DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CYNTHIA A. MCSHANE-POWERS, Plaintiff/Appellant, v. DR. BRADLEY DR. FOLKESTAD, M.D.; and ARROWHEAD HOSPITAL, Defendants/Appellees.	)	No. 1 CA-CV 10-0638 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-031692

The Honorable Edward O. Burke, Judge

REVERSED AND REMANDED WITH INSTRUCTIONS

Cynthia A. McShane-Powers — Phoenix
Plaintiff/Appellant *in Propria Persona*

Jones Skelton & Hochuli PLC — Phoenix
By Eileen Dennis GilBride
Attorneys for Defendant/Appellee Dr. Folkestad

T I M M E R, Judge

¶1 Cynthia A. McShane-Powers appeals the superior court's order dismissing her medical malpractice complaint against Dr. Bradley Folkestad because she failed to provide a

sufficient preliminary expert opinion affidavit as ordered by the court and required by Arizona Revised Statutes ("A.R.S.") section 12-2603 (Supp. 2010). She argues the court erred because no expert affidavit was required by § 12-2603 and, in any event, she supplied a compliant affidavit. For the reasons that follow, we agree with the court that McShane-Powers was required to serve a preliminary affidavit, and the affidavit she provided does not comply with the statute. Nevertheless, because the trial court failed to give McShane-Powers reasonable time to cure the deficiencies in the affidavit before dismissing the complaint as required by A.R.S. § 12-2603(F), we reverse and remand with instructions to afford her this opportunity.

BACKGROUND[1]

¶2 In April 1998, Dr. Folkestad, a board-certified physician in obstetrics and gynecology ("OB/GYN"), performed abdominal surgery on Powers for a hysterectomy and prolapsed bladder at Arrowhead Hospital. According to McShane-Powers, a surgical sponge or towel ("surgical material") was left in her body. After the surgery, Powers experienced pain during sexual intercourse. In September 1998, Dr. Folkestad performed another

[1] When reviewing the superior court's dismissal order, we accept the facts alleged in the complaint as true, and we view those facts in the light most favorable to McShane-Powers as the non-prevailing party. *See Johnson v. McDonal*d, 197 Ariz. 155, 157, ¶ 2, 3 P.3d 1075, 1077 (App. 1999).

surgery, but the pain continued. In May 1999, a second OB/GYN physician, Dr. Gordon Davis, performed a third surgery on Powers, which resolved her pain issues.

¶3 Approximately seven years later, in August 2005, skin lesions appeared on McShane-Powers, and Dr. Davis diagnosed warts, which he removed. Thereafter, she experienced joint pain and migraine headaches. Eventually, in October 2007, her primary care physician, Dr. Vogt, took x-rays of her sinuses, which revealed "some type of gauze/textile." According to McShane-Powers, subsequent x-rays taken of different parts of her body, including her foot, similarly show the presence of gauze/textile. She contends the pieces of gauze/textile were remnants of the surgical material left behind during her first 1998 surgery and had traveled from her abdomen to different parts of her body via "trans mural [sic] migration."

¶4 In October 2009, Powers initiated this lawsuit against Dr. Folkestad and Arrowhead Hospital,[2] alleging Dr. Folkestad is at fault for leaving the surgical material in her abdomen and indicating her intent to rely on the res ipsa loquitur ("res ipsa") doctrine to prove Dr. Folkestad's negligence. Dr. Folkestad moved to dismiss the complaint without prejudice, arguing Powers failed to include the required certification

[2] The record does not reflect that McShane-Powers served Arrowhead Hospital; it has not appeared in this lawsuit and is not a party to this appeal.

regarding the need for a preliminary expert affidavit ("preliminary affidavit" or "affidavit"), as mandated by § 12-2603(A). The superior court denied the motion, ruling McShane-Powers' allegation that Dr. Folkestad violated the standard of care by failing to ensure removal of the surgical material was a matter of common knowledge, and no expert opinion would be needed. Powers then moved for summary judgment and attached x-rays purporting to show the surgical material in her body. The court denied her motion, noting the court did not have the expertise to interpret the x-rays and significant issues of fact remained unresolved.

¶5 Dr. Folkestad subsequently moved for an order pursuant to § 12-2603(D) requiring Powers to serve a preliminary affidavit, arguing common knowledge alone was insufficient to prove his alleged negligence. Dr. Folkestad avowed that the Arrowhead Hospital nursing staff was responsible for ensuring removal of surgical material and, regardless, McShane-Powers' subsequent surgery could have resulted in the surgical material purportedly left in her body. Consequently, Dr. Folkestad argued that because McShane-Powers had not sued all individuals who participated in the various surgeries, she could not rely on the res ipsa doctrine to avoid compliance with § 12-2603(A).

¶6 After full briefing, the court granted the motion. The court reasoned that if the allegations in the complaint

comprised the entirety of the record, it would not require an affidavit. But because the record revealed the existence of surgery by another doctor, and because the significance of provided x-rays, microscopic skin sample reports, and the theory of transmural migration are not matters of common knowledge, the court concluded that a preliminary affidavit is required. The court therefore stayed the action until June 1, 2010, when the court would dismiss it if McShane-Powers failed to file a preliminary affidavit.

¶7 In May 2010, Powers filed a second motion for summary judgment and attached an affidavit from Jeffrey Davidson, a microbiologist. Davidson opined that gauze had been left in McShane-Powers' body during her 1998 surgery, it was the surgeon's responsibility to ensure such material is removed, and the material had migrated through her body and intermingled with her tissues.

¶8 In June, the court denied the motion, stating without elaboration McShane-Powers had failed to comply with § 12-2603. Two months later, upon Dr. Folkestad's request in an objection to a motion to set the case for trial, the court dismissed the complaint without prejudice due to McShane-Powers' failure to submit the required affidavit. This appeal followed.[3] Because

[3] In her reply brief, McShane-Powers questions why we accepted Dr. Folkestad's answering brief later than the January 19, 2011

we are presented with a mixed question of fact and law, we review the superior court's dismissal de novo.[4] *Wilmot v. Wilmot*, 203 Ariz. 565, 568-69, ¶ 10, 58 P.3d 509, 510-11 (2002) (noting appellate courts are not bound to superior court's conclusions and findings that combine both fact and law).

DISCUSSION

I. Requirement for preliminary affidavit

¶9 Powers argues the superior court erred by requiring a preliminary affidavit pursuant to § 12-2603 because the basis for the allegations against Dr. Folkestad are demonstrated by the res ipsa doctrine. The res ipsa doctrine is a rule of circumstantial evidence that permits the fact-finder to infer negligence when (1) the injury is the type that ordinarily does not occur in the absence of negligence, (2) the injury is caused by an agency or instrumentality under the exclusive control of the defendant, and (3) the claimant is not in a position to show

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deadline set by this court. We did so because a subsequent deadline was set, which Dr. Folkestad met. Specifically, Dr. Folkestad moved to dismiss this appeal before January 19, 2011, and we granted the motion. We subsequently reinstated the appeal and gave Dr. Folkestad until July 8, 2011 to file his answering brief. He timely filed his brief on June 27, 2011. Although Dr. Folkestad should have sought an extension to file his answering brief pending resolution of his motion to dismiss, McShane-Powers was not prejudiced by the lapse.

[4] McShane-Powers also appeals the denial of her motion for summary judgment and motion to set and certificate of readiness. The court's rulings are not subject to appellate review because they did not necessarily affect the judgment of dismissal. A.R.S. § 12-2102(A) (2003).

the particular circumstances that caused the offending agency or instrumentality to result in injury. *Sanchez v. Tucson Orthopaedic Inst., P.C.*, 220 Ariz. 37, 39, ¶ 8, 202 P.3d 502, 504 (App. 2008); *Schneider v. City of Phoenix,* 9 Ariz. App. 356, 358, 452 P.2d 521, 523 (1969). Dr. Folkestad contends McShane-Powers is not entitled to invoke res ipsa because the record does not establish he had exclusive control over her surgeries. Additionally, he asserts that because other issues relating to the standard of care and liability are not matters of common knowledge, McShane-Powers was required to submit a preliminary affidavit. To resolve this dispute, we examine the interplay between common law principles applicable to medical malpractice claims, § 12-2603, and the res ipsa doctrine and then apply the principles we glean to the record.

¶10 To prevail in her lawsuit, McShane-Powers is required to prove Dr. Folkestad owed her a duty, he breached that duty, and she sustained damages as a result. *Seisinger v. Siebel*, 220 Ariz. 85, 94, ¶ 32, 203 P.3d 483, 492 (2009). Dr. Folkestad breached his duty if he failed to exercise the "same care in the performing of his duties as was ordinarily possessed and exercised by other physicians of the same class in the community in which he practiced." *Id*. at ¶ 33 (citation and internal quotation marks omitted). This level of care is commonly referred to as the "standard of care." *Id.* at ¶ 32. McShane-

Powers is required to establish the standard of care by expert medical opinion, unless it is a matter of common knowledge that her injuries would not have occurred if Dr. Folkestad had exercised due care. *Id.* at ¶ 33; *see also Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, 321, ¶ 13, 183 P.3d 1285, 1289 (App. 2008) (holding expert testimony is necessary to establish departure from standard of care "except when negligence is so clearly apparent that a layman would recognize it").

¶11 Section 12-2603(A) requires a plaintiff in a medical malpractice action to certify at the time of the complaint whether expert opinion testimony is necessary to prove the standard of care or liability. If the plaintiff certifies the need for such testimony, a preliminary affidavit setting forth this testimony must be provided along with the disclosure statement mandated by Arizona Rule of Civil Procedure 26.1. A.R.S. § 12-2603(B). If the plaintiff certifies that no expert testimony is needed, the defendant health care professional may move the court to order the plaintiff to obtain and serve a preliminary affidavit. A.R.S. § 12-2603(D). If the court grants the motion, the plaintiff must obtain and serve an affidavit by the date and on the terms specified by the court. A.R.S. § 12-2603(E). The court must dismiss the complaint without prejudice if the plaintiff fails to comply with the court's order. A.R.S. § 12-2603(F).

¶12 Section 12-2603 does not impose a heightened requirement for expert testimony that did not exist at common law. *Old Pueblo Anesthesia,* 218 Ariz. at 321-22, ¶ 14, 183 P.3d at 1289-90. Thus, the determinative issue before us is whether Dr. Folkestad's alleged failure to ensure removal of the surgical material is so obviously below the standard of care and clearly caused injury to McShane-Powers that a layperson could identify it, making expert testimony unnecessary. *See id*. at ¶ 13.

¶13 McShane-Powers asserts Dr. Folkestad's negligence is obvious because "[d]octors are supposed to see that [the] sponge count is correct" before completing the surgery. We disagree that McShane-Powers' recitation of this aspect of the standard of care is so obvious that a layperson could perceive it without expert testimony. In his motion to compel acquisition and service of a preliminary affidavit, Dr. Folkestad avowed that nurses employed by Arrowhead Hospital assisted him in Powers' operation, and "[o]ne of the functions and responsibilities of nursing in such an operation is to perform preoperative and postoperative sponge counts in order to verify that no sponges, pads or other materials have been unintentionally left behind in the patient's body." According to Dr. Folkestad, a surgeon is so occupied with the details of surgery that he does not oversee the sponge count and must rely on nurses for that task. Because

a layperson would not know whether the standard of care applicable to Dr. Folkestad included ensuring an accurate sponge count, expert witness testimony is necessary, and a preliminary affidavit to that effect is required. Similarly, as it is not a matter of common knowledge that surgical material left in a patient would cause the type of injuries McShane-Powers is experiencing years after the complained-about surgery, a preliminary affidavit addressing that point is also necessary.[5] A.R.S. § 12-2603(B)(4) (providing that a preliminary affidavit must include a recitation of manner in which health care professional's error caused damages to claimant); *Ryan v. San Francisco Peaks Trucking Co.,* 228 Ariz. 42, 48-49, ¶ 23, 262 P.3d 863, 869-70 (App. 2011) ("[U]nless a causal relationship is readily apparent to the trier of fact, expert medical testimony is normally required to establish proximate cause.").

¶14 McShane-Powers' reliance on the res ipsa doctrine to avoid the affidavit requirement of § 12-2603 is misplaced.

[5] Dr. Folkestad also argued in his motion to compel that McShane-Powers is required to provide a preliminary affidavit demonstrating that the surgical material was left behind during a surgery performed by Dr. Folkestad rather than the later surgery performed by Dr. Davis. Although ultimately McShane-Powers will be required to make this demonstration to prove Dr. Folkestad was negligent, we do not perceive a need to do so in a preliminary affidavit, which addresses the standard of care and how breach of that standard injured the claimant. A.R.S. § 12-2603(A), (B). Moreover, nothing in the record suggests that identifying the surgery in which the surgical material was left behind is the proper subject of expert testimony.

Section 12-2603 does not exempt res ipsa claims from the preliminary affidavit requirement. Our holding in *Old Pueblo Anesthesia* is instructive:

> . . . Arizona law has never applied the res ipsa loquitur doctrine to relieve a claimant of the necessity of securing expert testimony when such testimony would be required to establish the prerequisites for applying the doctrine. Res ipsa loquitur is applicable "'only when it is a matter of common knowledge among laymen or medical [experts], or both, that the injury would not ordinarily have occurred if due care had been exercised.'"

218 Ariz. at 321, ¶ 12, 183 P.3d at 1289. As previously explained, *see supra* ¶ 13, it is not obvious that a surgeon's standard of care includes ensuring the absence of surgical material in the patient's body before completing surgery. Thus, even assuming McShane-Powers eventually may rely on the res ipsa doctrine to prove that surgical material left in a patient falls below the standard of care,[6] she is not relieved from securing expert testimony to establish as a prerequisite to applying that doctrine that Dr. Folkestad had exclusive control over the sponge count and was therefore responsible for the surgical material left behind. *Tucson Orthopaedic Inst.*, 220 Ariz. at

[6] We need not decide whether McShane-Powers can ever invoke the res ipsa doctrine in light of her failure to join Dr. Davis as a defendant. *cf. Tiller v. Von Pohle*, 72 Ariz. 11, 230 P.2d 213 (1951) (holding res ipsa can be used in medical malpractice case in which a cloth sack was found in patient's body and only one operation occurred).

39, ¶ 8, 202 P.3d at 504; *see also Old Pueblo Anesthesia*, 218 Ariz. at 321, ¶ 11, 183 P.3d at 1289 ("[T]he doctrine of res ipsa loquitur does not relieve claimants of the obvious necessity of identifying which defendant or defendants controlled 'the agency or instrumentality' causing their injuries.").

¶15 In sum, the superior court did not err by requiring McShane-Powers to obtain and serve a preliminary affidavit.

II. Sufficiency of Davidson affidavit

¶16 McShane-Powers argues the superior court erred by dismissing her complaint on the basis that Davidson's affidavit did not comply with § 12-2603. The court did not specify how Davidson's affidavit failed to comply with § 12-2603. Regardless, we agree the affidavit is non-compliant because it fails to offer a sufficient opinion regarding Dr. Folkestad's breach of the standard of care. As McShane-Powers points out, Davidson opines that a surgeon is responsible for ensuring the removal of all surgical material from the patient – required subject matter for the preliminary affidavit. *See supra* ¶ 13. But A.R.S. § 12-2604(A) (Supp. 2010) explicitly requires the affiant to be a board-certified OB/GYN physician, among other qualifications, to render an opinion on the standard of care applicable to board-certified OB/GYN physicians like Dr. Folkestad. *See also Old Pueblo Anesthesia*, 218 Ariz. at 322, ¶

15, 183 P.3d at 1290 (noting an expert in one field may not testify as an expert on the standard of care for a specialist in another field). Davidson, a microbiologist, cannot offer expert testimony regarding the standard of care applicable to Dr. Folkestad. For this reason alone,[7] the superior court correctly concluded that McShane-Powers failed to provide a sufficient affidavit pursuant to § 12-2603.

¶17 We next address the propriety of dismissing the complaint as a result of McShane-Powers' failure to comply with the court's order to obtain and serve a sufficient affidavit. Section 12-2603(F) provides that when a claimant provides a preliminary affidavit, "[u]pon any allegation of insufficiency of the affidavit, the court shall allow any party a reasonable time to cure any affidavit, if necessary." In denying McShane-Powers' motion for summary judgment, the court stated she had failed to comply with § 12-2603. The court neither specified the insufficiency nor provided McShane-Powers a reasonable time to cure the deficiency. Consequently, the court erred by dismissing the complaint without affording McShane-Powers an opportunity to cure the deficiency in the affidavit. We therefore reverse and remand with instructions to permit

[7] We do not address the sufficiency of Davidson's affidavit to constitute expert opinion testimony on causation because that issue was neither raised in Dr. Folkestad's objection to the affidavit nor explicitly addressed by the court. That issue may be raised and resolved on remand.

McShane-Powers a reasonable time to cure the deficiency in the provided affidavit by obtaining, at a minimum, an affidavit from a board-certified OB/GYN who otherwise meets the requirements of § 12-2604(A) to opine on the standard of care for an OB/GYN and whether Dr. Folkestad's alleged actions constituted a breach of that standard.

CONCLUSION

¶18 For the foregoing reasons, we reverse and remand with instructions as specified in this decision.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

G O U L D, Judge, dissenting.

¶19 I respectfully dissent. I believe the trial court erred when it dismissed Power's case on the grounds she was required to submit an expert affidavit regarding the standard of care pursuant to A.R.S. § 12-2603(A). Powers' allegation - that Dr. Folkestad was negligent because he left a surgical sponge or gauze in her body during surgery – is the type of allegation that does not require expert medical testimony.

¶20 Generally, expert testimony is necessary to prove that a physician is negligent. *Riedisser v. Nelson*, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975). However, it is well-established in Arizona that no expert testimony is necessary to prove negligence when a physician leaves a foreign object, such as a sponge, in a patient's body. *Revels v. Pohle*, 101 Ariz. 208, 418 P.2d 364 (1966) (expert testimony not required where physician left steel sutures in plaintiff's abdomen); *Tiller v. Von Pohle*, 72 Ariz. 11, 230 P.2d 213 (1951) (expert testimony not necessary where physician left a cloth sack in plaintiff's body). As the court so aptly stated in *Landgraff v. Wagner*, 26 Ariz. 49, 57, 546 P.2d 26, 34 (App. 1976):

> "[I]t must be remembered we are dealing here with a surgical instrument which was left within the appellant's body after an operation. In our opinion the testimony of an expert is not required in this instance to establish the standard of care in the medical community. The error is so self-evident that a jury can determine the question of negligence without reliance upon the opinion of an expert."

¶21 The majority contends that expert testimony is necessary "[B]ecause a layperson would not know whether the standard of care applicable to Dr. Folkestad included ensuring an accurate sponge count." Dr. Folkestad is certainly entitled to present expert testimony in his defense that it was the nurses, and not him, who were responsible for counting the sponges. However, if such expert testimony is required under

A.R.S. §12-2603(A), then it is hard to conceive of any case where a sponge or gauze left in a patient's body would be exempt from the expert testimony requirement. A plaintiff in such cases would always be required to produce an expert to prove that the physician was responsible for the sponge count. *See Burke v. Wash. Hosp. Ctr.*, 475 F.2d 364, 365 (D.C. Cir. 1973)(holding that where plaintiff alleged surgeon was negligent for leaving surgical sponge in her abdomen, the surgeon's claim that expert testimony was necessary to establish responsibility for the sponge count lacked merit, because it was "that rare sort of case in which the type of harm itself raises so strong an inference of negligence, and the physician's duty to prevent the harm is so clear, that expert testimony is not required to establish the prevailing standard of care").

¶22 The issue before this court is not medical causation. The trial court did not dismiss Powers' case because she failed to provide an expert affidavit regarding causation; the dismissal was based on her failure to provide an expert affidavit regarding the standard of care. This court should not be sidetracked by whether or not Powers can prove that the gauze allegedly "migrated" to different parts of her body, whether the nurses were responsible for counting the surgical sponges/gauze, or whether the gauze was left in her body during a surgery performed by a different physician. All of these questions go

to the issue of causation; they do not address whether Dr. Folkestad should have left the gauze in Powers' body in the first place.

¶23 Likewise, Dr. Folkestad's argument that Powers is unable to prove "exclusive control" under her theory of res ipsa loquitur should not be the focus of this court. Powers' inability to prove exclusive control may give rise to a number of defenses by Dr. Folkestad. *Sanchez v. Tucson Orthopaedic Inst., P.C.*, 220 Ariz. 37, 39, ¶ 8, 202 P.3d 502, 504 (2008)(listing the elements of the res ipsa doctrine). However, the relevant consideration for us is whether Powers needs an expert to prove the *first* element of res ipsa: "the injury is of a kind that usually does not occur without negligence." *Id.* at 39, ¶ 8, 202 P.3d at 504.

¶24 Powers certified that she did not need an expert regarding the standard of care pursuant to A.R.S. §12-2603(A). She based this certification on her allegation that Dr. Folkestad left a sponge/gauze in her body when he performed surgery on her. To support her position, Powers presented x-rays and stated that Dr. Vogt had told her that there was "some type of gauze/textile" in her body. She also presented the affidavit of a microbiologist who tested the material, and opined that it was some type of surgical gauze. Whether or not this presents a compelling case of medical negligence is not

before us. This case was dismissed because Powers failed to comply with A.R.S. §12-2603(A). I believe Powers satisfied the requirements of the statute by presenting a detailed, good faith basis to support her certification she did not need a standard of care expert. I would reverse the trial court's dismissal on this issue and remand without instruction to submit an expert affidavit.

/s/
ANDREW W. GOULD, Judge