JEANNE N. SCHWAB	*	**NO. 2006-C-1661**
VERSUS	*	**COURT OF APPEAL**
DR. IRA P. MARKOWITZ, ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-5890, DIVISION "I"
HONORABLE LOUIS A. DIROSA, JUDGE PRO TEMPORE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge Max N. Tobias Jr.)

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STATEMENT OF THE CASE

Touro Infirmary (Touro) seeks supervisory review of the judgment denying its Motion for Summary Judgment seeking dismissal of the plaintiff's medical malpractice lawsuit.

FACTS

On November 16, 1998, the plaintiff underwent two medical procedures at Touro: an angiogram performed by radiologist, Dr. Valeria Drnovsek, followed by an angioplasty performed by vascular surgeon, Dr. Ira Markowitz. After the procedures, plaintiff developed a blood clot at the site on her right arm where the catheter was inserted.

On June 22, 1999, plaintiff filed a Patient's Compensation Fund (PCF) Complaint against Touro and Drs. Drnovsek and Markowitz, complaining that the nerves in her right arm and hand were injured as a result of the procedures performed by the physicians.

On March 15, 2001, the medical review panel concluded that neither Touro nor Drs. Drnovsek and Markowitz breached the standard of care, and that the plaintiff suffered a known complication from the procedure and received proper treatment for that complication.

On April 5, 2001, plaintiff filed this malpractice suit against Touro invoking the doctrine of *res ipsa loquitur*. Alternatively, the plaintiff

claimed her injuries were caused by Touro's negligence in allowing: her right arm to hang over the side of the operating table; someone to lean against her arm; or hyperextended her arm during the procedure. Plaintiff claims that the application of pressure from any or all of the previously mentioned actions caused a hematoma and fistula, which injured the nerves of her arm and hand resulting in pain and impairment of hand function.

In May 2003, Touro filed a Motion for Summary Judgment arguing that the plaintiff cannot provide expert testimony to support her allegation that her injuries could not have happened but for Touro's negligence or breach of standard of care. Touro further argued that the plaintiff cannot, as a matter of law, rely on the doctrine of *res ipsa loquitur*.

Due to the trial court's unintentional failure to rule on the motion for summary judgment, and a change in counsel on behalf of Touro, the motion was not heard until December 2006, at which time the trial judge denied it.

DISCUSSION

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Sears v. Home Depot, USA, Inc.* 2006-0201, p. 11 (La. App. 4 Cir. 10/18/06), 943 So. 2d 1219, 1288. A summary judgment shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B.

Under the summary judgment procedure, the burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C (2).

In a medical malpractice action, the plaintiff has the burden of proving the applicable standard of care, the breach of the standard of care, and the causal connection between the breach and the resulting injuries. La. R.S. 9:2784; *Lindner v. Hoffman,* 2004-1019, p.5 (La. App. 4 Cir. 1/12/05), 894 So. 2d 427, 431.

Malpractice claims against a hospital are subject to the general rules of proof applicable to any negligence action. *Moore v. Willis-Knighton Medical Center*, 31,203, p.5 (La. App. 2d Cir. 10/28/98), 720 So.2d 425, 428. Hospitals are held to a national standard of care. *Id.* The locality rule does not apply to hospitals. Hospitals are bound to exercise the requisite amount of care toward a patient that the particular patient's condition may require. It is the hospital's duty to protect a patient from dangers that may result from the patient's physical and mental incapacities as well as from external circumstances peculiarly within the hospital's control. *Id.*

While the question of causation is usually an issue for the factfinder's determination, it is possible to determine this issue on summary judgment if reasonable minds could not differ. See, *Row v. Pierremont Plaza, L.L.C.*, 35,796 (La. App. 2 Cir. 4/3/02), 814 So. 2d 124, citing *Guillie v. Comprehensive Addition Programs*, 98-2605 (La. App. 4 Cir. 4/21/99) 735 So.2d 775. The mere scintilla of evidence in support of a plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Therefore, the judge must determine whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. *Row*, p. 14, 814 So.2d at 131.

In *Blankenship v. Ochsner Clinic Foundation*, 2006-0242 (La. App. 4

Cir. 8/16/06), 940 So. 2d 12, *writ den.* 2006-2291 (La. 11/22/06), 942 So. 2d 560 this Court noted:

> In *Cangelosi v. Our Lady of the Lake Regional Medical Center*, 564 So.2d 654, 667 n. 11 (La.1989) (on reh'g), the Louisiana Supreme Court discussed the applicability of the doctrine of *res ipsa loquitur* in medical malpractice cases. The Supreme Court stated:
>
> In medical malpractice actions based on res ipsa loquitur the plaintiff generally must use expert testimony to establish that the plaintiff's injury is a type which ordinarily would not occur in the absence of negligence. Lay jurors with common knowledge and ordinary experience cannot be expected to infer from the circumstances surrounding an injury incurred during medical procedures whether the health care provider failed to use reasonable care and whether this failure was a cause of the injury.
>
> Thus, even in a malpractice case where the doctrine of *res ipsa loquitur* is applicable, the plaintiff is still required to present expert testimony to establish the standard of care that should have been used by the provider of medical services. The only exception to this requirement occurs when the injury is the result of an obviously careless act of the type described in the *Pfiffner*[*v. Correa*, 94-0924, 94-0963, and 94-0992 (La.10/17/94), 643 So.2d 1228, 1230] case from which a layman could infer negligence without the need for an expert witness.

Id. 2006-0242 at p. 8, 940 So.2d at 17.

A plaintiff must satisfy three factors in order to utilize the doctrine of

res ipsa loquitur: (1) present evidence which indicates at least a probability that injury would not have occurred without negligence; (2) sufficiently exclude inference of his or her own responsibility or responsibility of others besides the defendant in causing the accident; and (3) establish that negligence falls within the scope of duty to the plaintiff. *Cangelosi v. Our Lady of the Lake Regional Medical Center*, 564 So.2d 654, 665-666 (La. 1989). A plaintiff does not have to eliminate completely all other possible causes, but must present evidence that indicates at least a probability that the injury would not have occurred without negligence. *Id.*

Establishing causation is an essential element in the plaintiff's claim. After the defendant asserted by means of a motion for summary judgment that the plaintiff did not have sufficient evidence to prove causation, the plaintiff was required to show that she would be able to meet her burden of proof at trial. Based upon the evidence offered by the plaintiff in opposition to the motion for summary judgment, the trial judge did not err in deciding that the plaintiff successfully rebutted Touro's assertion that there is no genuine issue of material fact in dispute.

In opposition to the motion for summary judgment, the plaintiff argues that she does not need an expert to testify because it is reasonable for a layperson/juror to infer negligence on Touro's part. *Pfiffner v. Correa,* 94-

0924, 94-0963, 94-0992, (La. 10/17/94), 643 So.2d 1228, 1234. Supporting her position are the depositions of three of her physicians. Drs. Leon Weisberg, Aaron J. Friedman and Kelvin Contreary, all of who examined the plaintiff, performed testing and reviewed the plaintiff's records related to the procedures performed at Touro. All of the physicians excluded the "stick" as the source of injury. Instead the physicians' opined that the injury occurred when the plaintiff was positioned on the operating table in anticipation of the procedures or during the procedures by someone inadvertently leaning against her body. This evidence is sufficient to infer that the plaintiff's injuries stemmed from physician or staff negligence during the surgical procedures.

The plaintiff has also rebutted Touro's assertion that her injuries resulted from a known complication attendant to the angiogram and/or angioplasty. Drs. Weisberg, Friedman and Contreary did not relate the plaintiff's injuries to those medical procedures. Rather, the physicians linked the damages to preparation for the procedures or negligent, inadvertent application of pressure to the plaintiff's right arm during the procedures.

As for the plaintiff's burden of proving the applicable standard of care, the plaintiff has obviated a breach by showing that she underwent a

procedure to remediate a blocked artery and was left with injury to her right hand.

Based upon the foregoing evidence and analysis, the plaintiff has rebutted Touro's position that she cannot invoke the doctrine of *res ipsa loquitor* and that there is no genuine issue of material fact in dispute so as to preclude its right to summary judgment as a matter of law.

CONCLUSION

For the aforementioned reasons, we deny the writ application.

WRIT DENIED.