

APPENDIX A



SUPREME COURT OF ILLINOIS

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December 13, 2022

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Rosalyn McDonald-Henry
27 Huntingwood Road
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In re: McDonald-Henry v. Brink
129158

Today the following order was entered in the captioned case:

Motion by Petitioner, *pro se*, for leave to file a Petition for Leave to Appeal Instanter. Denied.

Order entered by Chief Justice Theis.

Very truly yours,

A handwritten signature in cursive script that reads "Cynthia A. Grant".

Clerk of the Supreme Court

cc: Appellate Court, First District
Michael Denny Huber
Michele Carole Anderson

APPENDIX B

IN THE
SUPREME COURT OF ILLINOIS

ROSALYN McDONALD-HENRY,)	Appellate Court
)	First Judicial District
Plaintiff-Appellant,)	Case No. 1-20-0152
)	
v.)	Circuit Court
)	Cook County, Illinois
DALE S. BRINK, D.P.M., Individually and)	Case No. 2016 L 001371
as agent of PERFORMANCE FOOT and)	
ANKLE CENTER, an Illinois Limited)	Honorable Moira S. Johnson
Liability Company, and INGALLS)	Judge Presiding
MEMORIAL HOSPITAL, an Illinois not-)	
for-profit corporation, and SVEND J.)	
BJORN, D.P.M., as agent of Ingalls)	
Memorial Hospital,)	
)	
Defendants-Appellee.)	

PETITION FOR LEAVE TO APPEAL

Rosalyn McDonald-Henry
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Pro se Plaintiff-Appellant

ORAL ARGUMENT REQUEST IF PETITION GRANTED

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PRAYER FOR LEAVE TO APPEAL

Comes now, petitioner, Rosalyn McDonald-Henry, pursuant to Supreme Court Rule 315, and respectfully petitions this Court for leave to appeal from the decision of the Appellate Court, First District.

JUDGMENT OF THE APPELLATE COURT

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. The First District Appellate Court entered its decision on March 1, 2021, no petition for rehearing was filed.

POINTS RELIED UPON FOR REVIEW OF JUDGMENT OF THE APPELLATE COURT

The appellate court's opinion is a stark contrast in protecting the freedoms and liberties of a citizens First Amendment Rights with the United States Constitution and the Illinois Constitution. Constitutional laws are rights granted to all persons by the United States Constitution and state constitutions. The State of Illinois has a governing state constitution created through its governmental structure to manage public activities of the state. The constitutional rights of the plaintiff Rosalyn, were violated by Dr. Dale S. Brink, D.P.M., Dr. Svend J. Bjorn, D.P.M., and Ingalls Memorial Hospital, with a protective order granted by the circuit court that prohibited the plaintiff's pleadings from filing with the Clerk of the Circuit Court in an effort to prohibit public view.

The circuit court in its evaluation of the protective order, failed to protect the public's health and safety interest and the importance of the litigation to the public. The appellate court ignored critical facts, and failed to draw inferences in the plaintiff's appeal with the unconstitutional use of a protective order granted to the defendant podiatrists. The events that transpired in the circuit court were peculiar and unusual because it removed the

plaintiff Rosalyn's, "due process of law." Due process is important in a democracy because it mandates fair and reasonable treatment owed to a litigant.

In the Circuit Court of Cook County, a negligence complaint was filed on behalf of the plaintiff Rosalyn. The doctrine of negligence is derived through the doctrine of *res ipsa loquitur* which means "the thing speaks for itself." Both of these doctrines, negligence and *res ipsa loquitur*, assist in proving breach of duty in negligence cases. Dr. Brink, Dr. Bjorn, and Ingalls Memorial Hospital were negligent under a unique set of proofs. The defendants admitted to performing an operation on the plaintiff Rosalyn, a legally disabled patient for conditions she did not have. The Supreme Court finds the use of summary judgment as a measure in which disposing of a lawsuit is a drastic means that should only be allowed when the right of the moving party is clear and free from doubt.

Several of the issues for review and judgment of the appellate court consisted of: (1) the defendant spoiled the evidence and destroyed the plaintiff's medical records inside Ingalls Memorial Hospital; (2) the professional negligence and medical negligence admitted by Dr. Brink and Dr. Bjorn on behalf of Ingalls Memorial Hospital; (3) the unconstitutional use of a Protective Order; (4) Illinois First Impressions Medical Patient's Right Act; (5) Illinois Informed Consent laws in healthcare; and (6) the Illinois Compiled Statutes 755 ILCS 40/5 based upon legislative findings that guarantees all persons have a fundamental right to make decisions relating to their own medical treatment; (7) no expert testimony was necessary due to the defendant's admissions in operating on the plaintiff Rosalyn, for medical conditions she did not have, while using her left leg and foot as a teaching subject.

In Illinois law there exist a requirement that provides a physician with the informed consent from the patient to perform medical procedures. The doctrine of informed consent requires a physician disclose to each patient the material facts, risks, complications and alternatives to surgery that a reasonable prudent person would consider significant in deciding whether to undergo surgery

The arguments of the plaintiff Rosalyn, lay bare the necessity of this Court's supervisory authority in protecting the fundamental rights granted to every citizen in the State of Illinois and the rights of disabled persons. The plaintiff Rosalyn, deserves a day in court to seek justice as a result of Dr. Brink, Dr. Bjorn and Ingalls Memorial Hospital destroying Rosalyn's foot and leg health, where she now requires a prosthetic to assist in her ability to walk.

STATEMENT OF FACTS

¹"On February 9, 2016, the plaintiff filed her complaint in the Circuit Court of Cook County. C28-C42." Counsel for plaintiff filed a motion for withdrawal on March 28, 2019. C729-C730." On June 11, 2019, *pro se* plaintiff filed her appearance on record with the Circuit Court of Cook County. C1046-C1047." *Pro se* plaintiff filed her Memorandum in Support of Motion for Summary Judgment on July 12, 2019, with Exhibits A through D. C-1047-C1219." Defendant's counsel filed a Motion for Sanctions and Protective Order (Secured) on August 5, 2019. C1220." Defendants filed their Motion for Leave to File Motion Under Seal on August 6, 2019. C1221-C1222." On August 8, 2019, defendant's protective order was granted in the Circuit Court of Cook County. C1229-1230." On

¹ "A." references are to the appendix before the appellate court on remand. "R." references are to the record.

September 5, 2019, *pro se* plaintiff filed her reply in Support of Motion for Sanctions and Protective Order (Secured). C1240-C1241.” On December 6, 2019, defendants prohibited the deposition transcripts of defendants Dale S. Brink, Svend J. Bjorn and the plaintiff’s treating physician, Dr. Armen Kelikian, from public view. C1535-C1537.” On January 7, 2020, the circuit court entered summary judgment on behalf of the defendants. C1696-C1697.” *Pro se* plaintiff filed her Notice of Appeal and Request for Preparation of Record on January 23, 2020. C1698-C1706.” The plaintiff required permission from the Circuit Court in a “Motion to Incorporate Into the Record All Unstamped Pleadings and Orders,” on January 31, 2020, granted by the court. C1707-C1710.”

ARGUMENT

I. This Court’s Review Is Necessary And Should Grant Leave To Appeal Because The Appellate Court Was Conflicted In Protecting The United States Constitution First Amendment Rights and the Illinois Constitution

The First Amendment of the United States Constitution protects freedoms for all persons in their speech, religion, press, assembly and the right to petition the government. The Supreme Court of the United States has established the definition of a trial, as a public event. The information that transpires in a courtroom has been denoted as public property. Courtrooms in the United States of America are part of government, thereby recognizing the information that transpires in the courtroom is the people’s business and most effective when it’s open to the public for view.

Illinois courts presume there is a common law right of access that attaches to documents filed with the court. *A.P. v. M.E.E.*, 354 Ill.App.3d 989, (Ill. App. Ct. 2004). The trial court erred in entering a protective order without specific findings in *A.P.*, and the orders were public documents and every document in the court files were linked to the minor’s privacy in this case. The trial courts orders sealing the court files was reversed.

The appellate court held in *A.P.*, the trial court abused its discretion by sealing the entire court file. In the case of the plaintiff Rosalyn, the protective order granted to the defendants on behalf of their attorneys of record, was not about protecting the integrity of the lawsuit, but, protecting the gross negligence of Dr. Brink, Dr. Bjorn inside Ingalls Memorial Hospital. On August 8, 2019, the court granted the defendant's Protective Order, which prohibited any pleadings from being filed with the Clerk of the Court. In the United States, judicial proceedings are open to the public in criminal cases by constitutional command and in civil cases forced by tradition. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). The court found in *Press-Enterprise Co.*, the First Amendment Right to access to criminal trials applied to the preliminary hearings. In reversing the judgment, the State Supreme Court concluded the court failed to consider the First Amendment Rights and held the proceedings could not be closed to the public.

The laws established in the State of Illinois under (735 ILCS 5/1-104) state the Illinois Supreme Court has the power to make rules of pleadings, practice and procedures for the circuit court. The Illinois Supreme Court states the trial court has the discretion to take into account all of the facts and circumstances unique to a case. *Newell v. Field Enterprises, Inc.* 91 Ill. App. 3d 735. The *Newell* case decided by the Illinois Appellate Court, First District, held "an increasing number of society's problems are resolved through the judicial process. Thus, the entire judicial system from the filing of a complaint until final decision before the highest court of review should be exposed to the bright light of public scrutiny." The information contained in the plaintiff Rosalyn's pleadings were accurate and fair with the admissions of Dr. Brink and Dr. Bjorn, and were written for the purpose of revealing the truth with the medical operation the defendant podiatrists forced

on the plaintiff. The protective order granted by the court encroached upon the constitutional rights of the plaintiff Rosalyn.

The Protective Order provided the defendants leverage in a judicial process by suppressing the truth from the public. The court in granting the defendant's protective order was in conflict with previous decisions of Illinois courts. A common law right exists that provides the public with access to pleadings filed with the Clerk of the Court.² The court also granted an unusual request to defendant's counsel. The plaintiff Rosalyn, pleadings for filing with the Clerk of the Court were only allowed in the judge's chamber in an effort to prohibit public access. Defendant's counsel informed the court their client's medical profession and defendant counsel's legal careers would be harmed if the public had access to any of Rosalyn's pleadings. Defendants counsel made a request to the court, as to the necessary steps they could take with legal actions against the plaintiff Rosalyn, if the contents of the litigation was made known to the public. There is a right of access to documents under the First Amendment where (1) court records have historically been open to the public and (2) access would further the court proceeding at issue. The appellate court searched for particular pleadings by the plaintiff, and acknowledged in their order of March 1, 2021, some of the pleadings in the judge's chamber could not be located. The appellate court was in conflict with protecting the plaintiff's First Amendment Rights.

In evaluating the protective order granted to the defendants, Illinois courts recognize the public's right of access to judicial records as being rooted in the common

² The Illinois Constitution has established common laws as outlined in the Illinois Compiled Statutes that protects the rights of citizens. Article I, Bill of Rights, Section 4, Freedom of Speech, provides guarantees that all persons may speak, write and publish freely while also being responsible for that liberty.

law and First Amendment to the Constitution of the United States and the Illinois Constitution. The court abused its discretion where it should have taken into account the criticalness in protecting the public's interest with the defendant's Protective Order that read:

"No party or their counsel shall complain to governmental and oversight entities about any of their parties or their counsel during the pendency of this lawsuit."

The admissions of the defendant podiatrists in their deposition transcripts were made known to the court the information contained in those pleadings was important to the public and their safety. In law, conclusory information consists of or relates to a conclusion or assertion for which no supporting evidence is offered. A conclusory action would have existed if the plaintiff failed to identify adequately the acts or events that would entitle the plaintiff Rosalyn, to relief from the defendants. The court's decision in granting the defendant's protective order was in conflict with the plaintiff's Complaint at Law filed on February 9, 2016. The plaintiff's complaint was not filed under any restrictions that prohibited public access with any of the pleadings filed with the Clerk of the Court. The business of the court would have continued to go undisturbed absent the defendant's Protective Order with the plaintiff as a *pro se* litigant.

The Illinois Constitution guarantees "every person a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."³

³ The Illinois Constitution dictates in Section 12, the Right to Remedy and Justice.

Dr. Brink's attorney of record, Aimee Lipkis, stated in the defendant's pleadings
Dr. Brink:

"owed plaintiff only those duties imposed upon them by the laws and statutes of the State of Illinois."

The Illinois Compiled Statutes were passed in accordance with prescribed procedures for the enactment of laws according to state rules and regulations. Secondly, it means the contents of the law must not violate the Constitution, whereby those laws are supreme, and the law of the land to which other laws must conform. The laws enacted by the State of Illinois in medical practice do not provide a physician with the right to perform an operation on a patient for conditions that do not exist. The Illinois Constitution provides a "Due Process of Law," which includes the right to have procedures be designed in providing fairness. Under (410 ILCS 50/3.1) (from Ch. 111 ½, par. 5403.1) Sec. 3.1. holds: "(a) Any patient who is the subject of a research program or an experimental procedure, as defined under the rules and regulations of the Hospital Licensing Act, shall have, at a minimum, the right to receive an explanation of the nature and possible consequences of such research or experiment before the research or experiment is conducted, and to consent to or reject it."

This Court's supervisory authority is necessary in determining the laws and statutes applicable to the plaintiff Rosalyn.

II. This Court's Review Is Necessary And Should Grant Leave To Appeal The Appellate Court Because It Was Conflicted With The Illinois First Impressions of the Medical Patients Right Act 410 ILCS 50 ILCS 50/3.1(a)(b)(c) And The Statute Of Limitations With Section 13-211(a)(1)

In the State of Illinois, a "Patient's Medical Rights Act (410 ILCS 50/1)," establishes certain rights for medical patients and provides a penalty when a violation

against a patient occurs in medical procedures. A court's role in administering justice is to recognize a just law, while not forsaking the adversary. Dr. Brink, Dr. Bjorn and Ingalls Memorial Hospital violated the Medical Patients Right Act with the unnecessary operation on the plaintiff Rosalyn, a legally disabled person. The plaintiff's left leg and foot was used for the purpose of a medical experiment and teaching subject with the resident podiatrist, Dr. Bjorn on behalf of Ingalls Memorial Hospital. Dr. Brink admitted his role with Ingalls Memorial Hospital was a trainer who taught podiatry students and as a result of this title with the hospital, Dr. Brink taught medical procedures that did not exist in the plaintiff Rosalyn. When a law is established by the Illinois Medical Patients Right Act, it has met certain criteria as outlined in the Illinois Compiled Statutes and must be upheld.

In *Newman v. Spellberg*, a prior finding of the Appellate Court, First District, held: "even where a case involves a complicated medical procedure, expert testimony may not be required when the act alleged to be negligent is not an implicit part of the procedure." *Newman v. Spellberg*, 91 Ill.App.2d 310 (1st Dist. 1968).⁴ The appellate court overlooked prior findings of the court, in the plaintiff Rosalyn's appeal. In *Newman*, the court held the gastroscopic operation and the injury sustained was by the agency and instrumentality within the exclusive control of the defendant and that the plaintiff did not cause any voluntary act with the injury sustained. The *Newman* decision set a precedent that a medical expert was not necessary in establishing the defendant's negligence against the plaintiff. The appellate court was in conflict with *Newman*, a case that could later be a deciding factor in the plaintiff Rosalyn's appeal. The first impression doctrine under

⁴ The appellate court disregarded the defendant's admissions and the intentional destruction of evidence that demonstrated the reckless conduct of Dr. Brink, Dr. Bjorn and Ingalls Memorial Hospital.

Illinois law in this litigation would lead a reasonable person without expert opinion to reach a fair and accurate judgment with the injuries the plaintiff sustained were solely a result of the defendant podiatrists who performed an unauthorized operation on the plaintiff Rosalyn.

Two important and undisputed facts were clearly established to the circuit and appellate court with the deposition testimonies of Dr. Brink and Dr. Bjorn: (1) the defendants admitted to performing an operation on the plaintiff for conditions she did not have; and (2) Dr. Brink admitted to destroying the plaintiff's medical records. The common knowledge and gross negligence exceptions to the requirement of expert testimony, and where it is applicable by the evidence that the negligence of the physician is so grossly apparent and the medical treatment is egregious and intentional, a layman would have no difficulty in appraising it. Thus, rendering a decision in favor of the plaintiff in conjunction with Illinois First Impressions of the Medical Patient's Right Act.

Illinois law has two statutes of limitations (1) section 13-211(a), addressing minors and persons under a legal disability; and (2) section 13-209, addressing death of a party. The plaintiff Rosalyn, satisfies section 13-211, as a legally disabled person under state and federal guidelines. This Court's supervisory authority is necessary with the interpretation of the plaintiff Rosalyn, as a legally disabled person since 2003 and her standing with 735 ILCS 5/13-211(a). *Lawler v. The University of Chicago Medical Center*, 2016 IL App. (1st) 143189. In the case of *Lawler*, the issues surrounding the statute of repose with 735 ILCS 5/13-212(a)(b) (West 2010); 735 ILCS 5/2-616 (West 2010) and the Wrongful Death Act (740 ILCS 18010.01 *et. seq.* (West 2010), the Illinois Supreme Court held the plaintiff's wife arguments with the relation back statute provides:

The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time *under any statute*.....if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted.....or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some matter which is a necessary condition precedent to the right of recovery or defense asserted.....any pleading shall be held to relate back to the date of filing of the original pleading so amended.

The Illinois Supreme Court in *Lawler*, held based upon first impressions the medical malpractice statute of repose allowed *Lawler* to maintain the amended complaint alleging wrongful death. The Illinois Supreme Court held:

“ This interpretation does not create absurd, inconvenient, or unjust results, because the proposed amended complaint, as compared with the earlier, timely filed complaint, “show[s] that the events alleged were close in time and subject matter led to the same injury.”

This Court’s review is necessary and should grant leave to appeal as to the necessity with interpreting the statute of limitations period being tolled during a disabled individual’s life under statute 735 ILCS 5/13-211(a); and if the plaintiff Rosalyn, is entitled to this provision of the common laws and statutes established by our state government. This rationale was supported by public policy with tolling the statutes at issue which are intended to extend the limitations period for individuals who are legally disabled. This Court’s supervisory authority is necessary, as this is not a typical medical malpractice case.

III. This Court’s Review Is Necessary And Should Grant Leave To Appeal Based On The Plaintiff’s Negligence Complaint and The Doctrine Of *Res Ispa Loquitur*

In a negligence claim against the defendants as pled in plaintiff’s Complaint at Law, the doctrine of *res ispa loquitur* is a determining factor in establishing the defendant’s egregious conduct in the operation of the plaintiff Rosalyn. In proving negligence through

the doctrine of *res ipsa loquitur*, a plaintiff must establish three elements: (1) the injury would not normally occur in the ordinary course of events absent negligence which is an element that examines the probability of the injury sustained would have not ordinarily occurred; (2) the agency who caused the injury was in the control and management of the defendant; and (3) the injury was not due to any voluntary action by the plaintiff in which the plaintiff contributed to the negligence of the injury sustained. When a defendant is charged with negligence in a medical malpractice case, the doctrine of *res ipsa loquitur* is a question of law and applicable when decided by a court. Dr. Brink advised the plaintiff as having a need for corrective medical procedures for “talonavicular arthritis” which required fusing her left foot and ankle to remedy years of edema and swelling. Dr. Brink diagnosed the plaintiff with medical intervention for:

“left foot Gastrocnemius recession, left ankle, Calcaneal osteotomy, and a tendon arthrodesis with navicular prominence, left foot.”

Dr. Brink’s diagnosis of the plaintiff changed multiple times and later included:

“Gastrocnemius recession, Calcaneal osteotomy, Posterior tibial tendon repair and Talonavicular fusion for arthritis”

Dr. Brink’s dishonesty and intentional deceitfulness with the plaintiff’s diagnosis and the need for fusing her left foot and ankle for arthritis was a tortious act. Dr. Brink admits:

Q. I’m just – I’m just trying to confirm that there was no arthritis; right?

A. Correct.

Q. Okay. And as I – as I understand it, sir, there was no arthritis in any of the foot or ankle joints; correct?

A. That’s my re-recollection.

A Stem Wave medical device was surgically implanted in the plaintiff’s left leg to correct the defendant podiatrist’s mistakes who damages the plaintiff’s Posterior tibial

tendon during the medically unnecessary surgery. The plaintiff Rosalyn suffers with chronic and life-sustaining injuries that require expensive medical care and treatment for the remainder of her living years. The fusing of Rosalyn's left foot, completely removed all range of motion, and after years of therapy, and in light of the plaintiff's best efforts to overcome the injuries forced upon her, she requires a prosthetic foot and ankle medical device. The medical conditions the plaintiff suffers with are irreversible and the medical destruction with the plaintiff's health caused by Dr. Brink and Dr. Bjorn on behalf of Ingalls Memorial Hospital can never be repaired. Dr. Brink admitted under oath:

Q. Do you agree with me sir, that she did not have talonavicular arthritis, correct?

A. Correct.

The admissions of the defendant podiatrists was the weight and strength of the inference with the defendants who admitted to their negligence. *Edgar County Bank & Trust Co., v. Paris Hospital*, 57 Ill. 2d 298 (1974). In *Edgar*, the court held given the appropriate state of facts, the doctrine of *res ipsa loquitur* was applicable to an action involving medical malpractice. The plaintiff's medical malpractice complaint is unique and this Prayer For Leave To Appeal, presents issues that will assist this Court in determining the unlawful conduct of Dr. Brink, Dr. Bjorn who acted on behalf of Ingalls Memorial Hospital with performing a medical operation on the plaintiff for conditions that did not exist.

This Court's supervisory authority is necessary and should grant leave to appeal in determining if medical assault and battery was as an automatic right of the plaintiff Rosalyn, based upon the admissions of Dr. Brink and Dr. Bjorn. The defendant resident podiatrist Dr. Bjorn admitted in the operation of the plaintiff Rosalyn:

“there is some time physicians will perform surgeries that I – you know, I – maybe we shouldn’t have done that.”

The appellate court disregarded the facts in which the defendants knowingly and purposefully caused an intentional harm and disregarded the plaintiff’s safety and well-being with using the plaintiff Rosalyn, as an experiment for teaching purposes with Dr. Bjorn, a podiatry student at Ingalls Memorial Hospital. Defendants counsel on behalf of Ingalls Memorial Hospital, Michelle Anderson and Molly Pankauskas upheld the actions of Dr. Brink and Dr. Bjorn, and informed the court the plaintiff Rosalyn, was an excellent candidate for the surgery performed upon her before their grant of summary judgment that Dr. Brink was not an agent of Ingalls Memorial Hospital. Dr. Brink and Dr. Bjorn, by and through their attorneys of record advised the court in their ILCS Rule 213(f)(3) Interrogatories that Dr. K. Paul Flanigan of Portland Foot and Ankle was to testify:

“Ms. McDonald-Henry was an appropriate candidate for surgery, that no additional testing or consultations were necessary or required under the standard of care, and that no act or omission by Dr. Brink or Dr. Bjorn caused or contributed to cause Ms. McDonald Henry to sustain injury or to have pain or related problems.”

Illinois law has established through the Medical Patients Act that no physician may conduct any experimental procedure on a patient without the prior informed consent of the patient. The defendant podiatrist Dr. Brink, had prior knowledge through his interpretation of an MRI he reviewed of the plaintiff Rosalyn, the conditions he diagnosed to her did not exist. Dr. Brink, Dr. Bjorn and Ingalls Memorial Hospital were in violation of the Medical Patient Rights Act, wherein the operation of the plaintiff was an elective procedure, and was not subject to any life-threatening emergency and was not in accordance with Part 50 of Title 21 of, and Part 46 of Title 45, of, the Code of Federal Regulations. The appellate court’s decision was in conflict with well settled law in Illinois and federal courts.

IV. This Court's Review Is Necessary With The Constitutionality of Law With Illinois Informed Consent And Should Grant Leave To Appeal

Illinois law on informed consent is a legal requirement applicable to all medical care. Informed consent outlines a physician must obtain their patients consent before performing surgery or implementing any other significant medical treatment plan. The defendant podiatrist and hospital exceeded the consent given in performing the operation on the plaintiff Rosalyn and violated the plaintiff's constitutional rights with Illinois Informed Consent. *Pratt v. Davis* (1906), 224. Ill. 300, 305. In the case of *Pratt*, the cause of action before the court was that the operation exceeded the consent of the plaintiff and constituted a trespass to her person with an unauthorized medical procedure. The defendant physician was given consent to perform an operation for epileptic seizures, but was found to have exceed the consent granted by removing the uterus of the patient and performed a hysterectomy as part of a treatment plan in correcting the plaintiff's epileptic seizures. The defendant surgeon admitted to misleading the patient because he felt she was not competent to give consent. The court ruled against the defendant physician because the patient's rights under the law were violated. The judgment of the court ruled against the physician and in favor of the plaintiff.

In the case of the plaintiff Rosalyn, there is no greater weight of evidence with the defendant podiatrists and the hospital in which they can hold, by any argument that would be sufficient to overcome their negligence. Rosalyn the plaintiff is a legally disabled person under state and federal guidelines, was and continues to be of sound mind in receiving medical care and treatment proposed by any physician. The defendants, by their

touching of the plaintiff Rosalyn, was unauthorized and exceeded the consent given.

Justice Cardozo's standing holds:

“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.”

Illinois law aims at reducing medical malpractice complications with its informed consent law. This law was enacted in Illinois for the sole purpose and necessity that the doctor will disclose all necessary information a patient would find relevant in deciding to proceed with a surgical procedure. The defendant physician, Dr. Brink, was dishonest in his MRI interpretation to the plaintiff and deceived Rosalyn into Ingalls Memorial Hospital where he held privileges as a medical trainer for podiatry students. The defendant podiatrists and the hospital had no right to render medical treatment and thereby became liable for the tort of medical battery. Under Illinois law, “[a] battery is the unauthorized touching of the person of another.” *Fiala v. Bickford Senior Living Group, LLC* 2015 IL App (2d) 150067 (2015). The plaintiff in *Fiala* was given medication by the senior living facility without any prior consent from the plaintiff. The senior living facility removed *Fiala* from his wife in the nursing facility which constituted a battery because these acts were without any consent given by the plaintiff or his wife. The court held the acts of the defendants were unlawful.

V. This Court's Review Is Necessary And Should Grant Leave To Appeal With Considerations For Punitive Damages Where Appropriate To Punish Dr. Brink, Dr. Bjorn and Ingalls Memorial Hospital's Egregious Conduct For The Unnecessary Operation of Rosalyn McDonald-Henry

In Illinois a claim for punitive damages cannot be obtained without the permission of the court. The rule of law in Illinois is that a person may not seek punitive damages in

the initial complaint. (735 ILCS 5/2-604.1) *Loitz v. Remington Arms Co.*, (1989), 177 Ill. App.3d 1034, 532, N.E.2d 1091. In *Loitz*, the plaintiff sustained injuries from an explosion of a Remington Model 100 shotgun while the plaintiff was trapshooting reloading shells. The court held in *Loitz* there was sufficient evidence against the defendants and supported an award of punitive damages to the plaintiff. When punitive damages are awarded by a court, 3 issues are considered: (1) fraudulent, intentional, or willful and wanton; (2) proximately caused the injury or damage to the Plaintiff and (3) if the jury believes that justice and the public good require it.

This Court should grant this appeal based upon the gross magnitude of constitutional violations taken against the plaintiff Rosalyn, a legally disabled person.

A. The Fraudulent Medical Billings And The Unnecessary Medical Procedures Performed By Dr. Brink And Dr. Bjorn, Provided Financial Benefits To Ingalls Memorial Hospital

According Molly Pankauskas and Michelle Anderson, counsel for the defendant, Ingalls Memorial Hospital stated:

“Plaintiff cannot seek summary judgment on any claim for fraud because: (1) there is no sufficient cause of action for fraud currently pending; and (2) even if Plaintiff was given leave to file an amended complaint, a claim for fraud would be barred by the statute of limitations. Such a claim would never relate back to absolutely nothing in Plaintiff’s Complaint put Ingalls on notice that there was any type of fraud on behalf of anyone involved in this matter.”

According to Medicaid, a federally funded healthcare program, there remains an open claim for reimbursement of all the monies the program advanced on behalf of the plaintiff Rosalyn. Medicare and Medicaid programs are implemented for the purpose of reimbursing only those healthcare services that are reasonable and necessary for the diagnosis or treatment of illness or injury. Ingalls Memorial Hospital as a provider must certify when they submit claims for payment for the healthcare items or services

in which reimbursement is sought are medically reasonable and necessary. When medical procedures are performed on Medicare and/or Medicaid recipients and unnecessary medical procedures are found to have taken place, the government must prove two issues (1) the item or service was unnecessary and (2) the provider knew it was unnecessary. The operation performed by Dr. Brink and Dr. Bjorn on the plaintiff Rosalyn, was based upon a fraudulent claim, which was wantonness and reckless in law and amounts to malice upon the defendant podiatrists and Ingalls Memorial Hospital. *Universal Health Servs. v. United States ex rel. Escobar*- 136 S. Ct. 1989. In *Escobar*, Justice Thomas held a falsehood in the diagnosis and medical treatment of the plaintiff warranted punitive damages in a false claim case.

VI. This Court's Review Is Necessary And Should Grant Leave To Appeal Because Of The Unconstitutional Use Of A Protective Order By Defendant's Counsel On Behalf Of The Defendant's Dr. Dale S. Brink, Dr. Svend J. Bjorn And Ingalls Memorial Hospital

When describing the conduct of attorneys within a law firm and their employees as egregious, one should expect a degree of Professional Misconduct is necessary for review with violating Illinois Supreme Court Rules. In disciplinary case law, it instructs a violation of Rule 8.4(g), or its predecessor Rule 1.2(e), involves three actions necessary for disciplinary action against its attorneys as Officers of the Court. This rule states: "(1) a clear or unambiguous threat, (2) communicated to the intended target of the prosecution, and (3) a clear connection between the threat and a purpose or benefit sought to be gained in a civil matter."

The protective order defendant's counsel Aimee Lipkis, Michael Huber, Molly Pankauskas and Michelle Anderson received was for the purpose of withholding pleadings from the public. The gross negligence of the defendant podiatrists performed an operation

on the plaintiff Rosalyn, a legally disabled person for conditions Dr. Brink and Dr. Bjorn admitted did not exist. Where the defendant counsels withheld the plaintiff's pleadings from public view, the defendants counsel intentionally withheld their pleadings and misrepresentations from public view. The issue surrounding the defendant's pleadings can be found in:

Defendants Dale S. Brink, D.P.M., Svend J. Bjorn, D.P.M. and Performance Foot And Ankle Center, LLC's Motion for Sanctions and Protective Order; Motion for Summary Judgment; Response to Plaintiff's Motion For Summary Judgment and Plaintiff's 12-3-19 Motion For Partial Summary Judgment Against Defendants and;

Ingalls Memorial Hospital Motion for Summary Judgment

Of particular importance are the demands defendants counsel made to the circuit court and appellate court with removing the deposition transcript of Dr. Armen Kelikian from the record, while demanding the file be sealed into the appellate court from the public. The "Motion for Sanctions and Protective Order" raises an issue with Rosalyn filing a claim for racial discrimination over 20 years ago with the EEOC against her former employer Kominiarek Bresler Harvick & Gudmundson, LLC. The plaintiff's former treating physician Dr. Armen Kelikian was represented by Kominiarek Bresler Harvick & Gudmundson, LLC, at his deposition of the plaintiff Rosalyn, his former patient. The deposition testimony of Dr. Armen Kelikian stated the plaintiff Rosalyn, injuries sustained were all "superficial."

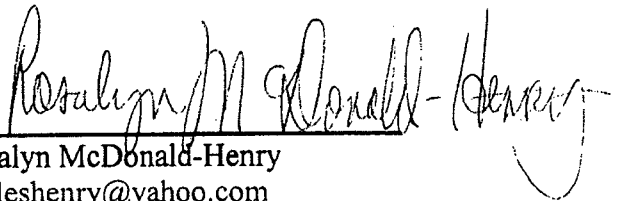
When fraud upon the court is obvious, the 7th Circuit Court of Appeals held "fraud upon the court is to embrace that species of fraud which does, or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." The Court held that fraud upon the court is "not in essence a decision at all,

and never becomes final.” It is a well settled Illinois law that any attempt to commit “fraud upon the court,” vitiates the entire proceeding.

The Court should grant this leave to appeal as this is not a typical medical malpractice case, but a tortious conspiracy where there was an agreement of two or more persons to cause loss or damage to another by doing an unlawful act by unlawful means.

This Court should grant leave to appeal.

Respectfully submitted,

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APPENDIX C

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

The Honorable
Moira S. Johnson,
Judge Presiding.

¶ 1 *Held:* The circuit court's entry of summary judgment in favor of defendants is affirmed. Plaintiff could not prevail in this professional negligence action without expert testimony, and she presented no other legal arguments on appeal that would warrant reversal of the circuit court's judgment.

¶ 2 Plaintiff, Rosalyn McDonald-Henry, appeals *pro se* from the circuit court's entry of summary judgment in favor of defendants, Dale S. Brink, Performance Foot & Ankle (Performance), and Svend J. Bjorn (collectively, defendants)¹ on plaintiff's professional negligence claims. We affirm the circuit court's judgment for the following reasons.

¶ 3

I. BACKGROUND

¶ 4 At the outset, we note that the statement of facts in plaintiff's appellate brief violates Illinois Supreme Court Rule 341(h)(6) (eff. May 25, 2018), which requires that the appellant's brief contain a separate section including "the facts necessary to an understanding of the case, stated accurately and fairly without argument, and with appropriate references to the pages of the record on appeal in the format as set forth in the Standards and Requirements for Electronic Filing the Record on Appeal." Here, plaintiff's statement of facts consists of a single paragraph and does not contain any citations to the record. We therefore disregard plaintiff's recitation of facts—and facts she alleges elsewhere in her brief that are not supported by citations to the record—and we will rely on the allegations set forth in the pleadings and the statement of facts in defendants' appellee brief.

¶ 5 Plaintiff, through counsel, filed a two-count complaint against defendants and made the following allegations relevant to this appeal. Prior to February 21, 2014, plaintiff consulted with Brink, a licensed podiatrist and employee of Performance, regarding pain in her left foot, and presented with pain and swelling in her left foot. Brink examined her feet and ankles and reviewed an MRI of her left foot and ankle. Brink diagnosed plaintiff with gastrocnemius equinus in her left ankle, calcaneal valgus in her left foot, and talonavicular joint arthritis with posterior tibial

¹Ingalls Memorial Hospital was a defendant in the circuit court. In October 2019, the circuit court entered summary judgment in favor of Ingalls and made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Plaintiff did not appeal the summary judgment order in favor of Ingalls, and Ingalls is not a party to this appeal.

tendonosis in her left foot, and recommended surgery. Plaintiff agreed and consented to surgery. On February 21, 2014, Brink and Bjorn—a resident podiatric physician at Ingalls Memorial Hospital—performed a left foot gastrocnemius recession on plaintiff's left ankle, a calcaneal osteotomy on her left foot, and a tendon arthrodesis with navicular prominence on her left foot. Bjorn dictated a preoperative and postoperative diagnoses (the operative report). On February 24, 2014, Brink edited and signed the operative report. According to the complaint, defendants

- "a) carelessly and negligently performed the left foot/ankle surgery;
- b) carelessly and negligently reviewed and interpreted the left foot/ankle diagnostic images;
- c) carelessly and negligently misdiagnosed [plaintiff's] left foot and ankle condition;
- d) carelessly and negligently performed the clinical examinations and evaluations of [plaintiff's] left foot and ankle;
- e) carelessly and negligently failed to obtain or perform adequate and necessary pre-operative and intra-operative investigation and analysis to ensure that the procedures contemplated were appropriate for [plaintiff's] clinical presentation; and
- f) carelessly and negligently performed incorrect and medically unnecessary surgeries."

¶ 6 After the surgery, plaintiff experienced chronic pain in her left foot and ankle that was worse than her presurgical pain, and she required additional subsequent surgeries to correct defendants' mistakes, which were a proximate cause of her injuries. Attached to the complaint was plaintiff's counsel's affidavit pursuant to section 2-622 of the Code of Civil Procedure (735 ILCS

5/2-622 (West 2014)) stating that he had consulted with a licensed physician he believed to be knowledgeable in the relevant issues, and that there was reasonable and meritorious cause for plaintiff's complaint. The physician's report was also attached. Defendants answered the complaint and the parties engaged in discovery, including numerous depositions. In April 2019, plaintiff's counsel was permitted to withdraw, and plaintiff subsequently filed a *pro se* appearance.

¶ 7 Defendants moved for summary judgment on the basis that plaintiff advised the circuit court that she would not be identifying or calling at trial any controlled expert witnesses on her behalf, which was memorialized in an October 11, 2019, circuit court order. Defendants argued that, during their depositions, Brink and Bjorn both testified that they were familiar with and complied with the applicable standard of care in their treatment of plaintiff, and that they did not cause plaintiff any injury. Defendants further argued that absent any qualified expert testimony, plaintiff had no avenue of establishing that defendants deviated from the standard of care or that any deviation from the standard of care was a proximate cause of plaintiff's alleged injuries. The only competent and admissible evidence before the court established that defendants were entitled to judgment as a matter of law because plaintiff could not establish each element of her podiatric negligence claim.

¶ 8 The parties have not directed our attention to plaintiff's response to defendants' motion for summary judgment in the record on appeal. The transcript of the circuit court's hearing on defendants' motion for summary judgment, however, reflects that plaintiff filed two motions styled as motions for partial summary judgment, filed November 8, 2019, and December 3, 2019, which the circuit court treated as responses to defendants' motion for summary judgment. We have only been able to locate plaintiff's November 8, 2019, motion for partial summary judgment in the record. The motion essentially asserted that defendants admitted their negligence in their

depositions and in responses to requests to admit. The theory of plaintiff's motion was that there were inconsistencies between defendants' operative report and their testimony, and that defendants had admitted that plaintiff was diagnosed and treated for conditions that she did not have. Nothing in plaintiff's motion, however, directly addressed the issue raised in defendants' motion for summary judgment regarding the necessity of an expert witness to prove her claims. After a hearing, the circuit court entered summary judgment in favor of defendants. Plaintiff filed a timely notice of appeal.

¶ 9

II. ANALYSIS

¶ 10 On appeal, plaintiff's appellate brief identifies eight issues for our review, but the substance of her brief focuses on three issues: whether (1) defendants failed to preserve evidence because Brink edited Bjorn's original operative report; (2) defendants admitted their negligence because they operated on plaintiff for conditions that she did not have; and (3) the circuit court entered an "unconstitutional" protective order preventing her from disseminating discovery materials. In the course of making these three arguments, plaintiff asserts that she did not need any expert testimony to establish her negligence claims because defendants admitted their negligence and that a reasonable jury could conclude without expert testimony that defendants' deviations from the standard of care proximately caused her injuries, resulting in damages. Overall, plaintiff's arguments are disjointed and at times difficult to follow, given her failure to provide us with an adequate statement of facts. We will, however, attempt to address her arguments in a logical fashion.

¶ 11 We begin by addressing plaintiff's argument that defendants admitted their negligence and therefore she could prevail on her negligence claims without presenting any expert testimony on the issues of the standard of care, breach, and proximate cause. We disagree.

¶ 12 Summary judgment is appropriate if the pleadings, depositions, affidavits, and other admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2018); *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17. The purpose of summary judgment is not to try a question of fact, but rather to determine whether one exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). “In determining whether a genuine issue of material fact exists, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmovant.” *West Bend Mutual Insurance Co. v. DJW-Ridgeway Building Consultants, Inc.*, 2015 IL App (2d) 140441, ¶ 20. We review a circuit court’s ruling on summary judgment *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 13 As previously noted, plaintiff’s argument is disjointed and often lacks context. She argues that defendants’ deviation from the standard of care “is apparent” based on Brink’s and Bjorn’s deposition testimony and she makes the following assertions. She consented to treatment for “left foot Gastrocnemius recession, left ankle, Calcaneal osteotomy, and a tendon arthodesis with navicular prominence, left foot,” but Brink testified at his deposition that plaintiff did not have any arthritis in her foot or ankle. She argues that the “procedure performed *** was not included in the medical records as it relates to [plaintiff’s] left foot operation.” In January 2014, Brink recommended “Talonavicular fusion for arthritis” but admitted at his deposition that plaintiff did not have talonavicular arthritis and stated that “that was a mistake by the resident *** in the dictation I didn’t correct it [*sic*], but primarily the decision was made based on the functional outcomes.” Brink further testified that talonavicular arthritis was reflected in both the preoperative and postoperative diagnoses, but asserted that:

“these records are prepared just based on *** the general findings after the procedure. They’re not prepared in *** preparation for a deposition. And going through each individual thing, not planning on being sued, you know, sometimes there may be slight inaccuracies in *** the record, and that doesn’t *** change *** the treatment or the care of the patient, and then taking reasonable care to provide the patient with the best care we can. The records are secondary to that.”

Plaintiff contends that “[w]hen a patient does not have the condition diagnosed, lay persons could determine the procedure performed was not an implicit part of the procedure.” She asserts that Bjorn’s “findings consistent with the diagnosis of calcaneus valgus, is grossly impossible” because, according to plaintiff—who is not a podiatrist—“[c]alcaneus valgus is a condition common in children born with foot deformities, which in turn leads to calcaneal osteotomy and a need for corrective surgeries with this deformity.” She asserts that the “[t]he purpose of charting accurately from a legal perspective is to record the accuracy of care given to a patient.”

¶ 14 She further asserts that Brink diagnosed her as having a fallen arch due to a tear in her left foot and that she consented to a repair of her posterior tibial tendon, but Brink testified that, during the surgery, he observed “thickening of the tendon, but no direct tears.” She then proceeds to offer an unqualified opinion that “[p]osterior tibial tendon surgery is a way to fix a tendon at the back of your calf which travels down the inside of your ankle into your foot” and that “these tendons can be torn or inflamed from an injury.” She contends that she did not suffer an injury to her left foot, but simply had on and off swelling since 1998.

¶ 15 Plaintiff’s argument lays bare that expert testimony was indeed necessary for her to establish defendants’ liability. To prevail in a medical negligence claim, the plaintiff must prove

the standard of care to which the defendant medical professional is held, that the defendant deviated from the standard of care, and that the deviation proximately caused the plaintiff an injury. *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 292 (2008). “Generally, expert testimony is required to support a medical malpractice claim because the assessment of the alleged negligence may require knowledge, skill or training in a technical area outside the comprehension of laypersons.”

Holzrichter v. Yorath, 2013 IL App (1st) 110287, ¶ 93. “ ‘Expert testimony is necessary whenever jurors who are not skilled in the practice of medicine would have difficulty, without assistance of medical evidence, in determining any lack of necessary scientific skill on the part of a medical professional.’ ” *Id.* (quoting *Schindel v. Albany Medical Corp.*, 252 Ill. App. 3d 389, 395 (1993)).

¶ 16 Here, plaintiff needed to present expert testimony to prevail on her claims because whether the surgical procedures were necessary and whether defendants exceeded the parameters of the surgery to which plaintiff consented are issues that an ordinary juror would not understand. See *id.* ¶ 88 (finding that whether a podiatrist “exceeded the parameters of the surgery to which plaintiff consented is beyond the ken of a layperson, and it requires a medical expert to opine on whether cutting tendons is part and parcel of the *** procedure.”). Plaintiff’s claims here are essentially that defendants misdiagnosed her condition, proceeded with unnecessary medical procedures, and failed to properly chart the surgery. Plaintiff’s purported understanding of the procedures and when they are necessary is not a substitute for a medical opinion on the propriety of defendants’ conduct. Without a medical expert to offer testimony regarding the applicable standard of care, to opine as to whether defendants’ conduct fell short of that standard, and to establish a causal link between defendants’ negligence and plaintiff’s injuries, plaintiff could not prevail on her negligence claims. The circuit court did not err by entering summary judgment in favor of defendants where plaintiff

steadfastly indicated that she would not be identifying any controlled medical experts or eliciting any medical expert testimony at trial.

¶ 17 We also note that plaintiff advances arguments related to medical battery and informed consent, but those claims were never pleaded in her complaint or supported by the section 2-622 report attached to her complaint. Regardless, she would have needed expert testimony on those claims to establish that defendants' conduct exceeded her consent to the surgery and rose to level of medical battery. *Id.* ¶ 88.

¶ 18 Next, plaintiff argues that defendants failed to adequately preserve records because, on February 24, 2014, Brink edited and signed the operative report that Bjorn dictated on February 21, 2014. She contends that the original, unedited operative report should have been included in her chart because she believes that the unedited report "posed a threat to" Brink, although she fails to articulate what information she believes was edited out of the report. Plaintiff fails to cite any evidence in the record that might tend to show that Brink's edits to the operative report were improper, and therefore her argument on appeal is nothing more than conjecture. She cites no authority to suggest that the circuit court should have, as a matter of law, entered judgment in her favor due to any alleged spoliation of evidence. Plaintiff theoretically could have pursued a negligent spoliation claim under traditional negligence law (*Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 192-93 (1995)), or discovery sanctions under Rule 219(c) (eff. July 1, 2002) based on an alleged destruction of evidence, but she did not. Instead, she baldly asserted that the edits themselves were evidence of wrongdoing. She marshalled no evidence to support her claim and does not direct us to any other evidence in the record that might lead us to conclude that she was entitled to any relief on this basis. We can discern no basis for disturbing the circuit court's

judgment based on plaintiff's unsupported argument that defendants engaged in any wrongdoing with respect to the operative report.

¶ 19 Finally, plaintiff argues that the circuit court entered an unconstitutional protective order prohibiting her from disseminating discovery responses, deposition transcripts and exhibits, and video of depositions to the public. Defendants apparently sought the protective order because plaintiff disclosed discovery responses and Brink's depositions to government agencies, including the FBI and the Illinois Attorney General's Office, as part of her allegations to those entities that Brink had engaged in fraud. Plaintiff fails to develop a coherent argument on this issue or offer a legal argument as to how the entry of the protective order prejudiced her in any manner. She has therefore forfeited this argument (Ill. S. Ct. R. 341(h)(7)), and we cannot discern any basis for granting plaintiff any relief.

¶ 20 Plaintiff's appellate brief identifies and discusses numerous other tangential issues that we have considered, none of which merit discussion, as they do not affect our analysis of the circuit court's judgment.

¶ 21

III. CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.