2016 IL App (4th) 150503-U

NO. 4-15-0503

FILED
June 10, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FIRST FINANCIAL BANK, Successor in Interest to PONTIAC NATIONAL BANK, Administrator of the Estate of CHRISTIAN RIVERA, Deceased, Plaintiff-Appellant, v. OSF HEALTHCARE SYSTEM, d/b/a OSF MEDICAL GROUP and d/b/a ST. JOSEPH PROMPTCARE, Defendant-Appellee.	)))))))	Appeal from Circuit Court of McLean County No. 05L58 Honorable Paul G. Lawrence, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court neither violated the appellate court's mandate nor committed error by striking the proximate-cause testimony of plaintiff's expert on institutional negligence and granting summary judgment in defendant's favor on plaintiff's institutional-negligence claim.

¶ 2 Plaintiff, First Financial Bank, successor in interest to Pontiac National Bank, administrator of the estate of Christian Rivera, deceased, appeals the McLean County circuit court's May 18, 2015, judgment, barring the testimony of plaintiff's expert witness on institutional negligence, Dr. Robert Chabon, and granting judgment in defendant's favor on the institutional-negligence claim. On appeal, plaintiff contends the circuit court erred because (1) the semantics of medical-causation testimony is an issue of weight and not admissibility and (2) the court's judgment did not conform to the mandate of the appellate court in a prior appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2005, plaintiff filed a wrongful death and survival action, against defendant, OSF Healthcare System (OSF), doing business as both OSF Medical Group (Medical Group) and St. Joseph PromptCare (PromptCare), and numerous other defendants, who are no longer parties to the case. Rivera, the deceased, was three years old when he collapsed from cardiopulmonary arrest, which was caused by a massive mediastinal tumor wrapped around his airway. The cardiopulmonary arrest caused a severe brain injury, and Rivera passed away in August 2003. During the six-month period preceding Rivera's cardiopulmonary arrest, he had been evaluated and treated for respiratory symptoms at PromptCare, an urgent-care clinic, and Medical Group, a primary-care center, both of which were owned by OSF at the time. In the original complaint, plaintiff alleged OSF was vicariously liable for the acts of its agents or employees.

¶ 5 In July 2010, plaintiff filed a fifth amended complaint, adding a claim of institutional negligence. In December 2010, plaintiff amended the institutional-negligence claim (count V), asserting defendant committed several allegedly negligent acts. The negligent act alleged in paragraph 9(c) of count V of the December 2010 complaint was OSF had a policy of placing limitations on PromptCare physicians from providing longitudinal care, which unreasonably interfered with an employed physician's exercise and execution of his or her professional judgment in a manner that adversely affected the employed physician's ability to provide quality care to patients in contravention of section 10.8 of the Hospital Licensing Act (Act) (210 ILCS 85/10.8 (West 2010)).

¶ 6 On the day the jury trial was set to begin, defendant filed a motion for summary judgment on the institutional-negligence claim. The circuit court granted summary judgment in

favor of defendant on only plaintiff's claim of institutional negligence as alleged in paragraph 9(c). At trial, the jury found in defendant's favor on the remaining claims. Plaintiff filed a posttrial motion, raising numerous claims of error at trial and contending the court erred by granting summary judgment on paragraph 9(c). The court denied plaintiff's posttrial motion, and plaintiff appealed.

¶ 7 On appeal, plaintiff argued the circuit court (1) issued erroneous rulings regarding the scope of cross-examination and the rehabilitation of plaintiff's expert witness, Dr. Finley Brown; (2) erred in hearing and granting an untimely motion for a summary judgment, and (c) erred in allowing a defense expert witness to offer opinions that were not disclosed more than 60 days before the trial. *Pontiac National Bank v. Vales*, 2013 IL App (4th) 111088, ¶ 1, 993 N.E.2d 463. The appellate court found the circuit court's rulings regarding the cross-examination and the rehabilitation of Dr. Brown were erroneous and a new trial was appropriate. *Vales*, 2013 IL App (4th) 111088, ¶ 21, 993 N.E.2d 463. The appellate court also found the use of a publication to cross-examine Dr. Brown about his earnings from his consulting work should not be permitted on retrial. *Vales*, 2013 IL App (4th) 111088, ¶ 25, 993 N.E.2d 463. As to the summary judgment, the court found the summary judgment motion should have been denied in its entirety because it was brought on the eve of trial without adequate notice to plaintiff. *Vales*, 2013 IL App (4th) 111088, ¶ 28, 993 N.E.2d 463. Additionally, the appellate court addressed paragraph 9(c) and found the following:

> "If the jury accepts the plaintiff's position, it could reasonably find or infer that OSF's policy restricting PromptCare physicians from providing longitudinal care unreasonably interfered with PromptCare physicians' exercise of independent clinical judgment

> in diagnosing and treating patients, in violation of section 10.8 of the Act, where that policy, taken together with OSF's practice of authorizing OSF Medical Group personnel to reroute its primary care patients who did not have appointments to a PromptCare facility, effectively prevented PromptCare physicians from accessing the primary care records of and providing continuity of care to returning walk-in patients, such as Christian Rivera. Based on the record, the entry of a summary judgment on allegation (c) was improper and is hereby set aside." *Vales*, 2013 IL App (4th) 111088, ¶ 31, 993 N.E.2d 463.

Moreover, as to the last issue regarding the timeliness of the disclosure of expert opinions, the appellate court noted that, on remand, the circuit court and the parties would "have an opportunity to set specific dates for the completion of any additional discovery, the disclosure of opinions of witnesses, and the filing of dispositive motions." *Vales*, 2013 IL App (4th) 111088, ¶ 32, 993 N.E.2d 463.

¶ 8 On remand, plaintiff filed an amended complaint in February 2014. Then, in May 2014, plaintiff filed a second amended complaint. The second amended complaint was only against OSF and asserted vicarious liability and institutional negligence claims. The allegations of institutional negligence were defendant had the following undisclosed policies: (1) referring primary care patients without appointments to PromptCare, but not giving PromptCare access to the Medical Group records; (2) placing limitations on PromptCare physicians from providing longitudinal care, which is medical care over a period of time, thereby limiting the patients' history and/or patients' charting to said physicians and physician assistants; and (3) placing

limitations on PromptCare physicians from providing longitudinal care, thereby unreasonably interfering with an employed physician's exercise and execution of his or her professional judgment in a manner that adversely affected the employed physician's ability to provide quality care to patients in contravention of section 10.8 of the Act. Additionally, plaintiff abandoned Dr. Brown as its expert witness and retained Dr. Chabon.

¶ 9 In December 2014, defendant filed a motion for summary judgment as to the first allegation of institutional negligence, which concerned the referral of Medical Group patients to PromptCare. In February 2015, the circuit court denied the motion, noting it was a close issue and referring to Dr. Chabon's written disclosures in addition to his discovery deposition. On May 1, 2015, defendant filed a motion to bar, *inter alia*, the trial testimony of Dr. Chabon and Dr. Claudio Sandoval, asserting they were not qualified to testify to the matters in this case. At a May 5, 2015, hearing, the court denied defendant's motion. At the same hearing, defendant made an oral motion to bar Dr. Chabon's testimony in his April 27, 2015, evidence deposition about proximate causation regarding the institutional-negligence claim. After hearing some arguments by the parties, the court stated it would take the matter up the next day.

¶ 10 On May 6, 2015, the parties again argued the proximate-cause issue. The court agreed with defendant Dr. Chabon's testimony regarding proximate cause was uncertain and vague and granted defendant's motion to bar the testimony. After barring the testimony, plaintiff did not indicate any other use for Dr. Chabon's testimony or provide any other reason why summary judgment should not be entered on the institutional-negligence claim. Instead, plaintiff asked for findings under Illinois Supreme Court Rules 304(a) (eff. Feb. 26, 2010) and 308 (eff. Jan. 1, 2015). On May 15, 2015, the court held a hearing on the language of a written order memorializing the court's findings on May 6, 2015. A transcript of that hearing is not included

in the record on appeal. On May 18, 2015, the court entered its written order, barring Dr. Chabon's testimony and granting judgment in favor of defendant on the institutional-negligence claim. The May 18, 2015, order included a Rule 304(a) finding.

¶ 11 On June 12, 2015, plaintiff filed a timely notice of appeal in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). Accordingly, we have jurisdiction of this appeal under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 12 II. ANALYSIS

¶ 13 A. Briefs

¶ 14 Defendant asserts plaintiff has forfeited review of its issues on appeal by failing to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). Plaintiff's brief does violate several provisions of Rule 341(h) as well as Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005), which addresses the requirements for the appendix to the brief. Moreover, the organization and style of plaintiff's brief makes it difficult at times to understand what plaintiff is actually arguing. Applying the doctrine of forfeiture to all of plaintiff's arguments on appeal is a drastic measure, and we decline to do so. However, if the violation of the supreme court rules significantly hampers our ability to review an issue, then we will apply forfeiture to that issue. See *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23, 962 N.E.2d 1071 (noting an issue may be forfeited for failure to cite relevant authority as required by Rule 341 and can cause a party to forfeit consideration of the issue); *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348, 846 N.E.2d 605, 613 (2006) (stating points not argued will be deemed forfeited).

¶ 15 Additionally, in its reply brief, plaintiff takes issue with defendant's statement of facts in its brief. We simply note this court will not consider any facts not supported by the record on appeal.

¶ 16 B. Prior Appellate Court Opinion

¶ 17 Citing the doctrine of the law of the case (*Kennedy v. First National Bank of Mattoon*, 259 Ill. App. 3d 560, 563, 631 N.E.2d 813, 815 (1994)), plaintiff asserts the circuit court could not ignore the mandate of the appellate court's opinion on remand. "The doctrine of the law of the case provides the rulings on points of law made by a court of review are binding in that case upon remand to the trial court and on subsequent appeals to that same reviewing court unless a higher court has changed the law." *Kennedy*, 259 Ill. App. 3d at 563, 631 N.E.2d at 815. Since the application of the law-of-the-case doctrine is a question of law, our standard of review is *de novo*. *In re Christopher K.*, 217 Ill. 2d 348, 363-64, 841 N.E.2d 945, 955 (2005).

¶ 18 The 2013 appellate court opinion set aside the entry of a summary judgment on allegation 9(c) of the institutional-negligence claim "[b]ased on the record." *Vales*, 2013 IL App (4th) 111088, ¶ 31, 993 N.E.2d 463. The opinion also provided that, "[o]n remand, the [circuit] court and the parties [would] have an opportunity to set specific dates for the completion of any additional discovery, the disclosure of opinions of witnesses, and the filing of dispositive motions." *Vales*, 2013 IL App (4th) 111088, ¶ 32, 993 N.E.2d 463. Thus, the prior appellate court opinion did not preclude another motion for summary judgment.

¶ 19 On remand, plaintiff filed two amended complaints. *Inter alia*, the parties took the evidence deposition of Dr. Chabon, plaintiff's new expert, on April 27, 2015. Thus, the record before the circuit court when it granted summary judgment in defendant's favor on the institutional-negligence claim was not the same as the one before the appellate court when it set aside the circuit court's prior grant of summary judgment on paragraph 9(c). Accordingly, the law-of-the-case doctrine did not prohibit the circuit court from granting summary judgment in favor of defendant on the institutional-negligence claim after it barred Dr. Chabon's proximate-

cause testimony.

¶ 20 C. Dr. Chabon's Testimony

¶ 21 Plaintiff also appears to challenge the circuit court's barring of Dr. Chabon's testimony. Specifically, it asserts the semantics of medical-causation testimony is an issue of weight and not admissibility. The court had found Dr. Chabon's opinion on proximate cause was insufficient because it was uncertain and vague and not made within a degree of reasonable medical certainty.

¶ 22 The decision of whether to admit expert testimony lies within the circuit court's sound discretion, and this court will not reverse that ruling absent an abuse of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 24, 787 N.E.2d 796, 809 (2003). "A circuit court abuses its discretion when its ruling 'is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23, 957 N.E.2d 413 (quoting *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001)). "An abuse of discretion standard is highly deferential to the circuit court." *Taylor*, 2011 IL App (1st) 093085, ¶ 23, 957 N.E.2d 413.

¶ 23 The elements of a negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 294, 730 N.E.2d 1119, 1129 (2000). Proximate cause consists of two separate requirements: cause in fact and legal cause. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395, 821 N.E.2d 1099, 1127 (2004); *LaSalle Bank, N.A. v. C/HCA Development Corp*., 384 Ill. App. 3d 806, 828, 893 N.E.2d 949, 970 (2008). Cause in fact exists " 'when there is a reasonable certainty that a defendant's acts caused the injury or damage.' " *City of Chicago*, 213 Ill. 2d at 395, 821 N.E.2d at 1127 (quoting *Lee v. Chicago*

Transit Authority, 152 Ill. 2d 432, 455, 605 N.E.2d 493, 502 (1992)). In deciding the aforementioned issue, courts first address "whether the injury would have occurred absent the defendant's conduct." *City of Chicago*, 213 Ill. 2d at 395, 821 N.E.2d at 1127. Additionally, when multiple factors may have combined to cause the injury, we must consider whether the "defendant's conduct was a material element and a substantial factor in bringing about the injury." *City of Chicago*, 213 Ill. 2d at 395, 821 N.E.2d at 1127. As to legal cause, we assess foreseeability and consider "whether the injury is of a type that a reasonable person would see as a likely result of his conduct." *City of Chicago*, 213 Ill. 2d at 395, 821 N.E.2d at 1127. While proximate causation generally presents a question of fact, a court may determine the lack of proximate cause as a matter of law "where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause." *City of Chicago*, 213 Ill. 2d at 395-96, 821 N.E.2d at 1127-28.

¶ 24 In this case, plaintiff chose to present Dr. Chabon as an expert on the issue of institutional negligence, including the proximate-cause element of that claim. Plaintiff notes a medical expert may testify concerning his or her opinions in terms of possibilities or probabilities. *Matuszak v. Cerniak*, 346 Ill. App. 3d 766, 772, 805 N.E.2d 681, 685 (2004). However, expert opinions "based upon the witness's guess, speculation, or conjecture as to what he believed might have happened are inadmissible." *Modelski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879, 886, 707 N.E.2d 239, 245 (1999). Thus, contrary to plaintiff's suggestion, an expert opinion may be inadmissible.

¶ 25 As to causation, Dr. Chabon gave the following testimony in his evidence deposition:

> "[PLAINTIFF'S ATTORNEY]: Was this Christian Rivera case a failure to connect the dots?

[DEFENDANT'S ATTORNEY]: Same objection.

[DR. CHABON]: I think it definitely was a failure of communication that contributed to the delay in diagnosis, absolutely.

[PLAINTIFF'S ATTORNEY]: Do you have an opinion as to whether or not these corporate policies that we've been discussing proximately cause or contributed to Christian Rivera's death?

[DEFEDNANT'S ATTORNEY]: Objection. Foundation. I'll leave it at that.

[DR. CHABON]: I think it's a bad idea to have barriers to communication in any situation that involves the care of the patient, and it's not just specifically a barrier, but it's an attitude of, you know, we don't share the records and we don't communicate well across the organization, and I think that's all contributory to bad medical care.

[PLAINTIFF'S ATTORNEY]: How did that affect the outcome in Christian Rivera's case?

[DEFENDANT'S ATTORNEY]: Foundation objection.

[DR. CHABON]: It's hard to be certain, but one would hope that, had there been better communication, better attitude and better sharing of records, that he could have been diagnosed earlier and treated earlier."

Dr. Chabon's testimony was not in terms of possibilities or probabilities. Dr. Chabon used the terms "hard to be certain" and "hope," which is akin to a guess and speculation. Accordingly, we find the circuit court did not abuse its discretion by barring Dr. Chabon's proximate-cause testimony.

¶ 26 D. Summary Judgment

¶ 27 Plaintiff also appears to challenge the circuit court's grant of summary judgment in defendant's favor on the institutional-negligence claim. Specifically, he contends (1) it is unnecessary to introduce expert testimony to sustain a claim of institutional negligence and (2) the judgment was not in accordance with the appellate court opinion. We have already addressed the latter issue. A grant of summary judgment is only appropriate when the pleadings, depositions, admissions, and affidavits demonstrate no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8-9 (2008). We review *de novo* the trial court's ruling on a motion for summary judgment. See *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 28 Regarding the need for expert testimony on institutional-negligence claims, we note plaintiff did not raise this issue in the circuit court. Plaintiff chose to present Dr. Chabon as an expert on the institutional-negligence claim, including testifying on the element of proximate cause. Generally, a party's failure to raise an issue in the circuit court results in forfeiture of that issue on appeal. *Fillmore v. Walker*, 2013 IL App (4th) 120533, ¶ 27, 991 N.E.2d 340. Moreover, the rule of invited error or acquiescence is another procedural default. *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004). Under that rule, a party cannot complain of error which that party induced the court to make or to which that party consented.

Swope, 213 Ill. 2d at 217, 821 N.E.2d at 287.

¶ 29 In this case, the circuit court barred Dr. Chabon's testimony regarding proximate cause on the institutional-negligence claim. Defendant's attorney then questioned whether the court was throwing out (1) all of Dr. Chabon's testimony and (2) the institutional-negligence claim. The court asked plaintiff's attorney if he was going to use Dr. Chabon's testimony for anything else. Plaintiff's attorney replied in the negative and asked for an interlocutory appeal. Plaintiff did not present any other materials showing proximate cause or request a continuance to present such materials. Presumably, since plaintiff did not point out any other evidence of proximate cause, the court granted summary judgment in defendant's favor on the institutional-negligence claim. Plaintiff had the opportunity to argue an expert was not needed for the institutional-negligence claim and/or to present other materials showing proximate cause, such as Dr. Sandoval's testimony, and did not do so. Moreover, even on appeal, plaintiff did not point to any other evidence of proximate cause until its reply brief. Thus, the issue may be forfeited for that reason too. See Ill. S Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (providing points not argued in an appellant's opening brief are forfeited and shall not be raised for the first time in the reply brief, in oral argument, or on petition for rehearing). Accordingly, we find plaintiff has forfeited its remaining arguments on why the circuit court erred by granting summary judgment in favor of defendant on the institutional-negligence claim.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the McLean County circuit court's judgment.

¶ 32 Affirmed.