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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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TAKARA CABELL, as Special Administrator of the Estate of Ashanti Webber, deceased,	)	Appeal from the Circuit Court of Kane County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-220
	)	
AURORA EMERGENCY ASSOCIATES, LTD.; MAXIME GILLES, M.D.; and	)	
PROVENA MERCY MEDICAL CENTER,	)	Honorable
	)	Mark A. Pheanis,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's order granting summary judgment in favor of the defendants was affirmed where the evidence failed to establish that defendants' negligence proximately caused the decedent's death.

¶ 2 Plaintiff, Takara Cabell, appeals an order of the circuit court of Kane County granting summary judgment in favor of defendants, Aurora Emergency Associates, Ltd. (Aurora), Maxime Gilles, M.D., and Provena Mercy Medical Center (Provena). We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are taken from depositions, affidavits, plaintiff's amended expert witness disclosure, and exhibits in the record. On December 13, 2005, plaintiff brought her six-month old daughter, Ashanti Webber, to the emergency room run by Aurora at Provena in Aurora, Illinois. Ashanti was seen by Nurse Practitioner Terry Digate, who worked under the supervision of Dr. Gilles. Digate and Dr. Gilles diagnosed Ashanti with pneumonia, and Digate prescribed Amoxicillin and "Rondec Infant Drops." The prescription form contained two boxes: "May Substitute" and "May Not Substitute," meaning the physician could indicate whether he or she was allowing a generic medication to be substituted for the brand prescribed. Digate did not check either box. Digate testified at her deposition that the prescription did not allow for a substitution, and that, if she had wanted a generic substitution, she would have specifically noted that it was allowed. Digate also testified that "pseudoephedrine," a decongestant ingredient that she erroneously thought was in Rondec, would have had an antihistamine effect on Ashanti. Plaintiff filled the prescription at an Osco drug store in Aurora. Larry Eckstein, the pharmacist, testified at his deposition that he did not contact either Dr. Gilles or Digate before filling the prescription with a medication that he believed was a generic substitution for Rondec.

¶ 5 In approximately September 2005, Alliant Pharmaceuticals (Alliant), the manufacturer of Rondec, reformulated the drug. Prior to that date, Rondec contained pseudoephedrine. The reformulation, of which Digate was unaware, contained the decongestant phenylephrine instead of pseudoephedrine. The record shows that the two ingredients are not chemically similar. In November 2005, Alliant notified the Osco store where plaintiff filled the prescription of the reformulation: "The old Rondec liquid products containing pseudoephedrine are being discontinued from the marketplace and can no longer be used to fill prescriptions within the Rondec family." Alliant further advised Osco that "[i]t is important to note that the newly

formulated family of Rondec products is a single source brand with no generic equivalents.” (Emphasis in original). The record reflects that a “generic equivalent” has the same active ingredients as the brand-name medication. It is undisputed that Rondec did not have a generic equivalent on December 13, 2005.

¶ 6 The record shows that Osco did not update its computer system to reflect Alliant’s reformulation of Rondec. On December 13, 2005, Eckstein dispensed the medication Carboxafed to Ashanti, believing it to be a generic substitute for Rondec. One of Carboxafed’s active ingredients was pseudoephedrine. When plaintiff presented the prescription to Osco, she also purchased an over-the-counter cold medication containing dextromethorphan. Over the next two days, plaintiff administered the Carboxafed and the cold medication to Ashanti in doses higher than those prescribed. Ashanti died in the early morning hours of December 15, 2005, of pseudoephedrine and dextromethorphan intoxication.

¶ 7 Plaintiff’s expert pathologist, Dr. Mary Case, opined in her deposition that the pseudoephedrine alone could have caused Ashanti’s death. Dr. Joseph Scott Just, plaintiff’s expert in emergency room medicine and Patricia Dempsey, plaintiff’s expert nurse practitioner both opined in depositions that Digate violated the standard of care in prescribing Rondec, because cold medications are contraindicated, and even dangerous, in children as young as Ashanti. Dempsey also furnished an affidavit in which she opined, *inter alia*, that this violation caused Carboxafed to be substituted, which caused Ashanti to ingest pseudoephedrine. However, both experts also opined that Digate would have expected Osco to dispense Rondec in accordance with her prescription. Plaintiff’s expert pathologist testified that Ashanti would not have died of pseudoephedrine intoxication if Osco had dispensed Rondec. Plaintiff’s expert in emergency room medicine testified that he was aware of no deaths caused by phenylephrine,

Rondec's active ingredient. Dr. James O'Donnell, plaintiff's expert pharmacologist and registered pharmacist, opined that Osco violated the Illinois Pharmacy Practice Act (225 ILCS 85/1 *et seq.* (West 2014)) and the applicable pharmacy standards of practice, as well as its own policies and procedures. Dr. O'Donnell further opined that the dispensation of Carboxafed was "illegal," because Osco was on notice that (1) Rondec with pseudoephedrine was discontinued from the marketplace and could not be used to fill prescriptions within the Rondec "family"; and (2) the reformulated Rondec was a single source brand with no generic equivalents.

¶ 8 On April 13, 2009, plaintiff sued defendants and others, including Osco. In her second amended complaint, plaintiff included the following allegations: (1) On December 13, 2005, Rondec did not contain the active ingredient of pseudoephedrine; (2) as of December 13, 2005, there was no generic equivalent for Rondec; and (3) the medication that Osco dispensed was not the generic equivalent of Rondec. Plaintiff settled her claims against all of the defendants except those involved in this appeal.

¶ 9 On October 30, 2015, the instant defendants moved for summary judgment on the ground that plaintiff could not establish that the prescription for Rondec proximately caused Ashanti's death. Plaintiff responded that, because Digate intended to give Ashanti a medication containing pseudoephedrine, it was reasonably foreseeable that Osco would dispense a drug with that ingredient. On May 26, 2016, the trial court granted the motion. The court noted that plaintiff's argument could prevail only if Digate had communicated her intention to Osco. The court found that all of the experts agreed that Osco was required to dispense what Digate actually prescribed. The court further found that, because Digate did not communicate her intention to prescribe a medication containing pseudoephedrine to Osco, her "intentions and understanding" were irrelevant to the issue of proximate cause. The court ruled that, without evidence that Digate

communicated her intention to give a medication containing pseudoephedrine to Osco, plaintiff could not prove that defendants' acts were the cause in fact of Ashanti's death, and a jury could not infer that defendants would reasonably foresee that Osco would dispense pseudoephedrine. Plaintiff filed a timely appeal.

¶ 10

## II. ANALYSIS

¶ 11 Plaintiff contends that the court erred in granting summary judgment in favor of defendants. She argues that, if we accept that Digate intended to prescribe pseudoephedrine, then "the foreseeability of Ashanti receiving a medication with pseudoephedrine \*\*\* is natural and obviously inferred beyond doubt." Further, plaintiff argues that whether Osco violated the standard of care is a question of fact for the jury.

¶ 12 In *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986), our supreme court set forth summary judgment principles applicable in medical malpractice cases. A defendant may move for summary judgment at any time, with or without supporting affidavits, as to all or part of the relief sought against him or her. *Purtill*, 111 Ill. 2d at 240. Because the purpose of summary judgment is to determine the existence of a genuine issue of fact, a motion for summary judgment should be granted only when the pleadings, depositions, and admissions on file, together with affidavits, show that there is no genuine issue of fact and the movant is entitled to judgment as a matter of law. *Purtill*, 111 Ill. 2d at 240. Such materials are construed strictly against the movant and liberally in favor of the opponent. *Purtill*, 111 Ill. 2d at 240. If the movant supplies facts which, if not contradicted, would entitle him or her to judgment as a matter of law, the opposing party cannot rely on his or her pleadings alone to raise issues of material fact. *Purtill*, 111 Ill. 2d at 240. The use of the summary judgment procedure is encouraged as an aid to the expeditious disposition of a lawsuit, but it is a drastic means of disposing of litigation

and should be allowed only when the movant's right to judgment is clear and free from doubt. *Purtill*, 111 Ill. 2d at 240.

¶ 13 To survive a motion for summary judgment, the nonmovant must present a factual basis that would arguably entitle it to a judgment. *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 518 (2008). Although the plaintiff need not prove his or her case at summary judgment, he or she must present sufficient evidence to create a genuine issue of material fact. *Hernandez*, 384 Ill. App. 3d at 519. Summary judgment in favor of the defendant is proper if the plaintiff cannot establish an element of his or her claim. *Hernandez*, 384 Ill. App. 3d at 519. At the summary judgment stage, the plaintiff must present some evidence that it is more probably true than not true that the defendant's negligence was a proximate cause of the plaintiff's injury. *Buck v. Charletta*, 2013 IL App (1st) 122144, ¶ 58. We review a grant or denial of summary judgment *de novo*. *Hernandez*, 384 Ill. App. 3d at 519.

¶ 14 To sustain an action for medical malpractice, the plaintiff must prove: (1) the proper standard of care in the medical community by which the physician's treatment should be measured; (2) that the physician negligently deviated from the standard of care; and (3) that the patient's injury was proximately caused by the physician's deviation from the standard of care. *Buck*, 2013 IL App (1st) 122144, ¶ 57.

¶ 15 The issues are whether plaintiff presented some evidence to establish that Digate's prescription was the proximate cause of Ashanti's death and whether Osco's conduct was an independent, intervening cause. The plaintiff must establish proximate cause in a medical malpractice by expert testimony to a reasonable degree of medical certainty, and the causal connection must not be contingent, speculative, or merely possible. *Buck*, 2013 IL App (1st) 122144, ¶ 59. It is the plaintiff's burden to present expert testimony that shows both that the

physician deviated from the standard of care and that the deviation was the proximate cause of the injury. *Buck*, 2013 IL App (1st) 122144, ¶ 59. Ordinarily, proximate cause is a question of fact, but it can be determined as a matter of law where the facts as alleged show that the plaintiff would never be entitled to recover. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 995 (2005).

¶ 16 Proximate cause consists of both “cause in fact” and “legal cause.” *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 548-49 (2005). The defendant’s conduct is a “cause in fact” of the plaintiff’s injury only if that conduct is a material element and a substantial factor in bringing about the injury. *Knauerhaze*, 361 Ill. App. 3d at 549 (quoting *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004)). In turn, the defendant’s conduct is a material element and a substantial factor in bringing about the injury if, absent the conduct, the injury would not have occurred. *Knauerhaze*, 361 Ill. App. 3d at 549 (quoting *Abrams*, 211 Ill. 2d at 258). “Legal cause” examines the “foreseeability” of the injury. *Knauerhaze*, 361 Ill. App. 3d at 549. “Foreseeability” is determined by whether the injury is of the type that a reasonable man would see as the likely result of his conduct. *Knauerhaze*, 361 Ill. App. 3d at 549.

¶ 17 Here, defendants contend that Digate’s conduct was not the legal cause of Ashanti’s death. Defendants also maintain that Osco’s conduct broke any causal connection between the prescription and Ashanti’s death. Put another way, defendants’ second argument is that Osco’s conduct was an independent, intervening cause of Ashanti’s death.

¶ 18 At this point, we must clarify whose burden it is to prove foreseeability or the lack thereof, because the parties seem to dispute the matter, or at least confuse it. As noted above, plaintiff has the burden to establish each element of her cause of action, and proximate cause is one of those elements. See *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 625 (2007). Also as noted above, foreseeability is a component of the proximate cause analysis. *Knauerhaze*, 361 Ill. App.

3d at 549. Thus, plaintiff has the burden to establish that Digate's conduct proximately caused Ashanti's death. Furthermore, a plaintiff must prove proximate cause through expert medical testimony. *Gulino v. Zurawski*, 2015 IL App (1st) 131587, ¶ 70 (in medical malpractice cases, the element of proximate cause must be established through expert testimony to a reasonable degree of medical certainty).

¶ 19 On the other hand, it is defendants' burden to establish that Osco's conduct was an independent, intervening cause of Ashanti's death. The subsequent act of a third party does not break the causal connection between a defendant's negligence and a plaintiff's injury if the subsequent act was probable and foreseeable. *Kunz v. Little Company of Mary Hospital and Health Care Centers*, 373 Ill. App. 3d 615, 622 (2007). To escape liability, the defendant must demonstrate that the third party's act was unforeseeable as a matter of law. *Roeseke v. Pryor*, 152 Ill. App. 3d 771, 779 (1987). Thus, while foreseeability is a component in each analysis, the plaintiff has the burden to establish that the injury was foreseeable, but the defendant has the burden to establish that the third party's conduct was an intervening cause of the injury. In the present case, the dispute is academic, because plaintiff failed to present facts to establish that Ashanti's death was proximately caused by Digate's conduct, and defendants presented ample evidence to establish that Osco's conduct broke any causal connection.

¶ 20 Plaintiff argues that Digate prescribed what plaintiff terms "old Rondec," meaning that it contained pseudoephedrine, and that Osco dispensed the medication prescribed, causing Ashanti's death. The fallacy in this argument is that there was no "old" Rondec. In September 2005, two months before Digate wrote the prescription, Alliant discontinued Rondec with the active ingredient of pseudoephedrine. Alliant notified pharmacies that only the reformulated medication with the active ingredient phenylephrine was in use. Thus, as of December 13, 2005,



when Digate wrote the prescription, the only formulation of Rondec contained phenylephrine, and plaintiff's own experts testified that Ashanti did not ingest phenylephrine. It is irrelevant that Digate was unaware of the reformulation or that she intended to give Ashanti pseudoephedrine. As the trial court noted, Digate did not communicate her intention to Osco. Under the circumstances, it is merely a terribly unfortunate coincidence that Osco dispensed a medication containing pseudoephedrine.

¶ 21 Even if Digate's prescription was a material element and a substantial factor in bringing about the death—in the sense that Osco would not have dispensed any medication absent the prescription—plaintiff failed to demonstrate that Digate's conduct was the legal cause of Ashanti's death. Plaintiff's own experts opined that Digate would expect the pharmacy to fill the prescription as written. Digate also testified in her deposition that she did not intend for a generic substitution to be dispensed. While Dr. Gilles testified in his deposition that he had no problem with a generic substitution, as of December 13, 2005, Rondec had no generic equivalent. Consequently, Dr. Gilles' testimony is irrelevant, and defendant's contention that there is a question of fact as to whether it was foreseeable that Osco would substitute Carboxafed fails.

¶ 22 Plaintiff argues that because the Food and Drug Administration (FDA) did not recall so-called "old" Rondec, there is a disputed question as to whether Osco properly dispensed Carboxafed. Defendant asserts that if Osco properly dispensed Carboxafed, it follows that Digate could reasonably have foreseen that Carboxafed would be dispensed. Plaintiff further argues that Eckstein's deposition testimony that he did not violate the standard of care in dispensing Carboxafed creates a genuine issue of material fact.

¶ 23 Plaintiff's first premise from which the rest of her argument flows—that there was an “old” Rondec capable of being prescribed and dispensed—is erroneous, as noted above. What the FDA did or did not do is irrelevant, because Alliant discontinued Rondec with pseudoephedrine and directed Osco that it should not be dispensed. Plaintiff's own pharmacology expert, Dr. O'Donnell, opined that Osco's dispensation of Carboxafed was illegal, because Alliant had put Osco on notice that the formulation of Rondec with pseudoephedrine could no longer be dispensed, and that the current formulation of Rondec had no generic equivalent. Indeed, plaintiff pleaded in her second amended complaint that (1) on December 13, 2005, Rondec did not contain pseudoephedrine; (2) as of December 13, 2005, there was no generic equivalent for Rondec; and (3) the medication that Osco dispensed was not the generic equivalent of Rondec. Consequently, these facts are undisputed.

¶ 24 Plaintiff argues that Dempsey's affidavit establishes proximate cause. In her affidavit, Dempsey opined that Digate violated the standard of care in prescribing Rondec to an infant. Dempsey also opined that this violation caused Carboxafed to be substituted, which caused Ashanti to ingest pseudoephedrine. Dr. Gilles and Aurora maintain that Dempsey's affidavit contradicts her deposition testimony and is improper. However, the discrepancy is whether Dempsey believed that Ashanti required hospitalization, not whether Digate's conduct was the proximate cause of the injury. Dempsey's opinion as to causation relates to the cause in fact of the injury. The prescription was a material element and a substantial factor in bringing about the injury, because, absent the prescription, the injury would not have occurred. See *Knauerhaze*, 361 Ill. App. 3d at 549. However, Dempsey did not opine that Digate could have foreseen that Osco would ignore Alliant's directive that Rondec had no generic equivalent. To the contrary,

Dempsey testified in her deposition that Digate would have expected Osco to dispense the medication as specified in the prescription.

¶ 25 The lack of foreseeability distinguishes our case from *Kunz*, upon which plaintiff relies. In *Kunz*, a nurse mistakenly wrote on a form transferring the plaintiff from a hospital to a nursing home that a certain drug should continue to be administered, when, in fact, the attending hospital physician had ordered the drug to be discontinued. *Kunz*, 373 Ill. App. 3d at 616-17. Relying on the transfer form, the nursing home physician continued to give plaintiff the drug, resulting in the plaintiff's injury. *Kunz*, 373 Ill. App. 3d at 616-17. The defendant contended that the transfer form was not the legal cause of the plaintiff's injury, because the nursing home physician failed to contact the hospital physician and failed to stop giving the plaintiff the drug. *Kunz*, 373 Ill. App. 3d at 621-22. The appellate court opined that the nursing home physician's conduct was foreseeable under the circumstances. *Kunz*, 373 Ill. App. 3d at 622. Here, in contrast, instead of dispensing the medication that Digate ordered, Osco dispensed something else entirely.

¶ 26 Plaintiff also relies on *Garest v. Booth*, 2014 IL App (1st) 121845. In *Garest*, the appellate court held that a contractor's failure to install a light in a stairway according to the building plans was the legal cause of the plaintiff's injuries, because it is reasonably foreseeable that a person may fall down the stairwell of a building in the absence of such lighting. *Garest*, 2014 IL App (1st) 121845, ¶ 42. *Garest* has no application. Here, plaintiff did not present one expert to testify that Digate would expect the pharmacist to deviate from the written prescription, and Dr. O'Donnell opined that the prescription was sufficiently ambiguous that Osco should have sought clarification. Osco did not contact Digate or Dr. Gilles, and Digate never communicated to Osco her intention to prescribe a medication containing pseudoephedrine.

Absent that communication, Digate could not have foreseen that Osco would ignore Alliant's notice regarding the reformulation of Rondec.

¶ 27 In her reply brief, plaintiff completely reframes the issue and argues that the September 2005 reformulation of Rondec is irrelevant, because Digate was unaware of it. We should not address arguments that are raised for the first time in a reply brief. *CCP Limited Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 485 (2006). However, to ensure a just result, we will consider it. Plaintiff's new argument fails, because plaintiff's own experts testified that a nurse practitioner in Digate's position would expect that the pharmacy would dispense the medication actually ordered. Had Osco done that, Ashanti would not have died of pseudoephedrine intoxication.

¶ 28 Furthermore, even if we assume that Digate's conduct was negligent, it did nothing more than furnish a condition that made the injury possible. Osco's subsequent conduct was an independent cause of Ashanti's death.

“ ‘If the negligence charged does nothing more than furnish a condition which made the injury possible and that condition causes an injury by the subsequent independent action of another, the creation of that condition is not the proximate cause of the injury. The subsequent independent act becomes the effective intervening cause which breaks the causal connection, and itself becomes the proximate cause.’ ” *Wilson*, 224 Ill. App. 3d at 384 (quoting *Kemp v. Sisters of Third Order of St. Francis*, 143 Ill. App. 3d 360, 361 (1986)).

¶ 29 When Digate prescribed Rondec, one of its active ingredients was phenylephrine. It is undisputed that phenylephrine was never administered to Ashanti and did not contribute to or cause her death. It was Osco's conduct in dispensing a medication with pseudoephedrine that

resulted in death. Where there is an intervening act by a third party, courts must determine whether the first wrongdoer reasonably might have anticipated the intervening cause as a natural and probable result of the first wrongdoer's own negligence. *Jenkins v. Evangelical Hospitals Corp.*, 336 Ill. App. 3d 377, 382 (2002). As explained above, Osco's act was not foreseeable. We again emphasize that Digate could not have foreseen that Osco would ignore Alliant's directive that Rondec had no generic equivalent. Accordingly, whether this case is analyzed from the perspective that plaintiff must establish each of the elements of her action, or from the standpoint that defendants must establish that Osco's conduct broke any causal connection, the result is the same, and we affirm the grant of summary judgment.

¶ 30

### III. CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 32 Affirmed.