a trial court's grant of judgment on the pleadings. *Id.*

¶ 24 Pursuant to section 2-1116 of the Code, the doctrine of comparative negligence may be applied to tort actions such as this wrongful death claim. 735 ILCS 5/2-1116 (West 1994).[1] Under that doctrine, the trier of fact may compare the contributory fault of the plaintiff (or, here, the plaintiff's decedent) with the fault of the other tortfeasors. If the trier of fact finds that the plaintiff is not more than 50% at fault for his injury, the damages must be reduced by the plaintiff's percentage of fault; if the plaintiff is more than 50% at fault for the injury, he cannot recover at all. *Id*. Thus, the affirmative defense of comparative negligence requires a determination by the trier of fact (here, a jury) regarding the extent of the plaintiff's contributory fault.

¶ 25 The affirmative defense pled by the defendant reflects this reality. The relief sought included a request that any judgment against the defendant "be reduced in an amount commensurate with [Russell's] own degree of comparative negligence" and, if his comparative negligence were found to be greater than 50%, that the plaintiff be barred from any recovery. Thus, even if the affirmative defense's conclusory allegation that Russell's actions "caused or contributed to cause" his death were deemed admitted, the jury would still be required to determine the extent of Russell's comparative negligence. We note that the affirmative defense does not allege that Russell was the sole proximate cause of his death. Accordingly, the trial court erred as a matter of law in holding that the admission of the affirmative defense mandated the entry of judgment on the pleadings in favor of the defendant.

[1] Although section 2-1116 of the Code was amended in 1995 by Pub. Act No. 89-7, that enactment was found unconstitutional in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Accordingly, we cite to the previous version of the statute.

¶ 26 The defendant argues that it was entitled to judgment as a matter of law because it did not have a duty to protect Russell from his own conduct, and that conduct was an intervening cause of his death, thereby relieving the defendant from all potential liability for that death. However, the defendant did not raise any of these arguments before the trial court in its motion for judgment on the pleadings. Accordingly, these arguments are forfeited. "A reviewing court will not consider arguments not presented to the trial court." *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010); see also *Jeanblanc v. Sweet*, 260 Ill. App. 3d 249, 254 (1994) (arguments raised for the first time on appeal, even from an order which we review *de novo*, are deemed forfeited). Further, to the extent that the defendant raised these arguments in its earlier motion for summary judgment, the trial court denied that motion, ruling that genuine factual disputes existed regarding the defendant's role in causing or contributing to Russell's death. That ruling was the law of the case, and the defendant did not argue that it should be reconsidered in the course of seeking judgment on the pleadings. Any attempt to relitigate that ruling now is beyond the scope of this appeal.

¶ 27 The defendant also points out that the appellant's brief contained citations to unpublished decisions. We remind the plaintiff that such decisions may not be cited, pursuant to Supreme Court Rule 23 (Ill. S. Ct. R. 23 (eff. July 1, 2011)). Further, we note that the plaintiff's brief failed to contain proper cites to the record as required by Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013). Given the nature of the record, that failure did not prevent us from conducting a meaningful review of the plaintiff's arguments. However, we caution the plaintiff to avoid these errors in the future.

¶ 28 We note that the plaintiff raised an additional argument in support of her challenge to the judgment on the pleadings—the procedural irregularity inherent in filing a dispositive motion as a "motion *in limine*." We do not condone this procedure, which appears to have been designed

to circumvent local circuit court rules barring the filing of dispositive motions shortly before trial. However, as we are reversing on other grounds the entry of judgment on the pleadings, we need not address this argument further.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the October 23, 2014, order of the circuit court of Kane County is modified to deem admitted only the factual, non-conclusory allegations of the affirmative defense that do not relate to the defendant's mental state. The circuit court's order of November 6, 2014, granting judgment on the pleadings in favor of the defendant, is reversed, and the cause is remanded for further proceedings consistent with this decision.

¶ 31 Modified in part and reversed in part; remanded.