

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 1699

JOHN RICHARD ELLIS, JR. AND GEORGIA LANGFORD CLESI

VERSUS

LOUISIANA CVS PHARMACY, LLC AND XYZ INSURANCE COMPANY

JRW
gcl
J

Judgment Rendered: JUN 05 2015

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2011-11317

Honorable Allison H. Penzato, Judge

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Pharmacy, L.L.C.

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

Georgia Langford Clesi appeals a partial summary judgment granted in favor of the defendant Louisiana CVS Pharmacy, L.L.C. (“CVS”), dismissing her claims for the wrongful death of her husband, John Richard Ellis, Jr. For reasons that follow, we affirm the judgment of the trial court and issue this memorandum opinion in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

On March 2, 2011, John Ellis, and his wife, Georgia Clesi, filed a petition for damages against CVS. In the petition, they asserted that on October 2, 2010, John Ellis was at a CVS store in Metairie and was proceeding to the restroom located in the storeroom. They alleged that as John Ellis approached the bathroom, he “encountered an undetectable liquid substance” on the storeroom floor and that he “slipped and almost fell to the floor of the storeroom, but he grabbed onto the utility sink near the door of the bathroom and prevented a fall to the floor.” John Ellis and Georgia Clesi further alleged that as a result of this incident, Mr. Ellis sustained various personal injuries and they both incurred other specified damages.

John Ellis died on August 18, 2013 from cirrhosis of the liver. Thereafter, Georgia Clesi, in her capacity as succession representative and court appointed administratrix of the succession of John Ellis, was substituted as a plaintiff in place of John Ellis. She then filed an amended petition for damages alleging that John Ellis died after “succumb[ing] to the cumulative massive injuries and illnesses he sustained [as a] consequence of [the] slip and fall at [the] CVS [store,] which was the subject of the original petition.” She further alleged that his “death was wholly and solely attributable to the medical consequences of his slip and fall injuries” and therefore, sought damages for his wrongful death.

In response, CVS filed a motion for partial summary judgment seeking the dismissal of the plaintiff’s wrongful death claims on the basis that Mrs. Clesi had no evidence that John Ellis’s alleged fall at the CVS store on October 2, 2010

caused him to die of cirrhosis of the liver almost three years later on August 18, 2013. In support of its motion, CVS relied on the death certificate of John Ellis; the deposition testimony of Melvin L. Parnell, Jr., M.D.; the medical records of John Ellis; and the affidavit of John Andrew Drummond, M.D.

The death certificate of John Ellis set forth his cause of death as “CIRRHOSIS OF THE LIVER.” The deposition testimony of Dr. Parnell, one of John Ellis’s treating physicians, established that John Ellis had previously had hip surgery and that he had contracted an MRSA (Methicillin-resistant Staphylococcus aureus) infection. Apparently, following the incident at the CVS store, John Ellis’s MRSA infection, which had been dormant, became active. Dr. Parnell stated that the injuries John Ellis sustained from the CVS store incident could have caused the MRSA infection to become active again.

According to John Ellis’s medical records he had multiple medical problems including, “decompensated cirrhosis thought to be from alcohol and fatty liver disease, diabetes, renal insufficiency, and coronary artery disease” and had “quit alcohol consumption in March [2013], [and] at that time he was drinking approximately a 5th of liquor every 2 days.” It was also noted that his cirrhosis was “most likely due to [his] alcohol abuse and obesity with fatty liver.” John Ellis’s medical records further reflected that he had “at least [a] 5-year history of ethanol abuse and he drank 1 pint of rum a day after retiring” although “[h]e apparently ... quit in March of 2013 and has not drank yet again.”

The affidavit of Dr. Drummond, a doctor board certified in internal medicine, established that he had reviewed John Ellis’s medical records, the amended petition for damages, the deposition testimony of Dr. Parnell, and the death certificate of John Ellis. Dr. Drummond stated that from his review of those documents, he concluded that John Ellis’s cause of death was cirrhosis of the liver and that this condition was caused by John Ellis’s alcohol use. Dr. Drummond

further stated John Ellis's cirrhosis of the liver was not caused by or otherwise connected to his slip at the CVS store on October 2, 2010, and that his liver condition was not caused by any reemergence of the MRSA infection, which Dr. Parnell believed to have been triggered by John Ellis's slip at the CVS store. Lastly, Dr. Drummond stated that because John Ellis's cirrhosis of the liver was caused by alcohol use and not by the slip at the CVS store, and because John Ellis's death was caused by cirrhosis of the liver, he was able to conclude that John Ellis's death was not caused by John Ellis's slip at the CVS store.

In opposition to the motion for partial summary judgment, the plaintiff relied on her own affidavit, as well as numerous articles from medical journals. CVS objected to the admissibility of articles on the basis that the articles contained inadmissible hearsay and were not supported by any medical testimony or affidavit. CVS also objected to the affidavit of the plaintiff on the basis that it contained inadmissible hearsay, as well as medical opinions for which she was not qualified to testify. According to the plaintiff's affidavit, after the incident at the CVS store in 2010, she was John Ellis's principal medical care giver and provider and was almost always with him, including going to medical appointments with him, and that she had to physically handle him as he became progressively sicker and unable to care for himself. Her affidavit then sets forth the factual circumstances surrounding John Ellis's slip and fall on the way to the bathroom, which she did not personally witness, and then sets forth what she did observe when she arrived at the scene of the incident. Her affidavit then sets forth a summary of John Ellis's purported medical history, diagnoses and medical opinions. The plaintiff's affidavit concludes with her personal observation that John Ellis increased his intake of alcohol during the last 18-24 months of his life, and that prior to that time, he was not a heavy or frequent consumer of alcohol.

At the hearing on May 15, 2014, the trial court sustained CVS's objection to the admissibility of the medical journal articles on the basis that the articles were hearsay.¹ At the conclusion of the hearing, the trial court took CVS's objection to the admissibility of the plaintiff's affidavit and its motion for partial summary under advisement. Thereafter, on May 28, 2014, the trial court issued written reasons for judgment finding that the plaintiff's affidavit was admissible as to those facts about which she had personal knowledge and that the plaintiff was not competent to testify as to medical causation. After noting that expert medical testimony was necessary when the conclusion regarding medical causation is one that is not within common knowledge, the trial court then determined that the plaintiff failed to produce factual support sufficient to establish that she could satisfy her evidentiary burden of proving that John Ellis's fall on October 2, 2010 caused his death on August 18, 2013. Accordingly, the trial court granted CVS's motion for partial summary judgment and dismissed the plaintiff's wrongful death claims. A judgment in accordance with the trial court's ruling was signed on July 3, 2014, and it is from this judgment that the plaintiff now appeals.²

First and foremost, we agree with the trial court that expert medical evidence was necessary for the plaintiff to establish causation for her wrongful death claims because the conclusion that damages sustained from a slip and fall and/or the re-emergence of an MRSA infection can result in death from cirrhosis of the liver is a conclusion that involves complex medical issues and is not within the common knowledge. See Lasha v. Olin Corp., 625 So.2d 1002, 1005 (La. 1993). With regard to the motion for partial summary judgment, the evidence offered by CVS

¹ The plaintiff has not challenged this ruling on appeal.

² The trial court designated the judgment as final and appealable in accordance with La. C.C.P. art. 1915(B) based upon the court's finding that there was no just reasons to delay the review of the judgment. Based on our *de novo* review of the matter, we find that the trial court properly certified this judgment as final for purposes of an immediate appeal. See R.J. Messinger, Inc. v. Rosenblum, 2004-1664 (La. 3/2/05), 894 So.2d 1113, 1122-23.

established that John Ellis died from cirrhosis of the liver, which was caused by his history of excessive consumption of alcohol (which predated the incident at the CVS store), and was not related to either his slip and fall and/or the re-emergence his MRSA infection. Thus, CVS's properly supported partial motion for summary judgment pointed out the absence of factual support establishing that John Ellis's fall in October 2010 caused his death three years later in August 2013. In response to the motion, the plaintiff failed to present any competent evidence establishing that she would be able to satisfy her evidentiary burden of proving that John Ellis's fall and the re-emergence of his MRSA infection caused his cirrhosis of the liver, and ultimately, his death from that disease. Accordingly, based on our *de novo* review of the record, the trial court properly granted CVS's motion for partial summary judgment and dismissed the plaintiff's wrongful death claims against CVS.

For all of the above and foregoing reasons, the July 3, 2014 judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Georgia Langford Clesi.

AFFIRMED.