2016 IL App (1st) 133130-U

SECOND DIVISION
January 26, 2016

Nos. 1-13-3130

MIARA MITCHEM LEE, a Minor, by Her Mother and Next Friend, TIARA LEE, Plaintiff-Appellant, v. MARY PALMORE, M.D., Defendant-Appellee (Nuru-Deen A. Olowopopo, M.D., deceased, by Estate of Nuru-Deen A. Olowopopo, Palmore & Olowopopo, MDs, Mac Henry Scott, M.D., and Advocate Trinity Health Partners, an Illinois corporation, d/b/a Trinity Hospital, Defendants).	)	Appeal from the Circuit Court of Cook County No. 08 L 5540 Honorable Susan Zwick, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered a directed verdict for the defendant doctor in this medical negligence case. Plaintiff failed to provide competent evidence that any negligence on defendant's part was a proximate cause of the injury to the minor child. Affirmed.

¶ 2 Plaintiff, Miara Mitchem Lee, through her mother Tiara Lee, filed this medical malpractice action seeking damages for injuries Miara allegedly sustained at birth. The claim against defendant Dr. Mary Palmore proceeded to trial where Dr. Palmore moved for a directed verdict. The trial court granted Dr. Palmore's motion and entered a directed verdict in her favor. Plaintiff moved for a new trial, which was denied, and this appeal followed. We affirm.

¶ 3 BACKGROUND

¶ 4 At about 6:00 a.m. on May 31, 2004, Tiara Lee, who was ten days past her due date, presented herself to Trinity Hospital in Chicago for induction of labor and delivery. Hospital nursing staff contacted defendant Mary Palmore, M.D. who reflexively ordered labor admission and induction orders at 6:30 a.m. on that date, thinking that Ms. Lee was her patient. At the time that she was admitted, hospital staff mistakenly believed that Ms. Lee was a patient of defendant. In truth, the clinic and hospital charts each reflected that a Dr. Olowopopo was Lee's attending physician. When she arrived at the hospital to deal with other patients, defendant discovered the error and "signed off" the case at 1:10 p.m. that afternoon. Hospital staff then engaged in an effort to get the patient's attending physician to the hospital for management of the rather expectant pregnant patient.

¶ 5 Apparently unable to get Dr. Olowopopo to the hospital in a timely fashion, hospital staff summoned another obstetrician, Mac Henry Scott, M.D. who was believed to be covering for Dr. Olowopopo's patients, to report on an urgent basis to deliver the child. As it developed, the baby was macrosomatic (birth weight of more than eight pounds), a fact which complicated the vaginal delivery in that it required the delivering physician to apply certain force in the effort to

deliver the child, since a cesarean delivery was not an option by the time he arrived at the hospital, owing to the imminent delivery.

¶ 6 Plaintiff filed suit against Dr. Palmore, Dr. Olowopopo, Dr. Scott and Trinity Hospital. Dr. Olowopopo died after the suit was filed and no appearance was filed on his behalf. Plaintiff's claim proceeded to trial against Dr. Palmore alone, after plaintiff settled with the other defendants.

¶ 7 Prior to trial, during rulings on motions *in limine,* the trial judge commented on the apparent legal inadequacy of any disclosed testimony purporting to establish that "the standard of care required this child be delivered by C Section at any point on May 31." The trial judge specifically informed plaintiff's counsel that the proposed testimony of Dr. Scott on this issue was not sufficient. Plaintiff's counsel, in fact, agreed that he had no testimony that indicated a requirement that the child be delivered by cesarean. Nonetheless, the trial judge permitted plaintiff to put on her case-in-chief.

¶ 8 Evidence at trial revealed that defendant and Dr. Olowopopo shared office space where they would see their patients for office visits, but that they did not cover each other's patients at Trinity Hospital, which was located across the street from their office. On the date of the delivery, defendant was covering Dr. Olowopopo's East 93rd Street office patients only. During Ms. Lee's pregnancy, she was seen only by Dr. Olowopopo in his Advocate Southeast office. When contacted at home early in the morning, apparently thinking that Ms. Lee was her patient, defendant verbally gave standard orders to start the labor process, including administration of a drug to promote thinning of the cervix, an essential start to any vaginal delivery. The order went on to allow the administration of pitocin, a drug that would stimulate uterine contractions, once

the cervix had effaced or thinned to 50%. That drug was to be administered per the protocol of the hospital. All of these orders were generated in the name of Dr. Olowopopo.

¶ 9 Upon her arrival at the hospital, defendant learned that Ms. Lee was listed on the labor and deliver unit board as a patient of Dr. Olowopopo and Advocate Southeast Clinic, a fact which alerted defendant that Lee was not her patient. Thus, the physician who was covering the call of Advocate Southeast and Dr. Olowopopo would be responsible for Lee. As a result, defendant never saw or evaluated Ms. Lee and never reviewed any of her medical records, including any ultrasounds. Defendant explained to the court and jury that there was no need for her to contact any physician in light of the fact that she already had "coverage" from another doctor. Defendant "signed off" the case around 1:00 p.m.

¶ 10 Dr. Scott testified that he often covered for Dr. Olowopopo's patients at Trinity but denied that he considered Lee his patient. Dr. Scott did agree that the only indication defendant may have been Lee's physician was the initial telephone orders. Evidence at trial also revealed Trinity had a 24-hour, on-call urgent obstetrician available. On the date of the child's birth, Dr. Scott testified that he was at a picnic when he was contacted by hospital staff at 2:30 p.m. He was listed as being present at the hospital, with the anesthesiologist already present, one hour later. By this time, the baby's head was already coming out of the birth canal. He performed an episiotomy to facilitate delivery and needed to pull the baby out by the shoulder. Upon delivery, the child's arm simply dropped, a condition caused by an injury to the child's brachial plexus, a bundle of nerves in the shoulder. In Scott's opinion, this likely occurred during the delivery itself, but may have happened *in utero*. He went on to opine that assuming the injury did occur during delivery, if defendant or Dr. Olowopopo had performed a cesarean delivery at any time before

delivery, the injury would not have occurred. Notably, neither he nor any other qualified physician offered an opinion at trial that defendant was required by the standard of care to order or perform a cesarean at any time before the actual delivery.

¶ 11 At trial, plaintiff did not call a medical expert witness to offer any opinions on negligence, causation or damages. Instead, her counsel attempted to prove the defendant's negligence through the use of hospital and American Medical Association (AMA) standards, all of which were used in an effort to establish that defendant was negligent for failing to appropriately treat the pregnant patient once she issued the admission, labor and induction orders and that she negligently failed to make arrangements for Dr. Olowopopo or another doctor to take over the case. Plaintiff also used these standards in an effort to prove that defendant was negligent for effectively "abandoning the patient." Plaintiff failed to offer any evidence that the failure to follow any of these hospital or AMA standards was a proximate cause of the injuries suffered by plaintiff.

¶ 12 Defendant called an expert medical witness, James Green, M.D., who testified that Dr. Olowopopo was Lee's attending physician and that there was no indication that Ms. Lee was a candidate for cesarean section. He also testified that it was "common" that Lee was not seen by a physician between 6:30 a.m. and 3:00 p.m. and that there was "no indication" that the baby suffered any harm during that time. He further testified that the child's head was delivered "spontaneously," which indicated a normal labor and delivery as of that point in time, but that Dr. Scott noted shoulder dystocia (difficulty delivering the child because the shoulder is stuck in the birth canal) and appropriately employed something called the "McRoberts maneuver" to deliver the child. This maneuver involves a nurse applying suprapubic pressure on the fetus and

the physician manipulating the shoulder and rotating the fetus in order to effect delivery. He did not fault the failure to order a cesarean, as Ms. Lee had previously delivered a 9-pound child and there was no way to predict that her second child would develop shoulder dystocia during vaginal delivery. He further opined that defendant did not deviate from the standard of care by allegedly failing to follow any of the standards referred to during plaintiff's case-in-chief.

¶ 13 At the conclusion of plaintiff's case, defendant filed a motion for directed verdict, the trial court entertained argument and expressed her belief that plaintiff's case had serious shortcomings and took the motion "under advisement," allowing defendant to put on her case. Following the testimony of the defendant's expert, the court ruled that, despite plaintiff's counsel arguing that there was testimony that a cesarean section would not cause a brachial plexus injury suffered during vaginal delivery, plaintiff had failed to offer any opinion that Dr. Palmore had violated the standard of care by failing to perform a cesarean section.

¶ 14 ANALYSIS

¶ 15 In a medical negligence action, plaintiff must prove the defendant deviated from the appropriate standard of care and that the defendant's negligence was a proximate cause of the injury to the plaintiff. *Higgens v. House*, 288 Ill. App. 3d 543, 546 (1997); *Purtill v. Hess*, 111 Ill. 2d 229, 242 (1986); *Walski v. Tiesenga*, 72 Ill. 2d 249, 256 (1978). Unless a physician's negligence is so grossly apparent or treatment so common as to be within everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the physician's deviation from that standard. *Purtill*, 111 Ill. 2d at 242.

¶ 16 Plaintiff may support a claim of medical negligence with proof of deviation from hospital or medical association standards. See *Studt v. Sherman Health Sytems*, 2011 IL 108182, ¶ 25;

Roach v. Springfield Clinic, 157 Ill. 2d 29 (1993); *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326 (1965). Plaintiff also has the burden of proving that the defendant's negligence was a proximate cause of the claimed damages. *Williams v. University of Chicago Hospitals*, 179 Ill. 2d 80, 87 (1997). Generally speaking, plaintiff must provide expert testimony to establish proximate causation. *Saxton v. Toole*, 240 Ill. App. 3d 204, 211 (1992). Proof of proximate cause must be established by expert testimony to a reasonable degree of medical certainty and cannot be merely possible, speculative or contingent. *Id.*; *Johnson v. Loyola University Medical Center*, 384 Ill. App. 3d 115, 122 (2008). If plaintiff fails to establish competent evidence that the defendant's negligent conduct was a proximate cause of plaintiff's damages by the conclusion of her case-in-chief, the court shall direct a verdict in defendant's favor. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 123 (2004); *Mayer v. Baisier*, 147 Ill. App. 3d 150, 155 (1986).

¶ 17 The granting of a directed verdict is reviewed *de novo*. *Sullivan*, 209 Ill. 2d at 112. We will view the evidence in a light most favorable to plaintiff and we will only affirm such a ruling if the evidence so overwhelmingly favors the defendant movant that no contrary judgment on the evidence could ever stand. *Id*. at 123; *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). Before we address the substance of plaintiff's contentions on appeal, we should mention that defendant urges us to affirm the trial court simply on the basis that plaintiff has forfeited any review by failing to specifically preserve the claimed errors. Notably, plaintiff has failed to include the trial court's order appealed from, the relevant pleadings and trial transcripts as an appendix to her appellate brief. Ill. Sup. Ct. Rule 342 (eff. Jan. 1. 2005) (appellant's brief shall include, among other things, the judgment appealed from, any findings of fact or opinions issued

by the trial court and the relevant pleadings). Furthermore, plaintiff has demonstrably failed to provide a specific citation in the trial transcript that establishes the proof of any negligence by defendant that was a proximate cause of the damages suffered. Appellant's overarching argument on appeal focuses on the notion that the trial court's directed verdict was improvidently granted because it inferred that plaintiff's proof was deficient because she failed to call an expert to establish the negligence aspect of her claim. This argument is advanced with brio, despite the fact that there is not a single citation to the order itself or the transcript of the argument on the directed verdict motion. Our review of the record reveals that defendant is correct that plaintiff has forfeited these contentions (see Ill. Sup. Ct. Rule 341(h)(6), (7) (eff. Feb. 6, 2013)), but in the interests of justice, we will review the claim.

¶ 18 In the case *sub judice,* plaintiff's claim for damages was directly predicated on the assertion that Ms. Lee was a candidate for cesarean section delivery of her fetus prior to the time that vaginal delivery was undertaken. Plaintiff claimed that the fetus was macrosomic and predisposed to shoulder dystocia and that cesarean delivery would have obviated any injury to the child's brachial plexus. While plaintiff did elicit certain testimony from the delivering physician, Dr. Scott, she did not elicit any opinion that defendant Dr. Palmore was negligent for failing to perform a cesarean section at any time when she was allegedly caring for Ms. Lee. In fact, Dr. Scott testified that he would not fault the failure to order a cesarean in light of the fact that the patient had vaginally delivered a macrosomic child and there was no pre-delivery indication that there was any increased risk for shoulder dystocia. The several efforts at impeaching various witnesses in order to offer admissions of departure from hospital policies or AMA standards does not in any way establish negligence on the part of defendant that caused

this child's injuries. Our detailed review of the trial transcript reveals that plaintiff did not tie up any of these alleged negligent acts to any competent causation evidence. As a result, the trial court properly directed the verdict for defendant as it relates to the policies and AMA standards.

¶ 19 Appellant's cobbled-together argument that there was adequate proof that defendant was negligent for failing to order or perform a cesarean section to deliver the baby is similarly flawed. As noted above, Dr. Scott conceded the child's brachial plexus injury likely occurred during delivery, even though it could have occurred while the fetus was still in the womb. His forthright testimony that, assuming the correctness of his belief, the earlier performance of a cesarean section would have avoided any brachial plexus injury does not equate to an opinion that defendant was in fact negligent for having failed to order or perform that procedure. Simply put, neither Dr. Scott nor any other competent expert witness testified that defendant was negligent or deviated from the standard of care by failing to perform a cesarean section procedure to deliver this child. The fact that there was "some evidence" that could, with further evidentiary support, have helped prove proximate cause does not assist appellant or this court in trying to find some corresponding proof that defendant was negligent for failing to order or perform that surgical procedure. As a result, the trial court's order directing a verdict in defendant's favor was appropriate and we affirm the judgment.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.