

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).

NO. 4-10-0515

Order Filed 3/4/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

SERGIO CORTEZ, Special Administrator)	Appeal from
of the Estate of DAWN M. CORTEZ,)	Circuit Court of
Deceased,)	Champaign County
Plaintiff-Appellant,)	No. 09L162
v.)	
CARLE CLINIC ASSOCIATION, P.C.; and)	Honorable
CARLE FOUNDATION HOSPITAL,)	Michael Q. Jones,
Defendants-Appellees.)	Judge Presiding.

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

ORDER

Held: (1) Where no violation of Supreme Court Rule 213 was shown, the trial court did not err in refusing to bar testimony from defendants' expert;
(2) Where no violation of Rule 213 was shown, the trial court did not err in refusing to grant a mistrial; and
(3) Where plaintiff failed to establish an agency relationship between hospital and nurses, the trial court did not err in directing a verdict for defendants.

In March 2010, plaintiff, Sergio Cortez, special administrator of the estate of Dawn M. Cortez, deceased, filed a second-amended complaint against defendants, Carle Clinic Association, P.C. (Carle Clinic), and Carle Foundation Hospital (Carle Hospital), seeking damages for medical negligence that caused Dawn's death. At a jury trial, the trial court dismissed Carle Hospital as a party with prejudice. The jury then found in favor of Carle Clinic. In June 2010, the court denied plaintiff's

posttrial motion.

On appeal, plaintiff argues the trial court erred in (1) failing to bar undisclosed opinion testimony, (2) refusing his request for a mistrial on account of defendants' violation of supreme court rules, and (3) directing a verdict for Carle Hospital. We affirm.

I. BACKGROUND

In February 2004, plaintiff filed a 16-count complaint in Macon County against various defendants, including Carle Clinic and Carle Hospital, seeking damages for medical negligence allegedly causing the death of Dawn Cortez. In June 2009, plaintiff filed a first-amended complaint. In August 2009, the case was transferred to Champaign County.

In March 2010, plaintiff filed a second-amended complaint against Carle Clinic and Carle Hospital. Plaintiff alleged Dawn Cortez was admitted to Carle Hospital on February 5, 2002, for treatment of multiple injuries suffered in an auto accident. The complaint alleged Dawn suffered complex injuries and developed a disorder of her gastrointestinal tract. On or about February 8, 2002, Dawn allegedly developed a pressure area on her coccyx, and the lesion continued to enlarge throughout her stay. Plaintiff alleged defendants provided personnel for patient care and treatment, and defendants, acting through its nurses and doctors, rendered negligent care by, *inter alia*,

failing to properly investigate the cause of Dawn's fever and diarrhea, failing to appreciate the development of a decubitus ulcer, and failing to properly plan for her discharge. As a result of the alleged negligent acts, Dawn died on February 27, 2002.

At plaintiff's jury trial, Sergio Cortez testified his wife was taken to Carle Hospital on February 5, 2002, following the auto accident. At some point, he became concerned with a "red dot" in the area of her tailbone. When she was getting ready for discharge on February 14, 2002, Sergio noticed the spot had turned a "violet color." A nurse told him to make sure to keep it dry and have Dawn stay off of it. By the third day after discharge, Sergio said Dawn "couldn't even get off the couch." Sergio stated she was mentally "getting worse and worse." He took her to St. Mary's on February 20, 2002, because of low back pain. She saw Dr. Douglas Maibenco on February 21, 2002. He examined the scab on Dawn's back and told her to keep the area dry and put cream on it. Thereafter, Sergio stated Dawn's mind "would start slipping more and more." Sergio took her to the emergency room on February 23, 2002.

Dr. David Huddleston, a pathologist, testified via videotape deposition he performed an autopsy on Dawn on February 27, 2002. He stated her cause of death was respiratory and renal failure due to presumed sepsis. Sepsis is "a condition where

there is something in the body that is triggering the body to not maintain its blood pressure." It then initiates organ failure throughout the body. Dr. Huddleston noted one of the three possible areas of infection was a retroperitoneal cavity, "like an abscess or a cyst," near the left psoas muscle, most likely caused by a decubitus ulcer, *i.e.*, a pressure sore. The decubitus ulcer was located near the coccygeal bone, otherwise known as the tailbone. Dr. Huddleston stated the location of the decubitus ulcer was significant given its "proximity and ease of being contaminated by stool." Cultures taken before Dawn's death revealed the presence of *E. coli* bacteria and Group D enterococcus, and those organisms are present in stool. Huddleston believed the decubitus ulcer developed during Dawn's admission to Carle. He opined the decubitus ulcer caused the abscess, which became infected and caused the sepsis leading to Dawn's death. He also stated Dawn's sepsis could have been caused by a urinary tract infection or pseudomembranous colitis, which is inflammation of the large intestine.

Dr. Franklin Michota, an acute-care specialist at the Cleveland Clinic in Cleveland, Ohio, testified via videotape deposition. He stated Dawn developed a decubitus ulcer, a pressure sore, near her coccyx. At the time, Dawn was suffering from diarrhea, which could contaminate the skin with bacteria, was intermittently in physical restraints, inadequately provided

nutrition, and had low potassium levels. Dawn was admitted to Carle Hospital on February 5, 2002, and her chart first reflected the development of any type of sore in a nurse report of a "purple spot on the coccyx" on February 8, 2002. Dr. Michota opined Dawn was not stable for discharge on February 14, 2002. He also opined Dr. Richard Berlin failed to order steps that could have prevented the condition or reduced the risk for the development of a pressure sore. As to the discharge, Michota stated Dr. Berlin should have required ongoing potassium replacement and treatment for clostridium difficile colitis, a bacterial infection of the colon and referred to as C. difficile colitis.

Dr. Richard Vasquez, a general surgeon, testified the injuries Dawn suffered in the auto accident did not cause her death. While she was at Carle, Dawn developed C. difficile enterocolitis and a pressure sore. Dawn was discharged from Carle Hospital on February 14, 2002. Cortez saw Dr. Maibenco on February 21, 2002. She was admitted to St. Mary's Hospital in Decatur on February 23, 2002, and diagnosed with sepsis and a pressure sore. Dr. Vasquez believed Dawn developed fulminant colitis sometime between Dr. Maibenco's visit and her admission to St. Mary's on February 23, 2002. He opined that surgical treatment upon admission to St. Mary's would more likely than not have dramatically reduced Dawn's mortality rate. He also opined the gastroenterologist at St. Mary's was negligent in failing to

timely diagnose the colitis. In his opinion, colitis was the predominant cause of Dawn's death.

Mary Jane Smith, a professor of nursing at Community College of Allegheny County in Pittsburgh, Pennsylvania, testified to the nursing standard of care in this case. After a review of the records, Smith opined (1) the nurses failed to correctly score Dawn's risk for skin breakdown; (2) the nurses failed to address, monitor, and treat the pressure sore; (3) nothing in the evidence indicated the nurses reported the bedsore to the treating physician or obtained treatment orders; (4) the bedsore was not protected from the diarrhea; and (5) the nurses improperly discharged Dawn. Smith stated these factors indicate the nurses violated the standard of care.

After the close of plaintiff's case, defense counsel moved for a directed verdict, claiming plaintiff had not proved negligent conduct on the part of defendants caused Dawn's death. The trial court denied the motion. Defense counsel also made a motion for directed verdict on behalf of Carle Hospital on the ground that agency had not been proved. The court withheld ruling on this motion and allowed plaintiff to reopen his case.

For the defense, Dr. Donald Graham testified he was the chairman of the Department of Infectious Diseases at the Springfield Clinic. He reviewed Dawn's medical records and concluded based on a reasonable degree of medical certainty that Dawn's

decubitus ulcer, *i.e.*, pressure sore, did not occur until after her discharge from Carle. He stated an abscess in or around the spleen and in the retroperitoneal space can be seen on a computerized tomography (CT) scan but the CT-scan report from St. Mary's did not mention an abscess. Moreover, the CT-scan report did not describe a soft-tissue distortion or a tract, and the most likely cause of Dawn's sepsis was her colitis. He did not believe the decubitus ulcer was the cause of the sepsis. He agreed with the pathologist's diagnosis that Dawn's cause of death was lung failure and renal failure due to presumed sepsis.

Dr. Douglas Maibenco, a general surgeon, testified Dawn was referred to him in February 2002 by Dr. Shane Fancher, an anesthesiologist at St. Mary's. On February 21, 2002, his exam revealed minimal redness in Dawn's tailbone region. Dr. Maibenco assessed the area as a decubitus ulcer. His plan for treatment was "local care with a dry gauze." He found no evidence the decubitus ulcer was infected at the time he saw her, stating there was no fluctuance, *i.e.*, "bogginess of the tissue," no drainage, and no odor. Dr. Maibenco also saw no signs or symptoms of sepsis.

Dr. Samir Gupta, a general surgeon, testified he reviewed Dawn's hospital records and various physician depositions. He opined the care provided by those at Carle Clinic and Carle Hospital was reasonable and met the standard of care. At

the time of Dawn's admission to St. Mary's on February 23, 2002, she had the decubitus ulcer. In his opinion, Dr. Gupta believed Dawn died of pseudomembranous colitis and severe sepsis.

Catherine Bond, a nurse practitioner at Carle Hospital, testified Carle is a level one trauma center with trauma surgeons available 24 hours a day, seven days a week. Nurse practitioners take care of the patients admitted for trauma until they are discharged.

Margaret Kraft, a legal nurse consultant, testified she reviewed Dawn's medical records from Carle Hospital and Carle Clinic. She opined the nursing care received by Dawn at Carle Clinic "was absolutely appropriate and met the expected standard of care." She also opined the nurses at Carle Hospital provided the appropriate care with respect to Dawn's coccyx area.

Dr. Jane Turner, a forensic pathologist, testified she reviewed Dawn's medical records from Carle Hospital, Carle Clinic, and St. Mary's. Based on a reasonable degree of medical certainty, Dr. Turner opined the cause of Dawn's death was colitis, based on the "breakdown in her membrane barrier in her gut [that] allowed bacteria to migrate into the blood stream and cause sepsis."

Dr. Richard Berlin testified he had reviewed Dawn's medical records and CT-scan films from St. Mary's. Over plaintiff's objection, Dr. Berlin was allowed to interpret the CT

scans on a view box for the jury and explain his opinions on the condition of Dawn's abdomen at the time she was admitted to St. Mary's. He stated the CT scan showed the decubitus ulcer. He also found the CT-scan film demonstrated an acute colitis. The CT scan did not show evidence of an abscess in the region of the psoas muscle. Based on his review of the records from St. Mary's, the CT scans, and the autopsy report, Dr. Berlin opined the cause of death was acute colitis.

Following Dr. Berlin's testimony and outside the presence of the jury, plaintiff's counsel renewed his objection to Dr. Berlin's testimony. He stated there had been no disclosure that Berlin had the capacity to testify regarding his interpretation of CT scans in violation of Supreme Court Rule 213 (eff. Jan. 1, 2007). Defense counsel stated Dr. Berlin's opinions were based on a review of the medical records in this case and, while the pretrial disclosure did not reference CT scans, they were a type of medical record. The trial court found no Rule 213 violation.

The trial court allowed plaintiff to reopen his case to call Catherine Bond outside the presence of the jury. She stated she had been employed at Carle for 26 years. She was employed by Carle Hospital in 2002, and the nurses on the trauma unit, the medical-surgical unit, the intermediate-care unit, the critical-care unit, and the bedside nurses were also employed by Carle

Hospital.

Defense counsel renewed his motion for a directed verdict in favor of Carle Hospital. The trial court found the agency of Carle Hospital had not been established. The court then dismissed Carle Hospital with prejudice.

Following closing arguments, the jury found in favor of Carle Clinic and against plaintiff. In April 2010, plaintiff filed a posttrial motion, alleging, in part, the court erred in directing a verdict for Carle Hospital and in failing to sustain his objection to the Rule 213 objections involving Dr. Berlin. In June 2010, the court denied the motion. This appeal followed.

II. ANALYSIS

A. Supreme Court Rule 213

Plaintiff argues the trial court erred in failing to bar undisclosed opinion testimony. We disagree.

Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007) mandates disclosure of the subject matter, conclusions, opinions, qualifications, and reports prepared by controlled expert witnesses. "Supreme Court Rule 213(i) imposes on each party a continuing duty to inform the opponent of new or additional information whenever such information becomes known to the party." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109, 806 N.E.2d 645, 651 (2004) (citing Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007)). The disclosure requirements found in Rule 213 are

mandatory and are subject to strict compliance. *Sullivan*, 209 Ill. 2d at 109, 806 N.E.2d at 651. "The admission of evidence pursuant to Rule 213 is within the sound discretion of the trial court, and the court's ruling will not be disturbed absent an abuse of that discretion." *Sullivan*, 209 Ill. 2d at 109, 806 N.E.2d at 651.

Plaintiff argues the trial court erred in not striking Dr. Berlin's testimony because the defense failed to timely disclose Berlin's intention to rely on his interpretation of CT scans as to the cause of death. The defense's disclosure of opinion witnesses was to have been completed on September 15, 2008. On that date, defense counsel filed answers to plaintiff's Rule 213 interrogatories. As a controlled expert witness, Dr. Berlin was expected to testify that, "in his opinion, no act or omission by him or any of the other agents of Carle Foundation Hospital was a proximate cause of any injury to Ms. Cortez or a proximate cause of her death." He was expected to testify "Ms. Cortez most likely died from pseudo membranous colitis and that there appears to be no connection between the decubitus and the psoas muscle abscess." The answer also stated, in part, as follows:

"Dr. Berlin's opinions are based upon his direct knowledge of Ms. Cortez stemming from his care and treatment of her, upon his re-

view of Ms. Cortez's medical records as disclosed in this case, upon his review of the depositions of the medical personnel heretofore taken, along with the depositions of the plaintiff and his retained experts."

On April 20, 2009, defense counsel subpoenaed Dawn's CT scans from St. Mary's. On January 7, 2010, defense counsel sent a letter to plaintiff's counsel, indicating defense counsel had subpoenaed X-rays from St. Mary's, which had been reviewed by Drs. Berlin, Uretz Oliphant, and Gupta. The letter then stated "[t]heir review and interpretation of these films are a part of the basis for the opinions disclosed that a ulcerative colitis was the cause of death." Defense counsel offered to make a copy of the films. The trial began on March 9, 2010, and plaintiff's counsel objected to Dr. Berlin interpreting the CT scans for the jury.

"In determining whether the exclusion of a witness is a proper sanction for nondisclosure, a court must consider the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and

(6) the good faith of the party calling the witness." *Sullivan*, 209 Ill. 2d at 110, 806 N.E.2d at 652.

In the case *sub judice*, plaintiff cannot argue Dr. Berlin's conclusions and opinions caught him by surprise. Instead, plaintiff claims Dr. Berlin's reliance on the CT scans violated the discovery deadline and the duty to supplement. However, plaintiff was made aware in September 2008 that Dr. Berlin would base his opinions in part on Dawn's medical records. Defense counsel obtained the CT scans in April 2009, offered them to plaintiff in January 2010, and stated Dr. Berlin's use of the films was a basis for his opinion on the cause of death. We find plaintiff cannot claim surprise as to Dr. Berlin's testimony and note plaintiff's counsel had ample time to object.

Although it can be argued Dr. Berlin's use of the CT scan was prejudicial to plaintiff's case, it should be noted Dr. Vasquez, plaintiff's own expert, testified as to matters reported in the medical records, including the CT-scan report, and concluded the predominant cause of death was colitis. Further, Dr. Turner and Dr. Gupta also testified with respect to the medical records, including the CT-scan report, and found the cause of death was colitis.

Plaintiff's argument as to defense counsel's diligence and that a timely objection to the testimony was made offers

little support that the trial court abused its discretion in finding no Rule 213 violation. Defendants noted they would be relying on the records from St. Mary's, and along with the contents of the January 2010 letter, plaintiff still did not object until trial. It does not appear plaintiff asked for a continuance. Further, defendants do not appear to have engaged in any bad faith such that plaintiff could be said to have been prejudiced by a last-minute surprise. Instead, Dr. Berlin was simply utilizing one of the disclosed medical records to support and explain his opinions. We find the court did not abuse its discretion in not finding a Rule 213 violation and in allowing Dr. Berlin to testify using the CT scans.

B. Mistrial Request

Plaintiff argues the trial court erred in refusing his request for a mistrial on account of the Rule 213 violations in defendants' case in chief. As we have found no Rule 213 violations here, the trial court cannot be said to have erred in denying the request for a mistrial.

C. Directed Verdict

Plaintiff argues the trial court erred in directing a verdict for Carle Hospital. Plaintiff initially argues defendants' admissions in the answer to the first-amended complaint amounted to an admission the nurses who provided care to Dawn were employees of Carle Hospital.

In the first-amended complaint, plaintiff alleged, in part, as follows:

"At all times relevant herein[,] Defendant [Carle Hospital] operated, managed, and controlled a hospital for the care of the sick and injured and held itself out to the public and furnished accommodations where patients, including [Dawn], could be treated for diverse conditions.

The Defendant [Carle Hospital] provided personnel including nurses, aides, and attendants for the care and treatment of the patients at [Carle Hospital] for those to whom its facilities were made available, including [Dawn]."

Defendants admitted these allegations. The trial court did not believe the answer to the first-amended complaint operated as a judicial admission.

In its second-amended complaint, plaintiff alleged, in part, as follows:

"The Defendants Carle Hospital and Carle Clinic provided personnel including nurses, aides, and attendants for the care and treatment of the patients at Carle Hospital, in-

cluding [Dawn]."

In the answer to the second-amended complaint, defendants stated, in part, as follows:

"Defendants admit that each provided personnel for treatment of patients at Carle Hospital at the time and place alleged. Defendants are unable to admit which, if any of their employees provided care and treatment to Dawn Cortez since this paragraph does not identify said employees."

"[A]n admission in an unverified pleading is merely an admission against interest which may be contravened or explained." *Chavez v. Watts*, 161 Ill. App. 3d 664, 673, 515 N.E.2d 146, 152 (1987). Here, defendants admitted Carle Hospital employed and provided nurses for care and treatment of patients, including Dawn. However, defendants denied anyone on their nursing staff was negligent. Thus, plaintiff had the duty to prove which nurses of either Carle Clinic or Carle Hospital were guilty of negligent conduct. Plaintiff did not do so.

Plaintiff also argues Nurse Bond's testimony during plaintiff's reopened case showed the nurses caring for Dawn were employees of Carle Hospital. Bond testified she was employed by Carle Hospital in 2002. She also stated the bedside, intermediate-care, critical-care, and trauma-unit nurses were all

employed by Carle Hospital. On cross-examination, Bond testified she had no information about which nursing staff was taking care of Dawn during her stay. The trial court found the agency of Carle Hospital had not been established because the nurses had never been named and an agent cannot establish the agency.

A hospital may be held vicariously liable based on an agency relationship between the hospital (principal) and a physician (agent). *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518, 622 N.E.2d 788, 792 (1993).

"Actual agency may be express or implied. [Citation.] An implied agency relationship is an actual agency relationship that is established through circumstantial evidence. [Citation.] Although the question of whether an agency relationship exists is a question of fact, a court may decide this issue as a matter of law if only one conclusion may be drawn from the undisputed facts. [Citation.] The burden of proving the existence of an agency relationship is on the party seeking to charge the alleged principal." *Buckholtz v. MacNeal Hospital*, 337 Ill. App. 3d 163, 172, 785 N.E.2d 162, 170 (2003).

In this case, plaintiff attempted to prove the agency of Carle Hospital through the testimony of Nurse Bond. Plaintiff, however, failed to present competent evidence linking negligent conduct of a nurse with employment by Carle Hospital. Moreover, a "hospital cannot be liable on a *respondeat superior* theory if the individual defendants are not liable." *Northern Trust Co. v. Louis A. Weiss Memorial Hospital*, 143 Ill. App. 3d 479, 484, 493 N.E.2d 6, 9-10 (1986). Here, plaintiff did not name any individual nurses as defendants or introduce evidence establishing any specific nurses employed by Carle Hospital were negligent. Thus, as plaintiff did not establish the requisite agency relationship, the trial court did not err in directing a verdict for Carle Hospital. See *Barnes v. Michalski*, 399 Ill. App. 3d 254, 262, 925 N.E.2d 323, 332 (2010) (where all the evidence, when viewed in a light most favorable to the movant, so overwhelmingly favors the movant that no contrary verdict could stand, a directed verdict is appropriate).

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.