2018 IL App (2d) 170636-U
No. 2-17-0636
Order filed June 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EDWARD MARSHALL, Independent Executor of the Estate of MARJORIE MARSHALL, Deceased,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 11-L-213
PROVENA SENIOR SERVICES d/b/a PROVENA GENEVA CARE,	)	Honorable James R. Murphy,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: In survival action brought for medical professional negligence, the trial court erred in granting nursing care facility summary judgment where (1) plaintiff's nursing expert opined that defendant breached duty to prevent patient's fall and (2) plaintiff's physician expert opined that the injury resulted from a fall.

¶ 2 Plaintiff, Edward Marshall, as independent executor of the estate of Marjorie Marshall, filed a claim for medical professional negligence against defendant, Provena Senior Services, d/b/a Provena Geneva Care, for a hip fracture that Marjorie suffered from a fall while residing at

defendant's facility. The trial court granted defendant summary judgment on the claim, and plaintiff appeals. We conclude that a genuine issue of material fact exists as to whether defendant breached a duty of care to prevent Marjorie from falling. We reverse the summary judgment and remand the cause for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 This survival action, which plaintiff brought under section 27-6 of the Probate Act of 1975 (755 ILCS 5/27-6 (West 2014)), arises from a claim under the Nursing Home Care Act (2010 ILCS 45/1-101 *et seq.* (West 2014)) for personal injuries suffered by Marjorie when she fell at defendant's facility on December 2, 2010. The original complaint was filed on April 13, 2011, and Marjorie died on February 8, 2014. Thereafter, plaintiff was appointed independent executor of her estate, and he filed a second-amended complaint on September 23, 2014.

¶ 5 The second-amended complaint alleged that Marjorie was admitted as a new patient in defendant's facility on November 3, 2010. At the time of her fall, she suffered from dementia. Defendant's employees used a pull alarm system for patients suffering from dementia to alert the nursing staff when those patients sat up or attempted to get out of bed. Marjorie, with a pull alarm on her bed gown, got up and out of bed, walked toward the bathroom in her room, and fell.

¶ 6 The second-amended complaint alleged that, at the time of Marjorie's fall, defendant owed her a duty to exercise ordinary care in her treatment and care. Defendant allegedly breached that duty by (1) failing to timely respond to the pull alarm that alerted staff that Marjorie was moving out of bed; (2) failing to properly equip Marjorie with a pull alarm or other device that would notify staff that she was up and out of bed; and (3) by failing to provide Marjorie adequate fall prevention measures.

¶ 7 Plaintiff alleged that "[a]s a proximate result of one or more of these acts or omissions, Marjorie Marshall sustained personal injuries, including conscious pain and suffering, prior to her death on February 8, 2014, and had she survived she would have been entitled to further pursue a cause of action for personal and pecuniary damages, which she filed prior to her death."

¶ 8 On July 20, 2015, plaintiff identified Charlotte Sheppard, R.N., as a controlled liability expert under Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007). Plaintiff also identified five treating physicians as independent expert witnesses under Rule 213(f)(2): Dr. David Mahvi, Dr. Joseph Meis, Dr. David Morawski, Dr. Ricardo Senno, and Dr. Vasilios Stambolis.

¶ 9 Dr. Morawski is an orthopedic surgeon who treated Marjorie for her hip fracture. He testified by deposition that he had no knowledge of the care that defendant provided Marjorie at the facility, and therefore, he had no opinion as to the cause of her fall. However, Dr. Morawski testified that her injury was a subtrochanteric fracture that did not appear to be pathologic and appeared to be caused by a fall.

¶ 10 Sheppard opined in plaintiff's Rule 213(f)(3) disclosure and in her deposition that defendant failed to keep Marjorie safe. Sheppard stated that, at the time of Marjorie's admission, she was 87 years old and had weakness, poor appetite, depression, and anemia after undergoing a hemicolectomy for recurrent colon cancer on October 26, 2010. Marjorie had macular degeneration and required hearing aids. She was reported to have dementia and was evaluated by multiple care providers, including a psychiatrist and a psychologist. Dementia was confirmed, and she also had deficits in both short-term and long-term memory with diminished safety awareness. Marjorie had cognitive and executive functioning impairments. She required multiple reminders and cues to follow directions.

¶ 11 Upon admission, Marjorie was determined to be at a high risk for falls. At the facility, she was part of the Following Stars Program, and wore a clip/magnet pull alarm while seated and in bed. Marjorie underwent physical, occupational, and speech therapy.

¶ 12 Late at night and early morning on December 1 and 2, 2010, Marjorie was cared for by Janet Ohlson, a licensed practical nurse (L.P.N.), and Salud Martinez and Francis Francisco, two certified nursing assistants (C.N.A.s). According to Sheppard, Ohlson stated that she was aware that Marjorie did not follow directions and had trouble recalling what she was told. Marjorie required cues and reminders.

¶ 13 Marjorie's room was near the nursing station. Pursuant to her care plan, she required help with all transfers and was assisted in toileting, including moving from her bed or wheelchair to the bathroom where a nurse or C.N.A. would help remove her undergarments, remain with her while toileting, help her redress, and assist her back to her bed or chair. No logs were kept, but Ohlson said she or a C.N.A. would check Marjorie at the beginning of the night shift to determine whether the pull alarm was applied and working. Marjorie would be offered assistance to the toilet at the beginning of the shift, and then every two hours. Ohlson knew that Marjorie previously had removed the clip. When Marjorie was in bed, the staff moved the clip on the pull alarm from the back of her gown to another location where she could not reach it.

¶ 14 The facility's materials regarding the incident show that Francisco found Marjorie on the floor in her bathroom. Sheppard opined that defendant failed to keep Marjorie, who had a known risk for falls, safe. Sheppard explained that, if a pull alarm is used, it must be placed where the patient cannot remove it, and therefore, she believed it was unlikely that Marjorie could remove her clip. Sheppard concluded as follows: "[i]f Marjorie got up and the alarm sounded, staff should have responded to assist her prior to her entry into the bathroom. If it was

known that Marjorie Marshall was able to remove the clip, the facility had an obligation to more effectively monitor the patient and to use additional intervention to protect the patient."

¶ 15 On January 26, 2017, defendant moved for summary judgment, arguing that none of the physicians who plaintiff retained as experts provided an opinion on the standard of nursing care that Marjorie received at the facility. Defendant concluded that "[d]espite the nature of this case as a medical professional negligence action, plaintiff has no medical expert" to link the alleged deviations from the duty to provide adequate nursing services and Marjorie's injury.

¶ 16 The trial court granted defendant summary judgment on March 17, 2017. In determining that plaintiff had failed to establish the element of proximate cause, the trial court commented that Sheppard "stop[ped] short of saying that the deviation from the standard of care caused the fall, and therefore, caused the injury, and deferred to the medical doctors to say that." The court also stated that Dr. Morawski's testimony "doesn't fill in the gap." Without elaborating, the court predicted that "[t]here would likely be certain portions of the Sheppard or [Dr.] Morawski testimony that would be barred or stricken," and therefore, the gap would be expected to be greater at trial. The court concluded that "plaintiff does not have a [213](f)(3) [witness] who would tie that deviation from [the nurses'] standard of care to plaintiff's injury with cause in fact or legal cause."

¶ 17 On April 27, 2017, plaintiff filed a motion to reconsider, arguing that any gap in the evidence was filled by "common knowledge" and a lay person's understanding of "what causes falls" to argue that the alleged negligence is within the understanding of laypersons and therefore does not require expert testimony. The trial court viewed the new arguments as an attempt at "another bite at the apple" and denied the motion to reconsider. This timely appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, plaintiff argues that he presented sufficient evidence of proximate cause to withstand defendant's motion for summary judgment. Summary judgment is appropriate only when "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." 735 ILCS 5/2-1005(c) (West 2010). The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adams*, 211 Ill. 2d at 43. If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004).

¶ 20 In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is to be encouraged to expedite the disposition of a lawsuit; however, it is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Springborn v. Village of Sugar Grove*, 2013 IL App (2d) 120861, ¶ 24. We review *de novo* a trial court's grant of summary judgment. *Springborn*, 2013 IL App (2d) 120861, ¶ 24.

¶ 21 A plaintiff in a medical malpractice action must prove (1) the standard of care against which the medical professional's conduct must be measured, (2) the defendant's negligence by

failing to comply with that standard, and (3) the defendant's negligence was the proximate cause of the injuries for which the plaintiff seeks redress. *Freeman v. Crays*, 2018 IL App (2d) 170169, ¶ 21. The proximate cause element of a medical malpractice case must be established by expert testimony to a reasonable degree of medical certainty. *Freeman*, 2018 IL App (2d) 170169, ¶ 21.

¶ 22 Sheppard offered her opinion on the adequacy of defendant's nursing services, pursuant to Rule 213(f)(3), which provides in part that "[a] 'controlled expert witness' is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert." Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007). Dr. Morawski offered his opinion on whether the fall caused the injury, pursuant to Rule 213(f)(2), which provides that "[a]n 'independent expert witness' is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert." Ill. S. Ct. R. 213(f)(2) (eff. Jan. 1, 2007).

¶ 23 Defendant argues that there is inadequate proof of proximate cause because (1) Sheppard is not a physician and therefore is unqualified to opine on how the fall caused the hip fracture and (2) Dr. Morawski admitted that he had no opinion regarding the nursing care that Marjorie received at the facility. Defendant obfuscates the issue, creating an illusory "gap" in the evidence where there is none. Simply put, Sheppard's testimony creates a genuine issue of material fact as to whether defendant's staff implemented reasonable measures to prevent Marjorie's fall, and Dr. Morawski's testimony creates a genuine issue of material fact as to whether the fall caused the injury.

¶ 24 In arguing that plaintiff failed to create a genuine question of material fact, defendant relies on a brief colloquy in which Sheppard testified as follows:

"Q: And you would agree your opinions in this case are limited to nursing standard of care. True?

A: Yes.

Q: And you believe that you have the foundation to opine on the cause of the fracture?

A: To some extent. I don't have any intention of providing a causation opinion. If somebody were to ask me, that's my answer. But I am very comfortable deferring to the physicians and letting them sort that out between them.

Q: Okay. So you would agree that you would defer to the physicians regarding any causation opinions in this case. True?

A: Yes."

¶ 25 Viewed in the broader context of her testimony, this exchange amounts to an explanation that Sheppard had no opinion regarding the medical diagnosis of Marjorie's injury and whether the fall caused it. Sheppard left those opinions to the medical experts like Dr. Morawski. However, she gave a detailed opinion regarding the cause of the fall itself.

¶ 26 Sheppard opined that Marjorie's fall was caused one of two ways: (1) defendant's staff was not alerted when Marjorie rose from bed because the staff failed to place the pull alarm properly or implement more rigorous monitoring measures or (2) if the pull alarm was placed properly and functioning, the staff simply failed to timely respond when Marjorie rose and triggered the alarm. Sheppard opined that defendant "failed to keep Marjorie Marshall, a patient with dementia and a known high risk for falls, safe." This opinion supports the reasonable inference, or at least creates a factual question, about whether defendant's staff breached its duty of care to prevent Marjorie's fall. In turn, Dr. Morawski opined that Marjorie's hip fracture did

not appear to be pathologic but rather appeared to be from a fall. In other words, Sheppard testified that defendant's negligence caused the fall, and Dr. Morawski testified that the fall caused the injury.

¶ 27 Defendant's challenge to the complaint is based primarily on Sheppard's opinion that defendant's staff breached a duty to prevent Marjorie's fall. But defendant also argues in passing that summary judgment is appropriate because "Dr. Morawski did not testify that his opinions were given to a reasonable degree of medical certainty" and he "never testified that his education, knowledge, or experience as an orthopedic surgeon served as a basis for an opinion that the fall caused the fracture."

¶ 28 Because medical opinion testimony conveys "the aura of reliability," testimony from a treating physician is presented to a jury only when the physician testifies either that his opinions are within a reasonable degree of medical certainty or that his opinions are based upon specialized knowledge and experience and grounded in recognized medical thought. *Soto v. Gaytan*, 313 Ill.App.3d 137, 147 (2000) (citing *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1082 (1995)). Dr. Morawski's deposition met this threshold to preclude summary judgment in this case. He testified that he has been a board-certified orthopedic surgeon since 1995 and had completed a fellowship in joint reconstruction and joint replacement. He testified that his practice specializes in complete joint replacements and also addresses emergency room cases, fractures, and traumas related to joints. He surgically repaired Marjorie's hip fracture and testified that the injury was caused by a fall. Dr. Morawski described his professional credentials and the nature of his joint-replacement practice, which demonstrated that he possesses the requisite knowledge and experience to render a medical opinion regarding the proximate cause of Marjorie's injury.

¶ 29 Construing the pleadings, depositions, admissions, and affidavits strictly against defendant and liberally in favor of plaintiff, we conclude that summary judgment is precluded by a genuine issue of material fact regarding proximate causation. 735 ILCS 5/2-1005(c) (West 2010); *Williams*, 228 Ill. 2d at 417. Our conclusion obviates the need to address plaintiff's remaining arguments regarding common knowledge and layperson's understanding of what causes falls.

¶ 30 III. CONCLUSION

¶ 31 For the previous reasons, the summary judgment entered for defendant is reversed and the cause is remanded for further proceedings consistent with this disposition.

¶ 32 Reversed and remanded.