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2019 IL App (3d) 170299-U

Order filed July 19, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

SUSAN STEED, as Independent Administrator)	Appeal from the Circuit Court
of the Estate of Glenn Steed, deceased,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellant,)	
)	
v.)	
)	
REZIN ORTHOPEDICS AND SPORTS)	
MEDICINE, S.C., an Illinois Corporation)	
and STEPHEN H. TREACY, M.D.,)	
)	Appeal No. 3-17-0299
Defendants)	Circuit No. 10-L-340
)	
(SUSAN STEED, as Independent Administrator)	
of the Estate of Glenn Steed, deceased,)	
)	
Plaintiff-Appellant,)	
)	
v.)	
)	
REZIN ORTHOPEDICS AND SPORTS)	
MEDICINE, S.C., an Illinois Corporation,)	Honorable
)	Theodore J. Jarz,
Defendant-Appellee).)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Plaintiff is entitled to judgment *n.o.v.* on the issue of liability where evidence overwhelmingly established that orthopedic treatment facility was negligent in failing to schedule follow-up appointment as ordered by treating physician.

¶ 2 Plaintiff, Susan Steed, as independent administrator of the Estate of Glenn Steed, filed suit against defendants, Rezin Orthopedics and Sports Medicine, S.C. and Stephen H. Treacy, M.D., alleging medical negligence for failing to prevent a deep vein thrombosis (DVT) and resulting pulmonary embolism that caused Glenn's death. The jury returned a verdict in favor of both defendants. Plaintiff filed a posttrial motion only challenging the verdict in favor of Rezin Orthopedics, which the trial court denied. On appeal, she argues (1) that the trial court erred in denying her motion for judgment *n.o.v.* against Rezin Orthopedics and a new trial on the issue of damages only, or alternatively, a new trial on all the issues and (2) that she is entitled to a new trial based on the trial court's admission of irrelevant and prejudicial evidence.

¶ 3 BACKGROUND

¶ 4 On January 29, 2009, Glenn Steed sustained an injury to his right leg and ankle while playing basketball with some co-workers. On February 17, 2009, he visited Rezin Orthopedics and Sports Medicine (Rezin Orthopedics) in Plainfield to address the discomfort he was still feeling in his lower leg. Dr. Stephen Treacy, an orthopedic surgeon employed by Rezin Orthopedics, diagnosed Glenn with a partially torn Achilles tendon. Dr. Treacy's treatment plan included placing Glenn's right leg in a cast with his foot pointed in a downward direction, a position called plantar flexion, for six weeks. He also ordered Glenn to return to the clinic in two weeks for a follow-up examination. The receptionist scheduled Glenn's cast appointment for February 19, 2009, at the Joliet clinic. On February 19, Glenn had a plaster cast placed around his right leg. Before he left the office, a receptionist scheduled

Glenn's follow-up appointment for March 13, 2009. The next day, Glenn complained to his wife that the position of his ankle in the cast was uncomfortable. On February 25, 2009, Glenn called the Joliet office, and a receptionist changed his follow-up appointment from March 13 to March 12. On March 8, 2009, Glenn suffered a pulmonary embolism from a deep vein thrombosis (DVT) and died.

¶ 5 Susan Steed, Glenn's wife and the administrator of his estate, filed suit against Rezin Orthopedics and Dr. Treacy alleging medical negligence. Susan claimed that Dr. Treacy was negligent in failing to schedule a timely follow-up appointment for Glenn. She also alleged that Rezin Orthopedics' receptionists were negligent in failing to follow Dr. Treacy's order and schedule Glenn's follow-up appointment within two weeks and failing to schedule an immediate appointment for Glenn as a result of his February 25 phone call. The complaint claimed that, had Glenn returned to Rezin Orthopedics on or before March 3, 2009, the DVT would have been diagnosed and the fatal pulmonary embolism would have been prevented.

¶ 6 At trial, Dr. Treacy testified that on February 17, 2009, he told Glenn that he wanted to see him again in two weeks. It was Dr. Treacy's custom and practice to note the date of a follow-up appointment on the bottom of a document referred to as a "super bill" and to give the super bill to the receptionist on duty at the end of every appointment. The receptionist would then schedule the appointment in accordance with Dr. Treacy's instructions.

¶ 7 Dr. Treacy did not place a cast on Glenn's leg at the initial appointment on February 17 because Glenn had driven himself to the appointment and could not drive home with a cast on his right leg. Instead, he ordered casting at a later date and a follow-up exam in two weeks. He wrote those instructions on the super bill and handed it to Jodi Decker, the Rezin Orthopedics receptionist on duty that day. Decker scheduled Glenn's casting appointment

for February 19 at the Rezin Orthopedics office in Joliet. She did not schedule a follow-up appointment at that time.

¶ 8 Decker testified that she was familiar with the protocol for scheduling patient follow-up appointments. An order for a patient to return to be casted and an order to follow-up in two weeks are two instructions that Decker expected Dr. Treacy to write at the bottom of the super bill. Dr. Treacy gave Glenn's super bill to Decker before Glenn left the Plainfield office. Decker stated that it was the custom and practice at Rezin Orthopedics to follow the instructions on the super bill. It was also common practice to schedule the first appointment and then schedule the follow-up when the patient returned for the first appointment. She scheduled the appointment for Glenn's casting in Joliet and told him to check his calendar and schedule the follow-up appointment when he returned for casting.

¶ 9 On February 19, 2009, Glenn reported to the Joliet office, and Dr. McNab, a podiatrist, placed a cast around Glenn's right lower leg and ankle. At the conclusion of the February 19 appointment, Victoria Hare, another Rezin Orthopedics receptionist, scheduled Glenn's follow-up appointment with Dr. Treacy for March 13, 2009. Hare testified that she had been a receptionist at Rezin Orthopedics for many years and throughout her years of service there was a protocol in place for how to schedule patients. All patients scheduled follow-up appointments with a receptionist. According to the protocol, receptionists were supposed to follow the doctor's order and schedule patients to come back in accordance with the doctor's instructions. The practice in the office was to make an appointment for a date within the time frame the physician wrote at the bottom of the super bill.

¶ 10 Before Glenn left the Joliet office, he also received written instructions on caring for his cast from Cheryl Hadden, the technician who assisted with the casting procedure. The

instructions advised him to report any changes to his cast, any tightness of his cast, and any marked swelling or pain in his leg.

¶ 11 A day or two later, Glenn began experiencing some discomfort and achiness in his right leg. On February 24, he commented to his wife that his cast felt tight. The next day, on February 25, 2009, he called Rezin Orthopedics' Joliet office and spoke with receptionist Rossana Popplewell. As a result of that phone call, Popplewell changed Glenn's follow-up appointment from March 13 to March 12.

¶ 12 Popplewell testified that she could not remember the content of her conversation with Glenn. After reviewing her notes from that day, she stated that she changed the appointment from March 13 to March 12, but the only information she recorded as a reason for the change was "f/u cast." She stated that "f/u" indicated that it was a follow-up appointment. She did not record any other information regarding Glenn's phone call. She testified that every receptionist at Rezin Orthopedics was responsible for scheduling patients, and it was their responsibility to schedule patients in accordance with doctors' orders. She also noted that, as a receptionist at Rezin Orthopedics, she was required to write down a message if a patient reported having an issue with his or her cast. No message was produced relating to Glenn's phone call.

¶ 13 After the February 25 phone call, Glenn began icing the back of his right leg while his leg was elevated. At Susan's suggestion, he also started taking Aleve. Susan testified that the combination of Aleve and elevation with ice made Glenn's leg feel better but did not completely alleviate the symptoms. Late in the evening on Saturday, March 7, 2009, Glenn complained for the first time that he was experiencing pain in his right thigh. Glenn and Susan decided that Glenn should telephone Rezin Orthopedics first thing on Monday morning. On Sunday morning,

Susan woke and found Glenn lying on the floor, unresponsive. He died as a result of a pulmonary embolism from a DVT that originated in his right calf.

¶ 14 Susan presented the expert testimony of Dr. Mathew Jiminez, a board certified orthopedic surgeon. He testified that during Glenn's February 17 examination, he presented several risk factors for DVT. Glenn was older than 40, with an elevated body mass index and an injury to the leg that required a cast. Because of these factors, it was Jiminez's opinion that the standard of care applicable to both Dr. Treacy and Rezin Orthopedics required them to set his follow-up appointment for two weeks from his initial appointment. He testified that a three-and-a-half-week appointment from the date of casting was not within the standard of care.

¶ 15 Dr. Treacy testified that the professional standard of care did not require him to schedule Glenn's follow-up appointment for two weeks after his first visit. In his opinion, the applicable standard of care permitted the follow-up visit to be schedule for three or even four weeks after Glenn's first appointment.

¶ 16 Dr. Michael Pinzur, an orthopedic surgeon and the quality medical director at Loyola Hospital, testified as an expert witness on defendants' behalf. Part of Pinzur's duties at Loyola included designing a plan for reducing blood clots for patients within the hospital. He opined that the professional standard of care did not require Rezin Orthopedics to schedule Glenn's follow-up appointment for two weeks after the date of his first visit. He testified that Rezin Orthopedics could have scheduled the following appointment for three-and-a-half weeks, rather than two weeks as Dr. Treacy had ordered, and it still would have been within the standard of care. According to Pinzur, it would have been within the applicable standard of care for Rezin Orthopedics to schedule the follow-up appointment anytime between four and six weeks after the date of Glenn's initial visit with Dr. Treacy.

¶ 17 Dr. Jeffery Huml, a board certified physician in internal and pulmonary medicine, testified as an expert regarding the science of a DVT. He stated that pain or tightness in a leg that is in a cast might be indicative of a DVT and should be examined immediately. He testified that patients at a higher risk of developing a DVT are ones who suffered a fracture or have undergone surgery and are obese, extremely old, or have a family history of blood clots. Since Glenn did not exhibit any of these conditions, Huml opined that he was not at high risk for developing a DVT.

¶ 18 Dr. Jacob Bitran specializes in internal and hematology medicine and was another expert witness called by defendants. He also testified that Glenn was a low risk patient for the development of a DVT. He stated that from a hematological standpoint, Glenn had been appropriately treated for the development of a DVT. He also testified that Glenn's pulmonary embolism formed from a clot that originated in his right lower leg as a result of the plaster cast treatment. He noted that when a DVT is diagnosed, it is easily treated and further complications are preventable.

¶ 19 Susan presented Illinois Pattern Jury Instructions, Civil, No. 20.01 (2006), to the jury. In relevant part, the instruction alleged that Rezin Orthopedics was negligent in one or more of the following ways:

“Failed to schedule the Decedent for a follow-up appointment in two weeks from February 17, 2009, in accordance with Dr. Stephen H. Treacy's order;
Failed to notify any physician or physician's assistant on February 25, 2009, after the Decedent telephoned the Defendants' Joliet office; or
Failed to timely schedule the Decedent to return to the office for an examination after the phone call on February 25th, 2009.”

The instruction also stated that Susan alleged “one or more of [the negligent acts] was a proximate cause of her damages.”

¶ 20 The trial court denied Susan's proposed jury instruction regarding a directed finding. That instruction provided:

"The court has determined that the Defendant, Rezin Orthopedics and Sports Medicine, S.C., is negligent for failing to schedule the Decedent for a follow-up appointment in two weeks from February 17, 2009, in accordance with the Dr. Stephen H. Treacy's order. This is not an issue you will need to decide."

¶ 21 The jury returned a general verdict in favor of Rezin Orthopedics and Dr. Treacy. Susan filed a posttrial motion, requesting judgment *n.o.v.* in her favor and against Rezin Orthopedics and a new trial on the issue of damages only or, in the alternative, a new trial on all issues. The motion did not request any relief regarding the judgment entered in favor of Dr. Treacy. In her motion, Susan also argued that she was entitled to a new trial based on the trial court's admission of irrelevant and prejudicial evidence. The trial court denied Susan's motion, and she appeals.

¶ 22 ANALYSIS

¶ 23 Susan contends that the trial court erred in failing to enter judgment *n.o.v.* and order a new trial on the issue of damages only based on the court's prejudicial error in denying her motion for a directed finding on defendant's negligence. She claims that judgment *n.o.v.* should be entered against Rezin Orthopedics on the issue of liability because the evidence, when viewed in the light most favorable to Rezin Orthopedics, so overwhelmingly favors her that a contrary verdict

cannot stand. She asks us to reverse the trial court's denial of her motion and remand for a new trial on the issue of damages only, or in the alternative, remand for a new trial on all the issues.

¶ 24 A directed verdict or a judgment *n.o.v.* should only be entered where the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based upon the evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). We review *de novo* a trial court's decision on a motion for a directed verdict or judgment *n.o.v.* *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999). In ruling on a motion for judgment *n.o.v.*, the trial court does not weigh the evidence, nor is it concerned with the credibility of witnesses. See *Pedrick*, 37 Ill. 2d at 510. A judgment *n.o.v.* is improper where there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where witness credibility or a resolution of conflicting evidence is decisive of the outcome. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992).

¶ 25 In an action for negligence against a health care provider, a plaintiff must show (1) the applicable standard of care, (2) that the health care provider deviated from that standard of care, and (3) that the deviation was the proximate cause of plaintiff's injury. *Neade v. Portes*, 193 Ill. 2d 433, 443-44 (2000). A health care provider may be found liable in a negligence case based on two separate theories: (1) liability for its own "institutional" negligence; and (2) vicarious liability for the professional negligence of its agents or employees. *Groeller v. Evergreen Healthcare Center LLC*, 2015 IL App (1st) 140932, ¶ 22 (noting the application of institutional liability theory to hospitals and nursing homes). In cases alleging health care facility negligence, our supreme court has noted that health care facilities have an independent duty to assume responsibility for the care of their patients. See *Darling v. Charleston Community Memorial*

Hospital, 33 Ill. 2d 326, 332 (1965); *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 295 (2000). An institutional duty of care involves the facility's management and administrative responsibilities, rather than medical responsibilities, to enforce rules and policies "adopted by the [facility] to insure a smoothly run [facility] routine and adequate patient care and under which the physicians have agreed to operate." *Johnson v. St. Bernard Hospital*, 79 Ill. App. 3d 709, 718 (1979).

¶ 26 To fulfill this duty, a treating health care facility must act as would a "reasonably careful" health care provider under the circumstances. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 29 (1996). This duty has been found based on claims that a health care facility (1) failed to require treatment and consultation by specialists and failed to review physicians' qualifications (*Andrews v. Northwestern Memorial Hospital*, 184 Ill. App. 3d 486, 489 (1989) (reasonably careful duty applied to hospitals)), and (2) failed to properly monitor and attend to the care of a patient (*Groeller*, 2015 IL App (1st) 140932, ¶ 22 (reasonable careful duty applied to nursing homes)). Whether a health care facility is reasonably careful in its administrative duties may be shown by a variety of evidence, including (1) expert testimony, (2) the custom and practice of a health care facility, and (3) the rules and regulations of a health care provider. *Darling*, 33 Ill. 2d at 331-32; *Andrews*, 184 Ill. App. 3d at 494.

¶ 27 Here, the evidence regarding the standard of care of a reasonably careful orthopedic facility was clear. A reasonably careful orthopedic facility under the circumstances was required to schedule patient follow-up appointments as instructed in the super bill. Dr. Treacy and three Rezin Orthopedics receptionists testified that it was Dr. Treacy's custom and practice to write the date of a follow-up appointment on the bottom of the super bill and deliver the super bill to the receptionist on duty at the end of every appointment. Dr. Treacy testified that it was his custom

and practice to note the date of the follow up appointment and then it was up to the receptionist to schedule the appointment in accordance with his instructions. He stated that he ordered Glenn to return within two weeks of casting, wrote those instructions on the super bill, and handed the super bill to Decker. Decker agreed with Treacy's assessment of the facility's policy regarding follow-up appointments. She acknowledged that Treacy ordered a two-week follow-up exam for Glenn, but she did not schedule the appointment. Instead, receptionist Hare scheduled the appointment after Glenn received his cast two days later. Hare testified that it was her responsibility, as with other receptionists, to schedule patient appointments and take patient phone calls. She also acknowledged that it was the custom and practice of the office to schedule follow-up appointments for two weeks after casting, as ordered by the physician. She did not schedule Glenn within that time frame. Finally, Popplewell, the receptionist who answered Glenn's phone call, concurred that the protocol for all receptionists was to schedule patients for follow-up appointments as directed in the super bill. Thus, Susan met her burden of proving the standard of care applicable to Rezin Orthopedics in the management and administration of patient care.

¶ 28 The evidence established, through physician testimony, office protocol, administrative scheduling documents and custom and practice, that the standard of care of a "reasonably careful" treating institution was to follow the written order on the super bill. That evidence was not contradicted. The evidence also demonstrated that Rezin Orthopedics breached the standard of care. The super bill instructed the receptionists to schedule the appointment for two weeks from February 19, and the receptionists did not schedule the appointment within that two-week window. No one testified that Rezin Orthopedics scheduled or attempted to schedule the follow-up appointment between February 19 and March 3. Because there is no evidence demonstrating

a factual dispute, the trial court erred in denying Susan’s motion for judgment *n.o.v.* on the issue of Rezin Orthopedics liability.

¶ 29 Rezin Orthopedics claims judgment *n.o.v.* is not appropriate because the record contains sufficient evidence to support a finding that it was within the standard of care to schedule a follow-up appointment within four weeks of casting an Achilles tear. The record contains evidence indicating that a follow-up appointment scheduled two to six weeks from the date of casting was within the professional standard of care. But the issue on appeal is not whether a directed verdict on the issue of negligence is appropriate against Dr. Treacy—a question that *would* involve consideration of the professional standard of care. We have been asked to evaluate whether a verdict should have been entered against Rezin Orthopedics. That question requires the assessment of a general standard of care based on a reasonably careful orthopedic facility. That standard of care was established by plaintiff, and defendant presented no evidence to refute it. Based on the standard of care applied to an orthopedic treatment facility, all the evidence as to Rezin Orthopedics’ negligence so overwhelmingly favors plaintiff that no verdict for defendant could ever stand.

¶ 30 In this case, however, the jury returned a general verdict for Rezin Orthopedics. When a jury enters a general verdict for defendant, we do not know the basis for its finding of no liability. See *Maple*, 151 Ill. 2d at 449. We do not know whether the jury entered the verdict in favor of defendant because it found that Rezin Orthopedics did not breach the standard of care or because it found no causal connection between Glenn’s death and the failure to schedule the appointment as instructed. Thus, although we agree that the evidence at trial overwhelmingly established that Rezin Orthopedics breached the standard of care, we must also evaluate

proximate cause. See generally *Neade*, 193 Ill. 2d at 443-44 (plaintiff must establish standard of care, breach, and proximate cause).

¶ 31 Here, the evidence presented at trial showed that if Glenn had returned to the clinic in two weeks, his DVT would have likely been diagnosed and treated. Both Dr. Bitran and Dr. Huml testified that the pulmonary embolism that resulted in Glenn's death formed from a clot that originated in Glenn's casted leg. Evidence from both parties' experts also revealed that a DVT is easily diagnosed and treatable. Susan testified that Glenn experienced discomfort and swelling shortly after he was fitted for the cast on February 19. Treacy ordered a follow-up visit for two weeks, and Rezin Orthopedics scheduled his follow up appointment for March 13, a date more than three weeks after casting. Glenn suffered a pulmonary embolism and died on March 8. The record before us demonstrates that defendant's negligence was a proximate cause of Glenn's death.

¶ 32 We recognize that the standard for entry of judgment *n.o.v.* is a high one and is not appropriate if “ ‘reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.’ ” See *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)). However, in this case, the evidence and inferences, when viewed in a light most favorable to Rezin Orthopedics, so overwhelmingly favor Susan that no contrary verdict can stand. Accordingly, we reverse and remand with directions to enter judgment in favor of Susan on the issue of liability and to hold a new trial on the issue of damages only. See *Wiggins v. Bonsack*, 2014 IL App (5th) 130123, ¶ 27; *Hickox v. Erwin*, 101 Ill. App. 3d 585, 590 (1981) (reversing and remanding with directions to enter judgment in favor of plaintiff and hold new trial only on issue of damages where evidence of proximate cause was overwhelming).

