

2017 IL App (1st) 162185-U
No. 1-16-2185
Order filed December 15, 2017

Fifth Division

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 DISTRICT

SAMUEL LORD,

Plaintiff-Appellant,

v.

RUSH UNIVERSITY MEDICAL CENTER, a
Corporation, JASON LITAK, M.D., PATRICIA
BENITEZ, M.D., MERCY HOSPITAL AND MEDICAL
CENTER, a Corporation, BRADLEY HULTEN, M.D.,
THOMAS L. FISHER, M.D., JAMES O. ERTLE, M.D.,
EMERGENCY MEDICAL PHYSICIANS OF
CHICAGO, LLC, a Corporation, MERCY MEDICAL
AT DEARBORN STATION, ACCESS COMMUNITY
HEALTH NETWORK/SOUTH STATE FAMILY
CENTER, MICHAEL HARRIS, M.D., and MING H.
HWANG, M.D.,

Defendants

(Rush University Medical Center, a Corporation, Jason
Litak, M.D., Bradley Hulten, M.D., Thomas L. Fisher,
M.D., James O. Ertle, M.D., Emergency Medical
Physicians of Chicago, LLC, a Corporation, Michael
Harris, M.D., and Ming H. Hwang, M.D.,

) Appeal from the
) Circuit Court of
) Cook County.
)
) No. 12 L 4900
)
) Honorable
) James P. Flannery,
) Cassandra Lewis,
) Lorna Propes.
) Judges, presiding.
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Defendants-Appellees).

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

ORDER

¶ 1 *Held:* In the absence of any genuine issues of material fact, the grant of summary judgment to medical malpractice defendants on the issue of proximate cause was proper.

¶ 2 The plaintiff, Samuel Lord, appeals from the grant of summary judgment to the defendants, Rush University Medical Center (Rush), Jason Litak, M.D., Bradley Hulten, M.D., Thomas L. Fisher, M.D., James O. Ertle, M.D., Emergency Medical Physicians of Chicago, LLC, Michael Harris, M.D., and Ming H. Hwang, M.D.¹ On appeal, the plaintiff contends that: (1) the circuit court erred when it denied his motion for a continuance of the trial; (2) the circuit court erred when it granted the motion for substitution of judge without determining that the request for the substitution had a race-neutral basis; and (3) questions of fact precluded summary judgment.

¶ 3 During the pendency of the appeal, the plaintiff's motion to cite additional authority was allowed. Since we find the summary judgment issue dispositive of this appeal, we do not address the merits of the denial of the continuance of the trial date or the substitution of judge issues. We

¹ The remaining named defendants are not parties to this appeal.

find no questions of fact precluding summary judgment and affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 Initially, we draw the parties' attention to the fact that the two volumes of supplemental record to which they have cited in their briefs were not included in the record filed with this court. As a result, those portions of the proceedings in the circuit court are not before us in this appeal.

¶ 6 I. Facts

¶ 7 The facts set forth below are taken from the depositions, the pleadings and other relevant documents in the record on appeal. On February 19, 2010, the plaintiff sought treatment for pain in his right leg at Mercy Hospital's emergency room. Following an examination, he received written discharge instructions. The instructions informed the plaintiff that he was suffering from peripheral vascular disease (PVD) and that he needed to be evaluated by a vascular surgeon for his condition. The plaintiff was to follow up within three to four days at the Family Health Center. There is no evidence that the plaintiff followed up at the Family Health Center as he was instructed.

¶ 8 On February 24, 2010, the plaintiff saw Dr. Patricia Benitez, his primary care physician since 2001, complaining of right leg pain and numbness. The plaintiff told Dr. Benitez that the doctors at Mercy Hospital diagnosed him with PVD and that he needed to see a vascular surgeon. Dr. Benitez acknowledged that as the plaintiff's primary care physician, she must authorize a referral. The plaintiff brought only one page of the discharge instructions from Mercy Hospital and that page did not direct the plaintiff to see his primary care physician for a referral.

Based on what the plaintiff told her, she believed that the doctors at Mercy Hospital had referred the plaintiff to a vascular surgeon and that the plaintiff planned to make an appointment to do so. The doctor cautioned the plaintiff that his condition needed treatment or he could develop complications such as an ulcer on the leg.

¶ 9 On March 3, 2010, the plaintiff returned to Mercy Hospital's emergency room where he was seen by Dr. Hulten. The plaintiff complained of right leg pain, and a lesion, which had appeared on his right leg. Dr. Hulten diagnosed cellulitis, skin rash and melanoma. The doctor referred the plaintiff to Dr. Fisher, a dermatologist.

¶ 10 On March 5, 2010, Dr. Fisher examined the lesion on the plaintiff's right leg. From the Mercy Hospital emergency room notes, Dr. Fisher was aware that the plaintiff had been diagnosed with PVD. The doctor did not know whether the lesion was dermatologic or resulted from a vascular problem, and the lesion was not typical of arterial insufficiency. Dr. Fisher was not a vascular specialist and did not rule out vascular insufficiency. Dr. Fisher did not tell the plaintiff to see a vascular specialist; the plaintiff had already been referred to vascular specialists. Dr. Fisher diagnosed an ulcer and treated the plaintiff with an Unna boot – a dressing consisting of gauze permeated with a gelatinous substance and zinc powder and wrapped around the patient's leg from toes to knee. The doctor chose the Unna boot because the plaintiff was complaining of pain.

¶ 11 The plaintiff returned to Dr. Fisher on March 8, 2010. Prior to his visit, the plaintiff had removed the Unna boot because of the pain it caused. Dr. Fisher observed that the ulcer appeared in the same condition as at the prior appointment. The plaintiff was instructed to return in one week.

¶ 12 On March 12, 2010, the plaintiff sought treatment at Rush for pain in his right leg. He was admitted and treated with antibiotics for two days. The plaintiff was discharged on March 14, 2010.

¶ 13 The plaintiff returned to Dr. Fisher on March 24, 2010. The lesion on his right leg had grown larger. Dr. Fisher gave the plaintiff a prescription for a biopsy of the lesion and told him to schedule the procedure. Normally, the patient would take the prescription to the front desk and be given an appointment for the procedure to be done. Dr. Fisher was not aware of whether the plaintiff had the biopsy performed.

¶ 14 On April 2, 2010, the plaintiff returned to Rush. The doctors at Rush's dermatology clinic noted that the lesion on the plaintiff's right leg was increasing in size.

¶ 15 On April 20, 2010, the plaintiff was seen by Drs. Litak and Ertle at the Rush dermatology clinic. The plaintiff complained of increased swelling of his right leg for the prior two months. Dr. Litak did not suspect arterial or vascular disease because the plaintiff had a history of kidney disease, which could have caused the swelling. After his physical examination of the plaintiff, Dr. Litak believed that the lesion was a venous ulcer and was related to the plaintiff's kidney disease, rather than a circulation problem. It was Dr. Litak's standard practice to consult with Dr. Ertle prior to ordering a treatment plan for the patient. Dr. Litak ordered venous arterial dopplers which would reveal any abnormalities in the circulation of the right leg. The results showed severe PVD.

¶ 16 On May 4, 2010, plaintiff was seen again by Drs. Litak and Ertle. Based on the results of the dopplers, the doctors believed that the plaintiff's right leg lesion was an arterial ulcer. Dr. Litak referred the plaintiff to a vascular surgeon by providing him with the names of several

vascular surgeons. Either Dr. Litak would make the contact or Dr. Benitez, the plaintiff's primary care physician, would refer him to the vascular surgeon. Dr. Litak instructed the plaintiff to follow up with Dr. Benitez and a nephrologist (a kidney specialist). In addition, Dr. Litak faxed his notes, the dopplers' results, and his interpretations and findings from those results to Dr. Benitez. Dr. Ertle agreed with Dr. Litak's assessment and the plan for the plaintiff.

¶ 17 On May 23, 2010, the plaintiff went to the Mercy Hospital's emergency room complaining of chest pains. He was admitted to Mercy Hospital for evaluation and treatment of a heart attack. During his hospitalization, the plaintiff was seen by Dr. Harris, an internist, and Dr. Hwang, a cardiologist. On May 26, 2010, the plaintiff underwent a cardiac catheterization and stent placement. Due to complications from the dye injected as part of the cardiac procedures, Dr. Hwang recommended that the plaintiff's kidneys be allowed to recover before an angiogram of the plaintiff's right leg, which required the use of the dye, be performed to assess his peripheral vascular issues. On May 28, 2010, the plaintiff discharged himself from Mercy Hospital, against Dr. Hwang's recommendations that he remain for further treatment.

¶ 18 On June 1, 2010, the plaintiff was seen by Dr. Benitez for a refill of his medications. In her physical examination, Dr. Benitez noted an ulcer on the plaintiff's right leg that appeared to be infected. The doctor told the plaintiff to see the vascular surgeon and refilled his medications. Dr. Benitez did not recall if she asked the plaintiff if he had been to a vascular surgeon, but she did discuss with him the referral from Rush to see a vascular surgeon. Dr. Benitez did not give the plaintiff a written referral to a vascular surgeon.

¶ 19 On June 22, 2010, Dr. Benitez saw the plaintiff who complained of leg pain. Dr. Benitez diagnosed an infected ulcer on right leg and PVD. She prepared a referral for the plaintiff to be

seen at Mount Sinai Hospital's emergency room and ordered him to go there immediately and to follow up with her in one week.

¶ 20 On June 25, 2010, the plaintiff went to the Mount Sinai Hospital emergency room and was admitted to the hospital on June 26, 2010. The plaintiff was seen by Dr. Elizabeth Clark, a vascular surgeon. Another doppler arterial exam was performed on June 28, 2010, which indicated that portions of his right leg were still viable, and it would be worthwhile to attempt to revascularize the right leg. However, in order to perform the bypass, Dr. Clark needed a more complete imaging of the plaintiff's right leg to determine where the bypass graft should begin and end as well as more specific information about the patency of the arterial vessels in the leg which could not be discerned from the arterial doppler evaluation. Despite multiple attempts, including two under anesthesia, a Magnetic Resonance Angiogram (MRA) could not be performed due to the plaintiff's uncooperativeness and unwillingness to undergo the MRA.

¶ 21 On July 3, 2010, against medical advice, the plaintiff signed himself out of Mount Sinai Hospital. The plaintiff was informed that he was to return to Mount Sinai Hospital on July 6, 2010, for the MRA and that bypass surgery was scheduled for July 7, 2010. It is undisputed that the plaintiff did not return to Mount Sinai Hospital on either of those days.

¶ 22 On July 12, 2010, the plaintiff went to the Kling Clinic, an outpatient facility associated with Mount Sinai Hospital. He complained of severe leg pain and itching on the lower portion of his right leg. Dr. Clark sent the plaintiff to the Mount Sinai emergency room with instructions that he be seen by the surgical unit. On July 13, 2010, the MRA could not be completed due to the instability of the plaintiff's medical condition. By July 14, 2010, the records from Mercy Hospital had been received indicating that the plaintiff's heart condition could tolerate the use of

dye, which allowed Dr. Clark to perform an interoperative angiogram, rather than an MRA. Based on her findings, the doctor concluded that it was no longer feasible or safe to proceed with the bypass graft. Dr. Clark discussed the results of the interoperative angiogram with the plaintiff. The plaintiff then consented to the amputation of his right leg below the knee, which was performed on July 15, 2010. Following the surgery, the plaintiff was discharged to the Schwab Rehabilitation Hospital.

¶ 23

II. Circuit Court Proceedings

¶ 24 On May 7, 2012, the plaintiff filed his original complaint alleging that the amputation of a portion of his right leg was caused by medical malpractice. On July 16, 2012, the plaintiff filed an amended complaint naming additional defendants. On February 25, 2013, the plaintiff filed his second amended complaint.

¶ 25 Thereafter, the parties engaged in extensive discovery. All of the defendants filed motions for summary judgment. Trial was set for July 21, 2016.

¶ 26

A. Denial of the Continuance of the Trial Date

¶ 27 On July 21, 2016, Circuit Court Judge James P. Flannery, the assignment judge, was informed that counsel for one of the defendants was engaged in another trial and ordered the trial to be continued day to day. When it appeared that counsel would be available on July 29, 2016, Judge Flannery rescheduled the trial for that date. The plaintiff's oral motion for a continuance due to the unavailability of his expert witnesses was denied.

¶ 28 On July 29, 2016, plaintiff's counsel presented a written motion to continue the trial. In his affidavit, counsel requested a trial date in October or December 2016, when his experts

would again be available. Judge Flannery denied the motion and assigned the case to Circuit Court Judge Cassandra Lewis for trial on July 29, 2016.

¶ 29 B. Substitution of Judge

¶ 30 On July 29, 2016, Judge Lewis scheduled a meeting with the parties at 2 p.m. that day. Prior to the meeting, Dr. Litak and Rush, and Dr. Ertle filed separate motions for substitution of judge as a matter of right. 735 ILCS 5/2-1001(a)(2) (West 2016). The case was then assigned to Circuit Court Judge Lorna E. Propes.

¶ 31 On August 1, 2016, Judge Propes ordered the case returned to Judge Lewis to hear the plaintiff's motion to vacate the orders granting the substitution of judge and his request for sanctions. Judge Lewis granted the motion to vacate the substitution of judge orders but denied the request for sanctions. Counsel for Dr. Litak and Rush renewed their motion for substitution of judge by right. Plaintiff's counsel opposed the motion arguing that *Batson v. Kentucky*, 476 U.S. 79 (1986) required a race-neutral reason for a substitution of judge. Judge Lewis granted the substitution of judge by right. The case was then returned to Judge Propes for trial.

¶ 32 The plaintiff's counsel then renewed his motion for a continuance of the trial. Counsel explained that his experts were not available at this time to testify. He acknowledged that his prior requests for continuance had been denied by Judge Flannery. Judge Propes denied the motion to continue the trial date.

¶ 33 C. Summary Judgment

¶ 34 Following the denial of continuance of the trial date, the defendants requested that Judge Propes rule on the pending motions for summary judgment. On August 2, 2016, Judge Propes held a hearing on the defendants' motions for summary judgment.

¶ 35 On August 3, 2016, Judge Propes granted summary judgment to all the defendants on the issue of proximate cause. The plaintiff appeals from the August 3, 2016, order.

¶ 36 ANALYSIS

¶ 37 The plaintiff contends that whether the amputation of his right leg was the result of the defendants' failure to refer the plaintiff to a vascular surgeon presented a question of fact and precluded the grant of summary judgment to the defendants.

¶ 38 I. Standard of Review

¶ 39 We review the grant of summary judgment *de novo*. *Midwest Trust Services, Inc. v. Catholic Partners Services*, 392 Ill. App. 3d 204, 209 (2009). "Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits, when viewed in the light most favorable to the nonmovant, reveal there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Id.* at 209 (citing 735 ILCS 5/2-1005(c) (West 2000)). While the plaintiff is not required to prove his case at the summary judgment phase, he must present sufficient evidence to create a genuine issue of material fact. *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 292 (2008).

¶ 40 II. Discussion

¶ 41 In granting summary judgment to the defendants, Judge Propes determined that the failure of the defendants to refer the plaintiff to a vascular surgeon was not a proximate cause of the subsequent amputation of his right leg because at the time the plaintiff was seen by Dr. Clark, a vascular surgeon, his right leg was salvageable.

¶ 42 Dr. Clark had first seen the plaintiff on June 26, 2010. The doppler imaging test performed on June 28, 2010, indicated that the right leg was viable. However, the attempts to

secure additional necessary information via the MRA were unsuccessful due to the plaintiff's failure to cooperate and his anxiety about the procedure. According to the plaintiff's own expert, Dr. D. Preston Flanigan, the plaintiff's right leg was still salvageable as of July 3, 2010. However, on July 3, 2010, against medical advice, the plaintiff checked himself out of the hospital.

¶ 43 Dr. Flanigan, board-certified in vascular surgery, was the plaintiff's expert witness on the standard of care and causation. In his answers to Rule 213(f)(3) (Ill. S. Ct. Rule 213(f)(3) (eff. Jan. 1, 2007)), Dr. Flanigan stated that had the defendants referred the plaintiff to a vascular surgeon who presumably would have proceeded within the standard of care, the plaintiff's leg would have been saved. He stated further that the sooner the referral was made after the wound first appeared on March 3, 2010, the higher the likelihood of success would have been, but even by July 3, 2010, success was more likely than not.

¶ 44 In his deposition, Dr. Flanigan was questioned by Dr. Fisher's counsel as follows:

“Q. Why is that your opinion, to a reasonable degree of medical certainty, that even as late as July 3rd, 2010, it was more likely true than not true that Mr. Lord's leg could have been salvaged?

A. There are a couple of things you look at. One is the degree of tissue loss that's already occurred, and from what I could tell from the record, he had not reached the point that he would need an amputation just based on the amount of tissue he had lost at that point in time. The second thing is whether revascularization is actually possible. And my analysis of the data that was collected prior to that time, and as of that time, was that he

could have had a successful bypass, there would have been a target vessel to go to, and he had a good vein, as it turns out.”

Dr. Flanigan further opined that if the plaintiff followed Dr. Benitez’s advice on June 1, 2010, to see a vascular surgeon within a week or so of that date, his right leg would have been salvaged because, “it’s before July 3rd.”

¶ 45 In order to recover for medical negligence, a plaintiff must establish the breach of a duty, which is the accepted medical standard of care in the community. *Rohe v. Shivde*, 203 Ill. App. 3d 181, 192 (1990). “[T]he well-settled general rule is that a plaintiff in a malpractice case must present expert testimony to establish all of the following: (1) the applicable standard of care against which defendant’s actions may be measured; (2) defendant’s deviation from the standard of care; and (3) that the defendant’s deviation from the standard proximately caused the plaintiff’s injury.” *Id.* at 192-93. “ ‘The failure of a nonmovant in a medical malpractice case to bring forth experts, *who will raise the necessary inferences* sufficient to defeat a motion for summary judgment, is fatal and will result in the entry of summary judgment to the movant.’ (Emphasis added.)” *Id.* at 197 (quoting *Diggs v. Suburban Medical Center*, 191 Ill. App. 3d 828, 833-34 (1989)).

¶ 46 In *Rohe*, summary judgment for the defendant-doctor was affirmed where the plaintiffs failed to provide expert testimony supporting the allegations that the defendant breached the standard of care or that the doctor’s conduct caused the plaintiffs’ son’s injuries or increased his risk of injury. *Rohe*, 203 Ill. App. 3d at 196. In the present case, Dr. Flanigan’s expert opinion provided support for the allegation that the defendants violated the standard of care, but his opinion did not allow even the inference that the defendants’ breach of the standard of care was a

proximate cause of the amputation of the plaintiff's right leg. Dr. Flanigan opined that as of July 3, 2010, bypass surgery would more likely than not have been successful, and the plaintiff would not have suffered the amputation of his right leg.

¶ 47 The plaintiff correctly notes that deviations from the standard of care and whether they were a proximate cause the plaintiff's injury are normally jury questions. *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967, 971 (1997). Nonetheless, at the summary judgment stage, the plaintiff must present affirmative evidence that the defendant's negligence was arguably a proximate cause of the plaintiff's injuries. *Wiedenbeck*, 385 Ill. App. 3d at 292. In the absence of such affirmative evidence, summary judgment is proper as a matter of law. *Wiedenbeck*, 385 Ill. App. 3d at 292-93. Proximate cause must be established by expert testimony to a reasonable degree of medical certainty, and the causal connection between treatment, or a delay and treatment, and the claimed injury “ ‘[must not be] contingent, speculative, or merely possible.’ ” *Wiedenbeck*, 385 Ill. App. 3d at 293 (quoting *Aguilera*, 293 Ill. App. 3d at 976).

¶ 48 The plaintiff argues that he was not required to not prove that a better result would have occurred absent the malpractice. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 117-18 (1997). However, citing with approval the proximate cause analysis in *Pumala v. Sipos*, 163 Ill. App. 3d 1093, 1098 (1987), the supreme court in *Holton* stated that “a plaintiff, to establish proximate cause, must show with a reasonable degree of medical certainty that the negligent delay in diagnosis or treatment lessened the effectiveness of medical services rendered to the plaintiff.” (Emphasis omitted.) *Holton*, 176 Ill. 2d at 118; see *Aguilera*, 293 Ill. App. 3d at 974 (noting that the court in *Holton* cited with approval the proximate cause analysis in *Pumala*).

¶ 49 The plaintiff maintains that there was circumstantial evidence that had any of the defendants referred him to a vascular surgeon he would have gone and received the necessary treatment at an earlier time. The plaintiff argues that a jury might have believed that had the PVD lesion been properly evaluated and treated at an earlier date his right leg would have been saved.

¶ 50 Dr. Flanigan provided expert testimony that the defendants violated the standard of care. However, Dr. Flanigan did not opine that the defendants' failure to refer the plaintiff to a vascular surgeon at the various times they saw him "lessened the effectiveness of medical services rendered to the plaintiff." *Holton*, 176 Ill. 2d at 118. Moreover, Dr. Flanigan's expert opinion provided no evidence that the delay contributed to the amputation of the plaintiff's right leg, and provided affirmative evidence supporting summary judgment for the defendants by stating that until July 3, 2010, it was more likely than not that the bypass surgery would have been successful. By June 26, 2010, the plaintiff was under the care of Dr. Clark, a vascular surgeon, and preparations were being made for the plaintiff to undergo bypass surgery. As the plaintiff acknowledges, on July 3, 2010, against medical advice, he chose to discharge himself from Mount Sinai Hospital.

¶ 51 The plaintiff's reliance on *Cummings v. Jha*, 394 Ill. App. 3d 439 (2009), is misplaced. In that case, the defendant-doctor maintained that evidence of proximate cause between his failure to diagnose a bile leak in the patient and the injury suffered by the patient was lacking. He argued that even if he had made the appropriate diagnosis, he still would not have been able to repair or alleviate the leak. In affirming the judgment for the plaintiff, the reviewing court found there was expert testimony that had the defendant diagnosed the bile leak in the patient prior to the rupture of the fluid buildup, the patient could have been treated by a nonsurgical draining on

an outpatient basis rather than hospitalization and the resulting collateral losses. *Id.* at 454-55. In the present case, the plaintiff not only failed to present expert testimony that the defendants' delay in referring the plaintiff to a vascular surgeon was a proximate cause of the amputation of the plaintiff's right leg, but his expert witness provided affirmative evidence that the plaintiff was seen by a vascular surgeon at a time when the plaintiff could have undergone successful bypass surgery and not suffered the amputation of his right leg.

¶ 52 No genuine issue of material fact exists to preclude summary judgment for the defendants in this case, and the defendants are entitled to a judgment as a matter of law. Since this case was resolved at the summary judgment stage, we need not determine whether denial of the plaintiff's motion to continue the trial date was error. Because the grant of summary judgment is reviewed *de novo*, we need not determine whether Judge Lewis erred in granting the motion for change of judge by right.

¶ 53 **CONCLUSION**

¶ 54 The judgment of the circuit court is affirmed.

¶ 55 Affirmed.