IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

REBEKAH ANN KORAK, et al., *Plaintiffs/Appellants*,

v.

DANIEL J. PARA, et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0444
FILED 7-30-2019

Appeal from the Superior Court in Maricopa County
No. CV2015-090391
The Honorable David M. Talamante, Judge *Retired*

AFFIRMED

COUNSEL

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By Keith R. Lalliss
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MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Diane M. Johnsen joined.

S W A N N, Judge:

¶1 Rebekah Ann Korak appeals the superior court's entry of summary judgment on her medical malpractice claim against Dr. Daniel J. Para, contending that *res ipsa loquitur* applies.[1] We affirm. Testimony by Korak's expert was insufficient to permit an inference that Dr. Para's negligence was more likely than not the cause of her injury. Further, we discern no error in the superior court's decision to disregard, for purposes of Korak's new-trial motion, the opinions of a different expert that Korak could have presented during the summary judgment proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 On February 1, 2013, Korak was admitted to Arizona Regional Medical Center for abdominal pain and gallstones. Dr. Para removed her gall bladder that day by way of a laparoscopic cholecystectomy. Korak was discharged on February 4.

¶3 On February 7, Korak returned to Arizona Regional Medical Center with difficulty breathing, syncope, and hypotension. After Dr. Para evaluated her, she was admitted to intensive care to receive blood products and electrolyte and fluid support. On February 9, she was transferred to Mountain Vista Medical Center, where Dr. Raul Lopez performed an exploratory laparotomy and evacuation of a hematoma.

¶4 Korak returned to Mountain Vista Medical Center on February 20 and received a CT scan that showed a pseudoaneurysm of the splenic artery. The next day, she went to Banner Desert Medical Center with abdominal pain and syncope. There, she was diagnosed with "[p]ossibl[e] pancreatitis" and underwent multiple procedures, including an attempted splenic artery embolization and an exploratory laparotomy during which her spleen was removed.

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[1] Korak and Dr. Para's spouses also are parties to this appeal. For convenience, we refer to Korak and Dr. Para only.

¶5 Korak sued Dr. Para and others for medical malpractice. Korak alleged that on February 1, Dr. Para negligently "caused an instrument to come into forceful contact with an artery supplying blood to the spleen of [Korak], causing damage to the wall of the artery and gradual formation of a pseudo aneurism on the artery" that later "burst . . . , resulting in the permanent removal of [her] spleen." Korak also alleged that Dr. Para "caused a surgical instrument to cut into the liver of [Korak], causing the damaged organ to bleed."[2]

¶6 Korak disclosed Dr. Oluyemisi Sangodeyi as her standard-of-care and causation expert against Dr. Para. After deposing Dr. Sangodeyi, Dr. Para moved for summary judgment, contending that Korak could not establish proximate cause. Korak responded that the doctrine of *res ipsa loquitur* applied. Acknowledging that Dr. Sangodeyi was "not certain what Dr. Para did that caused the damage," Korak contended that "[t]here [was]no other explanation as to why the artery was damaged other than it came into contact with something that Dr. Para inserted into [Korak]'s body."

¶7 The superior court granted summary judgment for Dr. Para, concluding that *res ipsa loquitur* did not apply. Korak moved for a new trial, citing previously unsubmitted portions of Dr. Sangodeyi's deposition as well as a new declaration from Dr. Lopez in which he opined that Korak would not have suffered liver damage absent surgeon error in the original procedure. The court denied the motion, concluding that Dr. Sangodeyi's testimony did not establish either causation or *res ipsa loquitur*. The court declined to consider Dr. Lopez's declaration because it was "not disclosed . . . until . . . well after the close of discovery and after the Court's initial ruling on Defendant Para's Motion for Summary Judgment."

¶8 Korak appeals.

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[2] Korak further alleged that Dr. Para negligently prescribed blood-thinning medications for her to use upon discharge, and failed to provide appropriate post-operative care when she was readmitted on February 7. On appeal, however, she does not contend that summary judgment was inappropriate with respect to Dr. Para's post-operative conduct. We therefore conclude that she has abandoned any claim based on that conduct. *See DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572 (1979).

DISCUSSION

¶9 On review of a grant of summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the superior court correctly applied the law. *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 104, ¶ 13 (App. 2017). We view the facts and reasonable inferences in the light most favorable to the non-prevailing party. *Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160, 163, ¶ 11 (2017). Summary judgment should be granted only "if the facts produced in support of [a] claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves,* 166 Ariz. 301, 309 (1990).

I. THE SUPERIOR COURT DID NOT ERR BY DECLINING TO APPLY RES IPSA LOQUITUR.

¶10 A plaintiff alleging medical malpractice must prove both of the following elements:

> 1. The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances.
>
> 2. Such failure was a proximate cause of the injury.

A.R.S. § 12-563. Korak's exclusive theory of Dr. Para's liability, *res ipsa loquitur*, applies if it is commonly known among laymen, medical professionals, or both that the plaintiff's injury would not ordinarily have occurred if due care had been exercised. *Ward v. Mount Calvary Lutheran Church*, 178 Ariz. 350, 355 (App. 1994). A plaintiff arguing *res ipsa loquitur* must establish

> that the accident is of a kind that ordinarily does not occur in the absence of negligence, that the accident was caused by an agency or instrumentality subject to the control of the defendant, and that the plaintiff is not in a position to show the circumstances that caused the agency or instrumentality to operate to her injury.

Brookover v. Roberts Enters., 215 Ariz. 52, 57–58, ¶ 19 (App. 2007). The preliminary question of whether *res ipsa loquitur* should apply is a question of law. *Ward*, 178 Ariz. at 354. The court may grant summary judgment

against the plaintiff if any one of the *res ipsa loquitur* elements is not present. *Id.* at 355.

¶11 We begin with the first element. "To survive summary judgment on this element, the evidence presented must be sufficient to allow the jury to infer that negligence was more likely than not the cause of the accident: 'The facts must justify the conclusion that negligence is the most likely explanation for the occurrence.'" *Cox v. May Dep't Store Co.*, 183 Ariz. 361, 364 (App. 1995) (citation omitted). Korak contends that Dr. Sangodeyi's testimony alone established that "[t]he only possible source of [Korak's] injury was some instrument that Dr. Para was using which was misused."

¶12 Korak offered an affidavit from Dr. Sangodeyi in which he opined that Dr. Para caused Korak's injury by "inserting . . . trocars [a surgical instrument] in such a manner as to cause injury to the wall of the splenic artery," by "cut[ting] into the liver of the patient, resulting in internal bleeding," and by "concluding the operative procedure without sufficient effort to determine whether or not there was any bleeding in the operative area before closing the wound." But in his deposition approximately two years later, Dr. Sangodeyi, despite initially affirming that the affidavit still accurately reflected his opinions, later made multiple statements indicating uncertainty. He stated that "there could have been trocar injury" and instrumentation was a "possible cause of injury," but he could not say whether Korak's injury was caused by Dr. Para's trocar use or by post-operative pancreatitis. He also testified that bleeding is a risk associated with a laparoscopic cholecystectomy even when the procedure is performed correctly, though he also stated that he was not aware of any other cases of splenic artery injury resulting from that procedure. He conceded that Dr. Para had appropriately checked for bleeding during Korak's procedure.[3]

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[3] Korak attempted to rehabilitate Dr. Sangodeyi's testimony by submitting a document titled "Korak Deposition Review," apparently signed by Dr. Sangodeyi but not sworn or compliant with Ariz. R. Civ. P. 80(c), with her controverting statement of facts. There, Dr. Sangodeyi stated, in stark contrast to his deposition testimony: "There was no evidence that Mrs[.] Korak has [sic] pancreatitis prior to her original surgery. Therefore I cannot say patient has splenic artery pseudoaneurysm. I have to therefore conclude that the splenic artery injury is related to the laparoscopic cholecystectomy surgery." Even if this statement had been

¶13 Given the significant conflicts between Dr. Sangodeyi's affidavit and subsequent deposition testimony, the superior court did not err by concluding that the evidence was insufficient to permit the jury to infer that Korak's injury would not have occurred absent negligence.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO CONSIDER DR. LOPEZ'S DECLARATION.

¶14 Korak contends that the superior court erred by declining to consider Dr. Lopez's declaration, which she submitted in connection with her motion for a new trial. We review this ruling for an abuse of discretion. *Marquez v. Ortega*, 231 Ariz. 437, 441, ¶ 14 (App. 2013). We apply the same standard of review to the denial of a new trial. *Spring v. Bradford*, 243 Ariz. 167, 170, ¶ 11 (2017).

¶15 Korak contends that she offered Dr. Lopez's declaration under Ariz. R. Civ. P. ("Rule") 59(a)(2), which allows the court to take additional testimony following a nonjury trial. But the *grounds* for granting a motion for a new trial are limited to, as relevant here, "*newly discovered* material evidence *that could not have been discovered and produced at the trial with reasonable diligence*." Rule 59(a)(1)(D) (emphases added); *see also Waltner v. JPMorgan Chase Bank, N.A.*, 231 Ariz. 484, 490, ¶ 24 (App. 2013) ("To obtain relief, the moving party must demonstrate that the evidence . . . could not have been discovered before trial by the exercise of due diligence").

¶16 Dr. Lopez's opinions were not newly discovered; Korak identified him as an expert witness in May 2016 and referenced—but did not provide—his "expected" testimony in her response to the August 2017 motion for summary judgment. The court did not abuse its discretion by declining to consider it.

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sworn or made under penalty of perjury, a party cannot defeat summary judgment by offering a post-deposition affidavit or declaration contradicting a witness's deposition testimony. *MacLean v. State Dep't of Educ.*, 195 Ariz. 235, 241, ¶ 20 (App. 1999). We further note that Dr. Sangodeyi's deposition testimony analyzed causation in view of *post*-operative pancreatitis—a diagnosis supported by the record—and not in view of *pre*-operative pancreatitis as described in his "Deposition Review."

CONCLUSION

¶17 We affirm. Dr. Para may recover taxable costs incurred in this appeal upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA