2018 IL App (1st) 170828-U

SIXTH DIVISION
June 22, 2018

No. 1-17-0828

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DORIS DEMA f/k/a DORIS PETROSKI, Plaintiff-Appellant, v. R-JAY MARCUS, M.D., NORTHWESTERN MEMORIAL HOSPITAL and NORTHWESTERN MEDICAL FACULTY FOUNDATION, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 L 3721 Honorable Elizabeth Budzinski, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court properly granted defendants' motion *in limine*, barring plaintiff from presenting evidence on her *res ipsa loquitur* claims. Plaintiff's disclosed expert medical testimony was inadequate as a matter of law to support her claims under the doctrine of *res ipsa loquitur*. Affirmed.

¶ 2 Doris Dema, formerly known as Doris Petroski, sued Dr. R-Jay Marcus, Northwestern Memorial Hospital and Northwestern Medical Faculty Foundation (collectively "Northwestern") for medical malpractice, with counts sounding in *res ipsa loquitur* and specific negligence. On

the eve of trial the court granted defendants' motion *in limine* and dismissed the *res ipsa loquitur* claims. The court denied a motion to reconsider that decision. Dema voluntarily dismissed her remaining negligence claims and appeals the dismissal of her *res ipsa loquitur* counts. We affirm.

¶ 3 BACKGROUND

¶ 4 In April 2008, Doris Dema underwent breast biopsy and lymph node exploration surgery at Northwestern Memorial Hospital. Dr. R-Jay Marcus served as the anesthesiologist for the procedure. Laura Pappas assisted Dr. Marcus as a certified registered nurse anesthetist. Following the procedure, Dema proceeded to the post-anesthesia care unit ("PACU"). From there, Dema moved to the regular floor and was admitted overnight. The hospital discharged Dema the next day, but she returned that evening and was diagnosed with an embolic cerebellar stroke.

¶ 5 In 2009, Dema filed her initial complaint against Northwestern and others, alleging that the hospital negligently discharged her from their care and failed to timely diagnose her stroke. Dema voluntarily dismissed that complaint in 2014.

¶ 6 In 2015, Dema refiled her lawsuit. The refiled case contained counts against Northwestern, Dr. Marcus, and Pappas, alleging specific negligence and *res ipsa loquitur*. Dema alleged that defendants failed to properly position her neck and properly monitor the position of her neck while she was under anesthesia. As a result of improper neck positioning, she alleged, a blood clot formed in her vertebral artery. That blood clot later caused her stroke. The court dismissed Pappas from the case on *res judicata* grounds, having granted summary judgment in her favor in the original lawsuit.

¶ 7 Dr. Caplan, Dema's disclosed neurology expert witness, testified in his deposition that "if the patient had been positioned properly, she would not have had the stroke." Although he could identify no medical records or other evidence of Dema's neck position during her time in the PACU, Dr. Caplan relied on his expertise and training to conclude that the stroke was caused by a blood clot formed by Dema's neck position compressing the vertebral artery. However, he also testified that he did not have an opinion as to the standard of care for Dr. Marcus or anybody else responsible for positioning Dema's neck or monitoring its position. Additionally, Dr. Caplan conceded that in a quarter of all embolic stroke victims, the cause or source of the embolus is not identified. He went on to clarify that embolic strokes that occur in the immediate period after an operation, as opposed to embolic strokes generally, are "a different situation entirely."

¶ 8 In his deposition, Dr. Caplan also testified that Dema could have moved her own neck into the dangerous position:

> "Q: So would it be – is it your opinion that more likely than not it was during the postoperative period in the PACU that Ms. [Dema]'s neck was moved from one side or the other so as to compress her vertebral artery?
>
> A: Yeah, I would not say "was moved" but "moved."
>
> Q: Right. I don't want to – I'm not saying –
>
> A: Moved is passive. It means somebody did it.
>
> Q: Correct.
>
> A: She could have just moved it herself. I mean, it moved during that period that it was in that positioning, yes."

¶ 9 Less than four months before the scheduled trial date, Dema moved to withdraw her disclosed expert in the field of anesthesiology and requested leave to identify a substitute expert witness. Over defendants' objection, the court granted the motion. Dema identified Dr. Wolfgang Steudel as her substitute anesthesiology expert less than three months before the trial date. After Dr. Steudel's deposition, and 45 days before trial, Dema moved to amend her complaint to include claims against Dr. Nathan Mollberg. The court denied the motion. Twenty days before trial, Dema moved to amend her expert witness disclosures.

¶ 10 In neither his disclosed report nor his deposition did Dr. Steudel identify any deviation from the standard of care related to the positioning of Dema's neck. Rather, he focused on alleged failures to timely diagnose Dema's stroke, such as failure to request a neurological consultation. Critically, he testified that patients sleeping in the PACU often move their heads to the left or right and, as an anesthesiologist, he would not have documented a patient's neck position under those circumstances. When asked whether in 25% of embolic strokes the cause or source of the embolus is not identified, Dr. Steudel stated that the figure seemed "probably approximately" accurate. However, he went on to explain that he would have to review the literature and that he was not offering an opinion on that issue.

¶ 11 On the first day of trial, the parties exchanged motions *in limine*, including defendants' Motion *in Limine* No. 20, which sought to bar Dema from invoking the doctrine of *res ipsa loquitur*. Defendants argued that Dema's evidence showed that (1) her injury was of a kind that commonly occurs without negligence and (2) Dr. Marcus and Northwestern did not maintain exclusive control and management over the instrumentality or agency that caused the injury.

¶ 12 After hearing argument on the motions and reviewing the depositions of Dema's experts, the court granted Motion *in Limine* No. 20 and barred the claims based on *res ipsa loquitur*.

Specifically, the court observed that Dema lacked an expert to establish the standard of care for an anesthesiologist related to neck positioning. Additionally, the court noted that Dr. Caplan's testimony that Dema could have moved her own neck into the dangerous position vitiated the claim that defendants had exclusive control and management of her neck positioning.

¶ 13 The next day, Dema presented a written motion to reconsider the court's ruling on Motion *in Limine* No. 20, arguing that the motion was actually an inappropriate summary judgment motion to which she did not have an adequate opportunity to respond, and that the evidence was adequate to sustain a claim under the doctrine of *res ipsa loquitur*. The court denied the motion to reconsider and Dema voluntarily dismissed her remaining claims for specific negligence. With no claims remaining, defendants moved to dismiss the case; the court granted that motion. This appeal followed.

¶ 14 ANALYSIS

¶ 15 On appeal, Dema contends that (1) the circuit court should have denied defendants' Motion *in Limine* No. 20 as an untimely motion for summary judgment; (2) the evidence adduced by Dema was adequate to support a theory of *res ipsa loquitur* as a matter of law; and (3) the circuit court erred in denying her motion to reconsider. Whether the doctrine of *res ipsa loquitur* is applicable to a particular case is a question of law, which we review *de novo*. *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). Likewise, the entry of summary judgment is not discretionary and is subject to *de novo* review. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Motions to reconsider based on misapplication of the law are also reviewed *de novo*. *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838 (2002).

¶ 16 Dema first argues that the motion *in limine* was actually a summary judgment motion in disguise, and as such, should have been denied for failure to comply with local rules. By rule,

"[a]ll motions for summary judgment shall be filed and duly noticed for hearing such that the motion comes before the court for initial presentment and entry of a briefing schedule not later than forty-five (45) days before the trial date, except by prior leave of court and for good cause shown or unless a deadline for dispositive motions is otherwise specified in the case management order." Cook Co. Cir. Ct. R. 2.1(f) (eff. April 23, 1992). However, it is within the discretion of a court to excuse compliance with its own rules for good cause. *Bright v. Dicke*, 166 Ill. 2d 204, 208-09 (1995). Defendants dispute the characterization of their motion, but argue that, even if their motion actually was a motion for summary judgment, good cause existed for excusing the 45-day requirement. Dema contends that there was no good cause, and relies on *Silverstein v. Brander*, 317 Ill. App. 3d 1000 (2000) and *Peterson v. Randhava*, 313 Ill. App. 3d 1 (2000) in support of her position. The facts in those cases are distinguishable from those presented here.

¶ 17 In *Peterson*, the court converted a motion for sanctions into a motion for summary judgment *sua sponte*. *Id.* at 9. This court reversed, noting that the rules are designed to provide a litigant "an opportunity to demonstrate the factual basis for his complaint or to establish the existence of genuine issues of material fact." *Id.* at 11. In that case, discovery had been stayed and no depositions had been taken by either party. *Id.* at 10. We found that the circuit court had "deprive[d] the plaintiff of an opportunity to conduct discovery on the relevant issues, present evidence and argue against dismissal." *Id.* at 12. No such deprivation occurred here. In this case, Dema had already conducted her discovery. Her experts' reports and depositions were complete and available for the court to review before ruling on the motion. The court gave her the opportunity to raise objections during a pretrial hearing and invited her to provide case law in support of her position. *Peterson* is not applicable here because Dema did not suffer the sort of prejudice that was at the heart of that decision.

¶ 18 Likewise, *Silverstein* is distinguishable. In that case, the defendant filed a motion *in limine* seeking to bar the plaintiff's expert's opinion testimony. *Silverstein*, 317 Ill. App. 3d at 1003. Defense counsel admitted that the decision to present the motion as a motion *in limine* rather than as a motion for summary judgement was made for "strategic reasons." *Id*. at 1004. After that motion was granted, the defendant filed a motion for summary judgment, which was granted. *Id*. at 1005. This court reversed, holding that strategically mistitling a motion to avoid local notice requirements does not constitute "good cause" to excuse compliance with court rules. *Id.* at 1006. In this case, however, there is no indication that the decision to file a motion *in limine* rather than a summary judgment motion was a strategic choice to defeat the local rules.

¶ 19 Additionally, independent good cause existed to excuse the local rules in this case. Dema filed a previous action in 2009, which she voluntarily dismissed on the eve of trial in 2014. The case was refiled with the same experts as disclosed in the original iteration. Although her original anesthesiology expert witness had been deposed more than two years before the trial date, Dema moved to withdraw that expert witness less than four months before trial. She did not disclose Dr. Steudel as her replacement anesthesiology expert until less than three months before trial. He was not deposed until 47 days before trial. After the deposition, Dema moved to amend her complaint to add allegations related to Dr. Nathan Mollberg, a defendant whom the circuit court had dismissed from the 2009 case. Then, a mere 20 days before trial, Dema moved to amend her expert witness disclosures. While the trial court in *Silverstein* lacked good cause for excusing the local timing rule for summary judgment, Dema's own motion practice and late-in-the-game maneuvering created good cause for the circuit court to excuse the 45-day limit in this case.

¶ 20 More applicable than *Peterson* or *Silverstein* is the case of *Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7 (1999). In that case, the defendant moved *in limine* to bar the

testimony of plaintiff's nursing expert. *Id.* at 11. The court granted that motion, finding that the testimony was speculative and inadequate to establish proximate causation. *Id.* at 12. The defendant, at the court's suggestion, moved for dismissal of the case based on the ruling on the motion *in limine* and the court granted that motion the next day. *Id.* On appeal, the plaintiff argued that the motion to dismiss was actually an untimely motion for summary judgment. *Id.* at 17. We noted that regardless of whether the motion was properly a motion *in limine* or a summary judgment motion, there was no reason to reverse because no genuine issue of material fact remained in the case. *Id.* at 18. The same is true here.

¶ 21 Whether the doctrine of *res ipsa loquitur* should be applied in a case is a determination for the trial court to make as a matter of law. *Drewick v. Interstate Terminals, Inc*., 42 Ill. 2d 345, 349 (1969). Although expert testimony is not required in every case in which the doctrine of *res ipsa loquitur* is invoked, expert medical testimony is required if the court determines that "the common knowledge of laymen" is inadequate. 735 ILCS 5/2-1113 (West 2016), *Heastie*, 226 Ill. 2d at 537. Additionally, for a plaintiff to proceed under *res ipsa loquitur*, she must show that the defendant maintained control over the specific instrumentality of the injury. *Id.* at 531-32. The control element is satisfied when a patient is rendered unconscious for the purpose of surgery. *Kolakowski v. Voris*, 83 Ill.2d 388, 396 (1980). It is then the hospital's burden to dispel the inference that it exercised the requisite control. *Id.* at 396-97.

¶ 22 Here, the court determined that whether a postoperative embolic cerebellar stroke would ordinarily occur absent negligence was beyond the common knowledge of the general public. Consequently, expert testimony was required to establish that connection. Defendants argue that Dema's experts positively testified that embolic cerebellar strokes ordinarily occur absent negligence. Dr. Caplan testified that in 25% of all embolic strokes, the source of the embolus is

not identified. Dr. Steudel agreed "probably approximately" with that 25% figure, but stated that he would have to review the literature and that he was not offering an opinion on that issue. Defendants argue that this testimony alone is enough to establish that embolic strokes ordinarily occur absent any negligence and that, therefore, the doctrine of *res ipsa loquitur* is inapplicable. We disagree. In his deposition, Dr. Caplan made it clear that while the cause of 25% of *all* embolic strokes is never identified, strokes that occur "immediately in the post-operative period," as in Dema's case, are "a different situation entirely." That testimony does not foreclose the applicability of the *res ipsa loquitur* doctrine in this case.

¶ 23 However, the court found that the testimony of Dema's experts failed to connect her injury to any deviation from the standard of care. Dr. Caplan testified that the stroke was caused by Dema's neck being in a position that compressed the vertebral artery, but he offered no testimony as to any standard of care related to neck positioning. Dr. Steudel testified that, as an anesthesiologist, he would not have documented the neck position of a patient sleeping in the PACU. Rather, he testified that deviations from the standard of care occurred in the period after the stroke had already happened, such as failure to request a neurological consultation.

¶ 24 Likewise, the expert testimony dispelled the inference that the defendants exercised control during the immediate postoperative period. Dr. Steudel testified that patients often fall asleep in the postoperative setting and may turn their heads to the left or right while sleeping. When asked about the positioning of Dema's head and neck in the PACU, Dr. Caplan testified that "She could have just moved it herself." Given that the expert testimony did not connect the deviation from the standard of care to the alleged injury and did not establish the exclusive control of Dema's neck by defendants, the court properly barred the evidentiary presumption created by the doctrine of *res ipsa loquitur*.

¶ 25 For similar reasons, even if the motion *in limine* was a summary judgment motion, the result is the same. See *Seef*, 311 Ill. App. 3d at 18-19. As discussed above, good cause existed to excuse the 45-day requirement. What remains, then, are the questions of whether there are any genuine issues of material fact and whether defendants are entitled to judgment as a matter of law. *Seymour*, 2015 IL 118432, ¶ 42.

¶ 26 As discussed above, Dema's expert testimony was wholly inadequate to connect her injury to any deviations from the standard of care. Proximate cause "is ordinarily a question of fact to be determined from all the attending circumstances, and it can only be a question of law when the facts are not only undisputed but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them." *Merlo v. Public Service Co.*, 381 Ill. 300, 318 (1942). Dema's own expert evidence shows absolutely no connection between the cause of Dema's stroke and any deviation from the standard of care by defendants. Not only is there no testimony establishing that Dr. Marcus or any other agent of Northwestern deviated from a standard of care related to Dema's neck placement, Dr. Caplan's testimony that Dema may have moved her own neck into the position that compressed the vertebral artery establishes that defendants were not in exclusive control of her neck.

¶ 27 With no evidence that Dema's injury would not have ordinarily occurred absent a deviation from the standard of care or that the instrumentality of the injury was in the exclusive control of defendants, the court properly determined that there are no issues of material fact and that the doctrine of *res ipsa loquitur* does not apply as a matter of law. See *Heastie*, 226 Ill. 2d at 531-32; 735 ILCS 5/2-1113 (West 2016). As was the case in *Seef*, reversal on this issue would not salvage Dema's claims. Without expert testimony establishing a deviation from the standard of care, "the court would grant a directed verdict for the hospital, after having had to waste both

its and the parties' time, money and energy on an unnecessary proceeding." *Seef*, 311 Ill. App. 3d at 20.

¶ 28 Finally, Dema argues that the circuit court erred in denying her motion to reconsider. Motions to reconsider either bring to the court's attention (1) newly discovered evidence, (2) changes in the law, or (3) errors in the court's application of the law. *Evanston Insurance. Co. v. Riseborough*, 2014 IL 114271, ¶ 36. We review the circuit court's denial of a motion to reconsider under a *de novo* standard if the motion alleged error in the court's application of the law. *O'Shield*, 335 Ill. App. 3d at 838 (2002). Dema's motion to reconsider alleged that the court erred in its application of the law in dismissing her claims under *res ipsa loquitur*. We have already affirmed the circuit court's application of the law in ruling on the defendants' motion; for the same reasons, we affirm its ruling on Dema's motion to reconsider.

¶ 29 We note that Dema raises for the first time in her reply brief the argument that defendants impermissibly engaged in judge shopping by bringing the motion *in limine* before the trial judge rather than bringing a motion before the pretrial motions judge. She contends that by denying a motion to dismiss under 2-619 of the Code (735 ILCS 5/2-619 (West 2014)), the pretrial motions judge had already determined that the *res ipsa loquitur* claims were adequate as a matter of law. Consequently, defendants inappropriately attempted to have the trial judge vacate that ruling. We do not reach this issue because arguments not made in an appellant's opening brief and raised for the first time in the reply brief need not be addressed. See Ill. S.Ct. R. 341(h) (7) (eff. Nov. 1, 2017).

¶ 30 CONCLUSION

¶ 31 Accordingly, we affirm the judgment of the circuit court.

¶ 32 Affirmed.