

NOTICE

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2015 IL App (4th) 140669-U

NO. 4-14-0669

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 8, 2015

Carla Bender

4th District Appellate

Court, IL

SANDRA THORNSBROUGH and BRAD)	Appeal from
THORNSBROUGH, Individually and as Natural)	Circuit Court of
Guardians and Next Friends of PAIGE)	Champaign County
THORNSBROUGH, a Minor,)	No. 08L46
Plaintiffs-Appellants,)	
v.)	
CARLE CLINIC ASSOCIATION, P.C., THE CARLE)	
FOUNDATION HOSPITAL, KIM GELKE, and)	Honorable
WILLIAM STRATTON,)	Michael Q. Jones,
Defendants-Appellees.)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court found the trial court did not err in granting defendants' motion for summary judgment.

¶ 2 In August 2008, plaintiffs, Sandra Thornsborough and Brad Thornsborough, individually and as natural guardians and next friends of Paige Thornsborough, filed an amended complaint against defendants, Carle Clinic Association, P.C. (Carle Clinic), the Carle Foundation Hospital (Carle Hospital), Kim Gelke, and William Stratton, alleging Paige suffered injuries as a result of defendants' negligence. In April 2014, defendants filed a motion for summary judgment. In June 2014, the trial court granted defendants' motion.

¶ 3 On appeal, plaintiffs argue the trial court erred in granting summary judgment in favor of defendants. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In February 2008, plaintiffs filed a two-count complaint against defendants, Carle Clinic, Carle Hospital, Dr. Gelke, Dr. Stratton, Dr. Rebecca Wagner, and Dr. Melinda Dabrowski. The complaint alleged Paige was born on February 25, 2000, and defendants negligently treated her and caused her injuries. In June 2008, defendants filed a motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-615, 2-619 (West 2008)). In July 2008, the trial court granted the motion to dismiss, dismissed Dr. Wagner and Dr. Dabrowski with prejudice, and dismissed the remaining defendants without prejudice.

¶ 6 In August 2008, plaintiffs filed an amended complaint against defendants. The amended complaint alleged Paige was under the care and treatment of defendants from February 25 to February 29, 2000. On February 25, 2000, an intubation was performed, and plaintiffs alleged defendants were negligent in (1) improperly placing a nasogastric (NG) tube such that Paige's esophagus was perforated; (2) failing to adequately monitor the NG tube and, as a result, failing to discover the improper placement of the tube; (3) failing to diagnose the perforation of Paige's esophagus; (4) failing to develop a differential diagnosis that would have included perforation of the esophagus by the NG tube and treating Paige for the nonexistent condition of esophageal atresia; and (5) failing to correct the contrast medium when performing tests upon Paige, including the improper administration of barium through Paige's NG tube.

¶ 7 Plaintiffs alleged defendants' negligence was a proximate cause of Paige's injuries and claimed plaintiffs will be obligated to pay Paige's medical expenses until she reaches the age of majority. Plaintiffs attached to the amended complaint a written report by Dr. Jean Steichen pursuant to section 2-622(a)(2) of the Procedure Code (735 ILCS 5/2-622(a)(2) (West 2008)).

Therein, Dr. Steichen indicated he was a neonatologist and board certified in neonatology and perinatal medicine. Based on his review of the medical records, Dr. Steichen opined the doctors at Carle Hospital, Dr. Stratton, Dr. Gelke, as well as the radiology staff, violated prevailing standards of care by improperly placing and monitoring the NG tube, failing to diagnose a severe iatrogenic yet rare complication, failing to develop a correct differential diagnosis, and choosing the wrong contrast medium to make the diagnosis.

¶ 8 In September 2008, defendants filed an answer to the amended complaint. Depositions of treating physicians, plaintiffs' expert, and others were taken and the following facts were adduced. Paige and her twin sister, Peyton, were born prematurely, at approximately 28 weeks' gestation, on February 25, 2000, at Carle Hospital in Urbana. Paige was a patient in the neonatal intensive care unit (NICU) from February 25 until she was transferred to St. Francis Medical Center in Peoria on February 29, 2000. While at Carle Hospital, Paige had an NG or an orogastric (OG) tube inserted in the delivery room and her stomach was aspirated. The tube was then removed. She was transferred to the NICU and again intubated. Dr. Gelke, board certified in neonatal/perinatal medicine, testified in his discovery deposition that Paige had "some abdominal distension" on February 28. A nurse noted the OG tube was pulled after an X-ray showed "high placement." Another OG tube was inserted but "met resistance at 11 to 12 centimeters."

¶ 9 On February 29, 2000, Dr. Gelke looked at X-rays and noted the tube was not in Paige's stomach. After looking at all of Paige's prior X-ray films, Dr. Gelke became suspicious that she might have "an esophageal atresia." An "atresia" is when "the esophagus does not fully form and ends in a blind pouch."

¶ 10 Dr. Gelke performed an imaging study using contrast that was described by a

radiologist as "barium." Gelke testified he used "Gastrografin," a water-soluble contrast medium. He had no idea why the radiologist listed barium in his report, stating the radiologist was not present when the procedure was done and noting barium is rarely used in the NICU. He also stated barium would remain in Paige's system longer than Gastrografin and would appear in later X-rays since Gastrografin "dilutes out pretty quickly." Gelke stated an X-ray confirmed "esophageal atresia with lower tracheoesophageal fistula" and arranged for Paige's transfer to Peoria for surgery.

¶ 11 Dr. Kamlesh Macwan, associate director of the NICU at OSF Children's Hospital in Peoria, testified Paige arrived alert, "in no distress, but on a ventilator." Dr. Macwan reviewed the X-rays and found them consistent with tracheoesophageal fistula and esophageal atresia. Macwan then consulted with Dr. Richard Pearl, a pediatric surgeon.

¶ 12 Dr. Pearl testified his review of the "esophagram suggested that the proximal defect was much wider and larger than [he] would expect to see on a standard routine esophageal atresia." Pearl decided to do a bronchoscopy, which would allow him to see the connection of the esophagus to the trachea. Pearl stated this was not necessarily the standard of care but it was his standard of care. Pearl's use of the scope revealed a "normal trachea" and not a fistula. Pearl then concluded the NG tube "had been put in and had traumatically injured the esophagus." As to his diagnosis of esophageal perforation, Dr. Pearl stated this is "not an uncommon event" in "babies this small." The treatment for esophageal perforation is to remove the tube and let the perforation heal on its own. Paige underwent surgery to place a gastric tube to help her esophagus heal.

¶ 13 Sandra Thornsborough, now Sandra Snyder after her remarriage, testified, "Paige has a lot of trouble with her reading" but "Peyton's a really good reader." Brad Thornsborough

testified, "Peyton seems to be a bit more intelligent" and is "a little better socially" and "Paige is not as athletic."

¶ 14 Plaintiffs' expert, Dr. Steichen, testified he reviewed Paige's medical records and various depositions. He opined Dr. Stratton was negligent for not detecting the tube was malpositioned and not having it repositioned. As to Dr. Gelke, Steichen stated he "did not diagnose what was an obvious clinical diagnosis." Steichen also took issue with Gelke's alleged use of barium and believed "there was contrast in the mediastinum."

¶ 15 Steichen stated an esophageal perforation is "known to happen" when placing an OG tube. When an esophageal perforation from a tube placement occurs, Steichen stated the treatment is to "stop feedings, provide some nutrition to the baby, whichever best for this baby was total parental nutrition, put the baby on antibiotics and then evaluate when this thing is healed." Steichen opined to a reasonable degree of medical certainty "that the morbidities associated with all the treatment [Paige] needed had a long-term effect on her."

¶ 16 In April 2014, defendants filed a motion for summary judgment pursuant to section 2-1005(b) of the Procedure Code (735 ILCS 5/2-1005(b) (West 2012)). Defendants claimed plaintiffs did not have any evidence to support the first allegation that the NG tube was improperly placed, constituting a deviation from the standard of care. While defendants acknowledged plaintiffs had evidence from their expert to support the remaining allegations of breaches in the standard of care, they did not have any evidence that these alleged breaches proximately caused injury to Paige.

¶ 17 In May 2014, plaintiffs filed a memorandum in opposition to defendants' motion for summary judgment. In June 2014, defendants filed their reply. That same month, the trial court held a hearing on the motion for summary judgment.

¶ 18 The trial court found plaintiffs proffered evidence of the standard of care and possible breaches in regard to the failure to adequately monitor and discover the improper placement of the tube, the failure to diagnose the perforation of the esophagus, the failure to develop a differential diagnosis, and the failure to use the correct contrast medium when performing tests. While noting evidence indicated that if barium gets into the lungs, it can cause lung damage, fluid accumulation, and scarring, the court found no evidence indicating damages proximately caused by that alleged breach of the standard of care. On plaintiffs' claim of Paige's cognitive delay, the court stated that "to say this evidence is speculative is almost inadequate." The court also stated, in part, as follows:

"So I have to look at then are there damages proximately caused beyond the difference in cost just by the passage of time? Has this inured to the child's detriment? Has she been hurt in any way, hindered, adversely affected? And it is my conclusion after careful scrutiny after all of the evidence that there is none beyond mere speculation and possibilities that some different result more favorable to the child could have ensued by a sooner recognition that the child's condition was that of a perforation of the esophagus."

The court granted summary judgment in favor of defendants. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Standard of Review

¶ 21 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law.' "

Ioerger v. Halverson Construction Co., 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). "Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from doubt." *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291, 730 N.E.2d 1119, 1127 (2000). However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328, 722 N.E.2d 227, 237 (1999).

¶ 22 On appeal, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opposing party. *Illinois State Bar Ass'n Mutual Insurance Co. v. Mondo*, 392 Ill. App. 3d 1032, 1036, 911 N.E.2d 1144, 1148 (2009). On appeal from a trial court's decision to grant a motion for summary judgment, our review is *de novo*. *Bowles v. Owens-Illinois, Inc.*, 2013 IL App (4th) 121072, ¶ 19, 996 N.E.2d 1267.

¶ 23 B. Medical Malpractice

¶ 24 In a medical-malpractice case, the plaintiff must show: "(1) the standard of care in the medical community by which the physician's treatment was measured; (2) that the physician deviated from the standard of care; and (3) that a resulting injury was proximately caused by the deviation from the standard of care." *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 843, 931 N.E.2d 835, 847 (2010). "Unless the physician's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant physician's deviation from that standard." *Purtill v. Hess*, 111 Ill. 2d 229, 242, 489 N.E.2d 867, 872 (1986).

¶ 25 "Although the issue of proximate cause is generally a question of fact, at the summary judgment stage the plaintiff must present some affirmative evidence that it is 'more probably true than not true' that the defendant's negligence was a proximate cause of the plaintiff's injuries." *Johnson*, 402 Ill. App. 3d at 843, 931 N.E.2d at 847; see also *Raleigh v. Alcon Laboratories, Inc.*, 403 Ill. App. 3d 863, 871, 934 N.E.2d 530, 537 (2010) (stating "summary judgment is proper as a matter of law when the plaintiff fails to present affirmative evidence that the defendant's negligence was arguably a proximate cause of the plaintiff's injuries").

¶ 26 C. Proximate Cause

¶ 27 1. *Cognitive Impairment*

¶ 28 Plaintiffs argue the trial court erred in granting summary judgment on the issue of proximate cause, claiming their expert opined to a reasonable degree of medical certainty that the morbidities associated with all of Paige's treatment caused cognitive impairment. We disagree.

¶ 29 In their brief, plaintiffs rely on Dr. Steichen's claim that Paige had "poorer cognitive development than her sister" and that all of Paige's treatment had a long-term effect on her cognitive outcome. However, the deposition testimony offers no proof of cognitive impairment but relies on old medical records and Paige's parents' anecdotal comparison of her and her sister.

¶ 30 Steichen did not articulate an opinion to a reasonable degree of medical certainty that Paige has a specific cognitive deficit related to defendants' negligence. See *Krivanec v. Abramowitz*, 366 Ill. App. 3d 350, 356-57, 851 N.E.2d 849, 854 (2006) (stating proximate cause "must be established by expert testimony to a reasonable degree of medical certainty").

Steichen's opinions were based on a review of Paige's medical records from the initial care she

received after birth through the time of her discharge. He had not reviewed her current medical records. Moreover, when asked whether he had any opinions as to what, if any, of Paige's current problems were related to the care she received as an infant, Steichen responded, "of course not because I don't have the information." A review of the evidence reveals any claim that Paige suffered cognitive defects based on defendants' negligence is wholly speculative. See *Ayala v. Murad*, 367 Ill. App. 3d 591, 601, 855 N.E.2d 261, 270 (2006) (stating "the causal connection must not be contingent, speculative, or merely possible").

¶ 31 Plaintiffs also rely on their claim that Paige suffers socially and intellectually, struggles in school compared to her twin sister, and has trouble reading compared to Peyton. "However, a lay witness may not offer testimony pertaining to a specific medical diagnosis unless he or she is properly qualified as an expert to give such testimony." *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 48, 996 N.E.2d 711. Again, any claim that Paige suffers cognitive impairment based on defendants' negligence is not based in fact but relies solely on speculation and conjecture.

¶ 32 *2. Alleged Leakage of Barium Into Paige's Mediastinum*

¶ 33 Plaintiffs argue the trial court erred in granting summary judgment on the issue of proximate cause, claiming X-rays of Paige's chest showed haziness after defendants allegedly leaked barium into her mediastinum. We disagree.

¶ 34 Plaintiffs claim they have satisfied their burden on the issue of whether Gelke's alleged negligence in using barium as a contrast material proximately caused injury to Paige. They point to Gelke's testimony that if barium gets into the lungs, it can cause lung damage, fluid accumulation, and scarring. Plaintiffs also point out X-rays of Paige's chest showed haziness and Steichen testified to a reasonable degree of medical certainty that barium leaked into Paige's

mediastinum.

¶ 35 While there is a factual dispute as to whether Gelke used barium or Gastrografin and whether one of the substances leaked into Paige's mediastinum, plaintiffs have failed to set forth any evidence that Paige suffered an injury as a result. Plaintiffs state putting a contraindicated substance through a hole in a premature infant's esophagus such that it leaks into her chest cavity "is never a good thing, especially a substance that causes inflammation and scarring." While true, plaintiffs have not proffered any evidence, expert or lay, to show barium leakage caused injury to Paige. Plaintiffs' claim, as above, relies on nothing more than speculation.

¶ 36 *3. Failure To Diagnose Paige's Condition*

¶ 37 Plaintiffs argue the trial court erred in granting summary judgment on the issue of proximate cause, claiming their expert opined to a reasonable degree of medical certainty that Paige was damaged by defendants' failure to diagnose her condition. We disagree.

¶ 38 "Evidence that shows to a reasonable degree of certainty that negligent delay in diagnosis or treatment lessened the effectiveness of treatment is sufficient to establish proximate cause." *Woolums v. Huss*, 323 Ill. App. 3d 628, 637, 752 N.E.2d 1219, 1227 (2001). However, "[t]he causal connection between treatment, or a delay and treatment, and the claimed injury '[must not be] contingent, speculative, or merely possible.' " *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 293, 895 N.E.2d 1067, 1070 (2008) (quoting *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967, 976, 691 N.E.2d 1, 7 (1997)).

¶ 39 In the case *sub judice*, Paige suffered a perforated esophagus, a recognized complication that can occur even in the absence of negligence. The evidence indicates that even had the correct diagnosis been made earlier, Paige would have been transferred to Peoria.

Moreover, the treatment for a perforated esophagus is to remove the tube, allow the esophagus to heal, and provide nutrition to the baby via a gastric tube inserted into the stomach. Paige received the treatment necessary for such a complication, and no evidence indicates Paige's esophagus failed to heal correctly or that surgery beyond the gastric tube was required. Thus, the delay in diagnosis did not lessen the effectiveness of Paige's treatment.

¶ 40 Plaintiffs also argue the trial court failed to consider the pain and suffering Paige endured from having her esophagus perforated and contend the court should have "concluded that her pain and suffering experienced during that time included compensable damage that would not have happened but for Defendants' negligent treatment." However, plaintiffs did not set forth a claim for damages for pain and suffering in the amended complaint or argue that claim at the hearing on the motion for summary judgment. "An appellant who fails to raise an issue in the circuit court forfeits that issue on appeal." *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 41, 974 N.E.2d 914. By failing to raise the issue of pain and suffering in the trial court, plaintiffs have forfeited review of this issue.

¶ 41 III. CONCLUSION

¶ 42 In closing, we commend the trial court for its thorough and reasoned ruling articulated at the hearing on the motion for summary judgment. For the reasons stated, we affirm the trial court's judgment.

¶ 43 Affirmed.