IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Kimary Lee, special administrator of the estate of Faye J. Brown, deceased,	)	
Plaintiff,	)	
v.	)	No. 19 L 1397
Loyola University Health System,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A plaintiff presenting a medical malpractice cause of action is generally required to prove its case through expert opinion testimony. The plaintiff in this case failed to disclose any expert witness to establish either the standard of care, breach of that standard, or proximate injuries. Absent such expert testimony, the defendant's summary judgment motion must be granted.

Facts

This case arises from Loyola University Health System's alleged negligent medical treatment of Faye Brown in 2012 that caused her death. On September 19, 2014, Brown's daughter and administrator, Kimary Lee, filed a lawsuit (14 L 9810) alleging that Brown's injuries and death resulted from the administration of contrast dye, which triggered an allergic reaction, cardiovascular collapse, and cardiac arrest. The case proceeded in discovery, including Loyola's disclosure and Lee's deposition of Loyola's five expert witnesses identified pursuant to Illinois Supreme Court Rules. *See* Ill. S. Ct. R. 213(f)(3). On February 8, 2018, Lee voluntarily dismissed the case pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-1009.

On February 11, 2019, Lee re-filed her case. *See* 735 ILCS 5/13-217. Loyola answered the complaint, denying all substantive allegations and claims. On August 19, 2020, this court ordered Lee to disclose her Rule 213(f)(3) expert witnesses on or before October 1, 2020 and for Loyola to depose those witnesses by December 1, 2020. Lee did not disclose any expert witnesses.

Analysis

Loyola seeks the dismissal of Lee's case pursuant to summary judgment. The Code of Civil Procedure authorizes the issuance of summary judgment "if 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. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

A defendant moving for summary judgment may disprove a plaintiff's case by establishing that the plaintiff lacks sufficient evidence to meet an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to establish its case but failed in any way to demonstrate that he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. If the defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a

cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). If no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

In a medical malpractice action, the plaintiff bears the burden of proving: (1) the standard of care against which the defendant's conduct is measured; (2) an unskilled or negligent failure to comply with the standard of care; and (3) an injury proximately caused by the defendant's lack of skill or care. *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986). "Unless the health professional's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert testimony is required to establish the standard of care and the defendant physician's deviation from that standard." *Id.*; *see also Sullivan v. Edward Hosp.*, 209 Ill. 2d 110, 112 (2004); *Walski v. Tiesenga*, 72 Ill. 2d 249, 255-56 (1978). An expert's opinion must be based on recognized standards of competency in the particular profession. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 24 (1996); *Walski*, 72 Ill. 2d at 261.

Loyola's singular argument is that Lee cannot prove her case because she lacks the opinion of an expert who can testify as to the standard of care, Loyola's breach, and Brown's proximate injury. Lee did not directly respond to Loyola's argument but, instead, filed a motion to strike the deposition testimony of Loyola's five expert witnesses named in the 14 L 9810 lawsuit. Lee argues that such testimony is inadmissible based on Illinois Supreme Court Rule 191(a). The rule provides, in part that:

> Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

Ill. S. Ct. R. 191(a).

Lee's argument is unfounded for two reasons. First, even if this court were to strike the deposition testimony of Loyola's five expert witnesses, Lee would still have the burden of establishing a medical malpractice cause of action through expert testimony. Lee failed to disclose any experts. Lee also failed to provide this court with a reason for such an omission or file a motion for an extension of time to name an expert. Lee's tepid reliance on the deposition testimony of Dr. Robert Vogelzang is also unavailing. Lee identified Dr. Vogelzang in the 14 L 9810 case, but failed to disclose him as a Rule 213(f)(3) witness in the current case.

Second, Lee's argument is misdirected. Rule 191(a) concerns the admissibility of affidavits submitted in support of dispositive motions. Here, Loyola did not submit affidavits; rather, Loyola submitted the deposition testimony of its five identified expert witnesses. Lee's attorney deposed those experts and elicited their answers. Lee patently had the opportunity to expose the experts' lack of qualifications at the depositions and then seek to bar them. Yet Lee did not and does not attack either the substance of the experts' deposition testimony or their qualifications; rather, Lee seeks to avoid the import of their testimony through an off-point and purely procedural argument. That response is insufficient to

create a question of material fact sufficient to defeat a summary judgment motion.

Conclusion

For the reasons presented above, it is ordered that:

1. The plaintiff's motion to strike is denied;
2. The defendant's motion for summary judgment is granted; and
3. This case is dismissed with prejudice.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 14 2021

Circuit Court 2075