NOTICE
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2014 IL App (4th) 130239-U

NO. 4-13-0239

FILED
May 15, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JOSEPH DENTON,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
PRO AMBULANCE SERVICE, PROVENA HEALTH,	)	No. 02L43
PROVENA HOSPITALS, PROVENA COVENANT	)	
MEDICAL CENTER, COVENANT MEDICAL	)	Honorable
CENTER, and BRIAN LUKENBILL,	)	Jeffrey B. Ford,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff failed to present any expert testimony in a professional negligence case after more than a decade of litigation, the trial court properly granted summary judgment in favor of defendants.

¶ 2 In March 2000, plaintiff, Joseph Denton, a firefighter, suffered a back injury when he assisted defendant, Brian Lukenbill, a paramedic and employee of defendant Pro Ambulance Service, in removing an obese female from her trailer after an emergency call. Two years later, plaintiff filed a personal-injury action against Lukenbill; Pro Ambulance Service; and defendants Provena Health, Provena Hospitals, Provena Covenant Medical Center, and Covenant Medical Center. Plaintiff alleged Pro Ambulance Service was a division or an assumed name of the aforementioned corporate defendants. In February 2013, the Champaign County circuit court granted summary judgment in favor of defendants and against plaintiff.

¶ 3 Plaintiff appeals the summary judgment, asserting (1) no expert witness testimony was required to establish the element of duty, (2) the trial court erred by not considering the statements of Gary Ludwig, and (3) the court erred by citing cases from other states in explaining why it granted summary judgment in favor of defendants. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On March 12, 2000, plaintiff and Lukenbill responded to an emergency call involving a woman, weighing around 300 pounds, who was suffering from respiratory distress and located in a bedroom of a narrow trailer. Lukenbill evaluated the woman and determined she needed to be transported to the hospital. The woman stated she could walk with assistance. With Lukenbill on one side of the woman and plaintiff on the other, the three began to walk down a narrow hallway. After a few feet, the woman stated she was going to pass out and could not walk anymore. Lukenbill then decided to use a two-man carry to get the woman to a stretcher outside the trailer. Plaintiff took the upper body and secured her arms in his hand, and Lukenbill took the legs. Plaintiff and Lukenbill carried the woman out of the door, down a few steps, and then to the stretcher. According to the depositions, the use of a stair chair was mentioned by other firefighters and paramedics on the scene, but Lukenbill declined to use it. In his deposition, plaintiff stated that, within the first few steps of the two-man carry, plaintiff began to feel pain. In his deposition, Lukenbill stated plaintiff never complained or asked to be replaced by another responder while they were carrying the woman. As a result of carrying the woman, plaintiff suffered a severe back injury that required surgery and the attachment of titanium bolts and plates to plaintiff's spinal column.

¶ 6 On March 6, 2002, plaintiff filed his complaint against defendants, seeking an award for the injuries he sustained in carrying the woman on March 12, 2000. Plaintiff had la-

beled the cause of action as willful and wanton conduct. Moreover, in his complaint, plaintiff alleged, in pertinent part, the following: "At the aforesaid time and place, it was the duty of the aforementioned defendants to remove this patient from the aforesaid trailer in a manner consistent with the *standards of experts in the field of providing emergency services* with regard to the safety of the emergency service providers involved, including Plaintiff JOSEPH DENTON, as well the safety of the patient being removed." (Capitalization in original and emphasis added.) It further alleged "the recognized standard of emergency ambulance services" in such situations as the one at issue was to use the stair chair where feasible. Defendants filed an answer and raised the defense of contributory negligence. Defendants also filed a third-party complaint against the City of Champaign and the City of Champaign fire department for contribution.

¶ 7 In February 2004, defendants filed their first motion for summary judgment, to which they attached (1) the complaint; (2) Lukenbill's deposition; (3) plaintiff's deposition; (4) the deposition of Lloyd Galey, lieutenant firefighter with City of Champaign fire department; and (5) Fred Foster, Jr., an intermediate emergency medical technician and Lukenbill's partner on the March 12, 2000, call. Plaintiff filed a response with the following exhibits: (1) a sworn statement by the woman who was the subject of the emergency call; (2) a sworn statement by Gary Ludwig, a licensed paramedic and chief of special operations for Jefferson County, Missouri; (3) Lukenbill's deposition; (4) plaintiff's deposition; (5) Galey's deposition; and (6) Foster's deposition. Ludwig stated he was familiar with the standard of conduct for licensed paramedics in the United States and attached his curriculum vitae. He also noted material he had reviewed and stated those materials were customarily relied upon by experts in his field. After a June 2004 hearing, the trial court denied defendant's first motion for summary judgment, finding the case presented genuine issues of material fact.

¶ 8 The trial date for this case was continued numerous times between October 2004 and February 2006, and Judge Jeffrey Ford was assigned to the case in September 2005. The case then lay dormant until December 21, 2011, when new counsel for plaintiff entered his appearance and filed a motion to set an expert cutoff date and trial date. On January 31, 2012, the trial court entered a case management order, requiring plaintiff to disclose lay and expert witnesses in compliance with Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007) by March 15, 2012. On July 30, 2012 (mailed July 26, 2012), defendants filed their second motion for summary judgment, noting the case required expert testimony and plaintiff had yet to disclose an expert. On August 6, 2012, defendants filed a motion to bar witnesses, noting that on July 26, 2012, plaintiff had disclosed 58 witnesses, 25 of whom had never been disclosed through discovery. Defendants also noted plaintiff disclosed Dr. Gary Skaletsky as a retained expert witness, who would be examining plaintiff in late August. The other retained expert witness was Ludwig, who plaintiff did not disclose as an expert under Rule 213 until July 26, 2012. Plaintiff filed a response to both motions and attached Ludwig's sworn statement and affidavit to the summary judgment motion.

¶ 9 At an October 2, 2012, hearing, the trial court granted defendants' motion to bar witnesses and barred any witness that was not disclosed under Rule 213 before March 28, 2012. The court also gave defendants 30 days to refile their motion for summary judgment. On October 29, 2012, defendants filed their third motion for summary judgment, which they referred to as an amended motion for summary judgment. The third summary judgment motion asserted the need for expert testimony and argued plaintiff had not made a proper Rule 213 disclosure of an expert witness. Defendants attached the following to their third summary judgment motion: (1) the court's January 31, 2012, case management order; (2) plaintiff's undated answers to defend-

ants' interrogatories; (3) a list of witness from plaintiff's answers to interrogatories; (4) Ludwig's sworn statement; (5) plaintiff's complaint; (6) plaintiff's Rule 213 witness disclosures; (7) a list of newly identified witnesses; and (8) a list of witnesses identified in the course of discovery. Plaintiff filed a response and attached plaintiff's deposition; Foster's deposition, and the deposition of Bradley Diel, a firefighter and emergency medical technician with the City of Champaign fire department who was present at the March 12, 2000, emergency call.

¶ 10 After a February 27, 2013, hearing, the trial court granted defendants' motion for summary judgment. In granting the summary judgment motion, the court found that, based on the language of plaintiff's complaint, plaintiff had brought a professional negligence case and based on plaintiff's allegations expert testimony was required to establish the standard of care. The court also noted plaintiff's noncompliance with Rule 213 and the fact Ludwig's testimony had been barred. Additionally, the court cited numerous cases in support of his decision, including several from other states.

¶ 11 On March 7, 2013, defendants filed a motion to dismiss their third-party action, which the trial court granted on March 18, 2013.

¶ 12 On March 26, 2013, plaintiff filed a timely notice of appeal from the trial court's February 27, 2013, judgment in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). Thus, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 13 II. ANALYSIS

¶ 14 Here, plaintiff only challenges the trial court's grant of summary judgment in favor of defendants. His argument is brief, a little over four pages long, with few citations to authority and no citations to the record. Defendants' brief notes many deficiencies in the argument

section of plaintiff's brief. We note Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires the argument section of an appellant's brief to "contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. *** Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." The purpose of behind the aforementioned requirements is to have the parties present clear and orderly arguments to the reviewing court so it can properly ascertain and dispose of the issues involved. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7, 969 N.E.2d 930. "A failure to cite relevant authority violates Rule 341 and can cause a party to forfeit consideration of the issue." *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23, 962 N.E.2d 1071. Further, the appellant must argue the points he raises or the points will be forfeited. *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348, 846 N.E.2d 605, 613 (2006). "A conclusory assertion, without supporting analysis, is not enough." *Wolfe*, 364 Ill. App. 3d at 348, 846 N.E.2d at 613. When necessary, we will apply the aforementioned principles in this case.

¶ 15 While plaintiff argues the trial court's grant of summary judgment in defendants' favor should be reversed, defendants contend plaintiff's appeal is really about the trial court's grant of their motion to bar witnesses. We do recognize the trial court's granting of defendants' motion to bar witnesses did affect its ruling on the summary judgment motion. However, plaintiff's appellant brief does not even mention the trial court's granting of the motion to bar witnesses. Accordingly, the propriety of the trial court's grant of summary judgment is the only issue before us.

¶ 16 A grant of summary judgment is only appropriate when the pleadings, depositions, admissions, and affidavits demonstrate no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Williams v.*

Manchester, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8-9 (2008). With regard to analyzing summary-judgment motions, our supreme court has stated the following:

> "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. 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. Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt. [Citation.] If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper." *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

Moreover, a reviewing court "may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the trial court relied upon that ground." *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382, ¶ 7, 968 N.E.2d 1082. We review *de novo* the trial court's ruling on a motion for summary judgment. See *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 17 In his complaint, plaintiff labeled his action against defendants as "willful and wanton conduct." However, under Illinois law, a separate and independent tort of willful and wanton conduct does not exist. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 235, 938

N.E.2d 440, 452 (2010). Illinois law regards willful and wanton conduct as an aggravated form of negligence. *Krywin*, 238 Ill. 2d at 235, 938 N.E.2d at 452. Thus, "[t]o recover damages based upon a defendant's alleged negligence involving willful and wanton conduct, the plaintiff must allege and prove that the defendant owed a duty to the plaintiff, that the defendant breached the duty, and that the breach was the proximate cause of the plaintiff's injury." *Krywin*, 238 Ill. 2d at 235-36, 938 N.E.2d at 452. " 'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' " *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 295, 730 N.E.2d 1119, 1129-30 (2000) (quoting William L. Prosser, *Torts* 324 (4th ed. 1971)). The standard of conduct is also known as the standard of care. *Jones*, 191 Ill. 2d at 294, 730 N.E.2d at 1129.

¶ 18 The necessity of expert-witness testimony to establish the standard of care has been described as follows:

> "In an ordinary negligence case, the standard of care required of a defendant is to act as would an ordinary careful person or a reasonably prudent person. [Citation.] Generally, no expert testimony is necessary to prove the standard of care in an ordinary negligence case. [Citation.]
>
> In contrast, in a professional negligence case, the standard of care required of a defendant is to act as would an ordinarily careful professional. [Citation.] Pursuant to this standard of care, professionals are expected to use the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances. [Citation.] Generally, expert

> testimony is necessary to prove the standard of care in a professional negligence case. [Citations.] This requirement is based on the simple fact that without expert testimony, jurors, not skilled in the profession, are not equipped to judge the professional's conduct. [Citation.] Courts have recognized two exceptions to this rule: where the professional's conduct is so grossly negligent, or the procedure so common, that the jury can readily appraise it without the need for expert testimony." (Internal quotation marks omitted.) *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶¶ 36-37, 972 N.E.2d 266.

While plaintiff challenges the trial court's conclusion expert-witness testimony was necessary in this case, plaintiff does not contest the trial court's conclusion this was a professional negligence case. Further, as noted by the trial court, the language of plaintiff's complaint refers to the standards of experts in the field of providing emergency services. Thus, we apply the law governing professional negligence cases.

¶ 19 Plaintiff raises several arguments why expert testimony was not necessary in his case. He makes a general argument expert testimony was not needed to establish a duty in this case based on the circumstances of the case and because the facts were entirely undisputed. However, plaintiff brought a professional negligence cause of action, and as previously explained, expert testimony was required to establish the standard of care, unless an exception applied. See *Colburn*, 2012 IL App (2d) 110624, ¶ 37, 972 N.E.2d 266. We note the use of a stair chair to move a person is not a matter of which the general public would have knowledge. Moreover, while plaintiff argues the "grossly negligent" exception to the expert-witness require-

ment applies to his case, he cites no specific facts from the record or any authority indicating Lukenbill's actions were grossly negligent. Thus, plaintiff has forfeited his argument the "grossly negligent" exception applies in this case.

¶ 20 Citing *Studt v. Sherman Health Systems*, 2011 IL 108182, 951 N.E.2d 1131, plaintiff also contends the statements made by his "lay witnesses," who commonly used a stair chair, were sufficient to establish a duty to utilize the chair. However, our supreme court in *Studt* emphasized the necessity of expert testimony in professional negligence cases. *Studt*, 2011 IL 108182, ¶ 27, 951 N.E.2d 1131. Thus, plaintiff has not provided us with any authority in support of his assertion the statements made by his lay witnesses were sufficient to establish the standard of care and duty in this case and thus has also forfeited this argument. Accordingly, we find plaintiff has failed to show expert testimony establishing the standard of care was not required in this case.

¶ 21 Plaintiff next contends, that if expert witness testimony was required, he did present an expert witness, Ludwig. However, in granting the motion for summary judgment, the trial court noted Ludwig's testimony had been barred, and thus his affidavit could not be considered on the summary judgment motion. The court also explained how plaintiff had failed to comply with the requirements of Rule 213(f) for the disclosure of expert witnesses. Since plaintiff has not challenged on appeal the trial court's granting of defendants' motion to bar witnesses, Ludwig's testimony stands barred. "On a motion for summary judgment, a trial court cannot consider evidence that would be inadmissible at trial." *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 429, 879 N.E.2d 420, 424 (2007). Accordingly, we do not consider Ludwig's affidavit, and thus plaintiff did not present any expert testimony to establish the standard of care in this case. Additionally, we note the period for disclosure of expert witnesses had ended and

plaintiff had more than a decade to secure and disclose an expert witness.

¶ 22 Last, plaintiff asserts the trial court improperly rejected Illinois case law and considered case law from outside Illinois. We disagree with plaintiff's characterization of the trial court's ruling. The record indicates the court cited outside case law to support its conclusion under Illinois law because those cases specifically addressed paramedics and the establishment of the standard of care. Illinois case law clearly requires expert testimony in professional negligence cases, unless an exception applies. See *Colburn*, 2012 IL App (2d) 110624, ¶ 37, 972 N.E.2d 266. In deciding the motion for summary judgment, the trial court properly followed Illinois law, and we find no error. Additionally, we note that, even if the trial court had erred by considering case law outside of Illinois, that fact alone would not be a basis for reversing the grant of summary judgment. See *Perez*, 2012 IL App (2d) 110382, ¶ 7, 968 N.E.2d 1082 (noting a reviewing court may affirm a grant of summary judgment on any basis appearing in the record).

¶ 23 In this case, plaintiff failed to present expert testimony to show the standard of care necessary to establish the duty element, and plaintiff had more than a decade to do so. Since plaintiff failed to establish an element of his cause of action, we find the trial court's grant of summary judgment in defendants' favor was proper.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the Champaign County circuit court's judgment.

¶ 26 Affirmed.