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NO. 4-16-0437

FILED
February 8, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KRISTEN NESVACIL and GARY NESVACIL, Plaintiffs-Appellants, v. NAIM KOCHIU, M.D., Defendant-Appellee.	))))))))	Appeal from Circuit Court of McLean County No. 12L110 Honorable Rebecca Simmons Foley, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly granted defendant's motion for summary judgment on plaintiffs' *res ipsa loquitur* claims where plaintiffs failed to join all of the individuals who exercised control over the agency or instrumentality that caused the injury.

¶ 2 In August 2010, plaintiffs, Kristen and Gary Nesvacil, arrived at Advocate BroMenn Medical Center (BroMenn) for the delivery of their baby. Defendant, Naim Kochiu, M.D., administered an epidural catheter. The following day, doctors determined Kristen needed a Caesarean section to deliver the baby. Dr. Benjamin Taimoorazy provided additional anesthetic medication in the catheter and eventually removed the catheter after delivery.

¶ 3 After her discharge, Kristen developed an epidural abscess. In January 2016, Kristen filed an amended complaint that included counts of *res ipsa loquitur*, alleging Dr. Kochiu alone was negligent in placing the epidural catheter. That same month, Dr. Kochiu filed

a motion for partial summary judgment as to the *res ipsa loquitur* claims. The trial court granted Dr. Kochiu's motion, finding plaintiffs failed to join "all other possible" individuals who reasonably could have caused the abscess.

¶ 4 Plaintiffs appeal, asserting the trial court erred by granting defendant's motion for partial summary judgment because its finding that plaintiffs were required to eliminate "all other possible causes" of Kristen's injury as a prerequisite for a *res ipsa loquitur* claim (1) was unsupported under the *res ipsa loquitur* statute (735 ILCS 5/2-1113 (West 2014)), and (2) violated their right to due process. For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Background

¶ 7 On August 3, 2010, Kristen was admitted to BroMenn for the labor and delivery of her baby. As part of the process, Kristen opted to have an epidural catheter placed in her back to alleviate the pain of childbirth. Dr. Kochiu placed the epidural catheter. The next day, Kristen was still in labor, and the doctors determined she needed a Caesarean section to safely deliver the baby. Dr. Taimoorazy administered anesthesia medication to Kristen through the preexisting epidural catheter and later removed the catheter following delivery. Throughout the labor and delivery, Kristen was attended to by BroMenn nursing staff.

¶ 8 On August 5, 2010, Kristen was discharged from BroMenn. However, Kristen presented herself at Carle Foundational Hospital the next day, complaining of severe back pain and difficulty walking. Doctors determined she suffered from an epidural abscess in her lumbar spine with *cauda equina* syndrome. On August 7, 2010, Kristen underwent a laminectomy to remove and relieve the epidural abscess. Despite the surgery, Kristen sustained severe and permanent disabilities as a result of the abscess, *cauda equina* syndrome, and laminectomy.

¶ 9 B. Complaint

¶ 10 In August 2012, plaintiffs filed a 22-count complaint, asserting the negligence of various parties—including Dr. Kochiu, Dr. Taimoorazy, BroMenn, and BroMenn's parent company—caused Kristen to sustain an epidural abscess. Dr. Martin Dauber, a board-certified anesthesiologist, provided three health-professional's reports that accompanied plaintiffs' initial complaint—one for Dr. Taimoorazy, one for BroMenn, and one for Dr. Kochiu. At the time he prepared his reports, he had the benefit of Kristen's medical records from BroMenn and Carle Foundational Hospital. In his affidavits, Dr. Dauber opined Dr. Kochiu's, Dr. Taimoorazy's, and BroMenn's care fell below the minimum standard of care for carelessly and negligently failing to (1) sterilize the medical equipment and area prior to administering the anesthesia, (2) administer drugs in a sterile fashion, and (3) properly prepare Kristen before the insertion of the epidural catheter.

¶ 11 In January 2016, plaintiffs filed an amended complaint, this time naming only Dr. Kochiu as a defendant. Count I alleged Dr. Kochiu was negligent in placing Kristen's epidural, which caused her to suffer a spinal abscess and *cauda equina* syndrome that required surgery to repair. Specifically, the count alleged Dr. Kochiu was negligent in that he (1) carelessly and negligently failed to prepare Kristen before inserting the epidural catheter, (2) carelessly and negligently failed to properly sterilize Kristen's spinal area before inserting the catheter, (3) failed to verify and maintain the sterility of his medical instruments, and (4) carelessly and negligently failed to administer drugs in a sterile fashion. Count II alleged Dr. Kochiu's negligence resulted in Gary's loss of consortium and loss of his wife's services. Counts III and IV alleged Dr. Kochiu was liable under the theory of *res ipsa loquitur*, asserting Kristen's

injuries would not have occurred if Dr. Kochiu had used a reasonable standard of professional care. Plaintiffs thereafter moved to voluntarily dismiss their complaint as to all other defendants.

¶ 12 C. Motion for Summary Judgment

¶ 13 In January 2016, Dr. Kochiu filed a motion for partial summary judgment, asserting plaintiffs could not demonstrate *res ipsa loquitur* because they could not prove Kristen's injury resulted from an agency or instrumentality within Dr. Kochiu's exclusive control. In other words, Dr. Kochiu contended plaintiffs could not eliminate the "possibility" that Kristen's epidural abscess was caused by Dr. Taimoorazy or BroMenn nursing staff. Plaintiffs responded, asserting Dr. Kochiu's control over the instrumentality need not be exclusive, as plaintiffs only needed to prove Dr. Kochiu "probably" caused the injury. The parties attached the depositions of Dr. Dauber and Dr. R-Jay Marcus for the trial court's consideration.

¶ 14 Dr. Dauber admitted to writing the health-professional's reports that accompanied plaintiffs' original complaint; however, his medical opinion changed after reading the depositions of Dr. Taimoorazy and other medical personnel. He now opined only Dr. Kochiu was negligent with respect to Kristen's care. In particular, Dr. Dauber was swayed by Dr. Taimoorazy's deposition and other evidence showing he did not participate in the placement of Kristen's epidural catheter. Rather, Dr. Taimoorazy later added a *bolus* to Kristen's catheter and removed the catheter following a Caesarean section. According to Dr. Dauber, it was possible that Dr. Taimoorazy's actions, if not done in a sterile environment, introduced bacteria into the body that caused the infection. Dr. Dauber also opined, in a sardonic manner, that Dr. Taimoorazy or BroMenn staff engaging in an undocumented procedure could have disconnected the epidural catheter and injected a foreign substance—*e.g.*, spit—while no one was looking, thus causing the epidural abscess. Although Dr. Dauber could not completely rule out the possibility of

negligence by Dr. Taimoorazy or BroMenn, he stated, "the probability, the overwhelming likelihood is that the bacteria was introduced at the time the skin was penetrated during the placement which Dr. Taimoorazy and the BroMenn staff did not have a hand in."

¶ 15 In Dr. Marcus' deposition, he opined it was possible but unlikely Dr. Taimoorazy or the hospital nursing staff introduced bacteria to Kristen's catheter. Dr. Marcus noted nothing in the medical records indicated hospital or nursing staff interfered with the catheter, but such an action could have been undocumented.

¶ 16 The following month, the trial court granted defendant's motion for partial summary judgment regarding the counts of *res ipsa loquitur*. In doing so, the court stated:

> "[P]laintiff's failure to name as defendants all the entities who might have caused his [*sic*] injuries is fatal to the action since the plaintiff must eliminate the probable cause by someone other than any defendant.
>
> Here[,] while the pleadings have been amended to only allege and focus on the placement of the catheter, and here it appears that Dr. Kochiu is the only person who was involved in that particular process, the record before the [c]ourt reflects that expert testimony on both sides of the aisle indicates that it is possible there are other causes."

¶ 17 D. Jury Trial and Posttrial Proceedings

¶ 18 In March 2016, the case proceeded to jury trial on the remaining counts of negligence. Because plaintiffs' appeal centers on the trial court's order for partial summary

judgment, we need not detail the evidence introduced at trial. Following deliberations, the jury found in favor of Dr. Kochiu and against plaintiffs.

¶ 19 In March 2016, plaintiffs filed a posttrial motion, alleging, in part, the trial court erred by (1) granting summary judgment on the *res ipsa loquitur* counts, (2) barring Dr. Dauber's testimony that Kristen's injury would not have occurred if Dr. Kochiu used a reasonable standard of care, and (3) refusing plaintiffs' jury instruction related to their *res ipsa loquitur* claims. In May 2016, the court denied plaintiffs' posttrial motion.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, plaintiffs assert the trial court erred by granting defendant's motion for summary judgment because its finding that plaintiffs were required to eliminate "all other possible causes" of Kristen's injury as a prerequisite for a *res ipsa loquitur* claim (1) was unsupported under the *res ipsa loquitur* statute (735 ILCS 5/2-1113 (West 2014)), and (2) violated their right to due process. We begin by articulating the standard of review.

¶ 23 A. Standard of Review

¶ 24 The trial court should grant summary judgment only if there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *Gatlin v. Ruder*, 137 Ill. 2d 284, 293, 560 N.E.2d 586, 589 (1990). In deciding a motion for summary judgment, the trial court may consider the pleadings, depositions, admissions, and affidavits on file. *Id*. Where a defendant files a motion for summary judgment, it is the plaintiff's duty "to bring forth all facts and evidence that he believed would satisfy his burden of proving the existence of a cognizable cause of action." *Loizzo v. St. Francis Hospital*, 121 Ill. App. 3d 172, 180, 459 N.E.2d 314, 319 (1984). The court's summary judgment order is reviewed *de novo*.

Raleigh v. Alcon Laboratories, Inc., 403 Ill. App. 3d 863, 870, 934 N.E.2d 530, 537 (2010). We also review *de novo* the court's decision to deny a *res ipsa loquitur* claim. *Heastie v. Roberts*, 226 Ill. 2d 515, 531, 877 N.E.2d 1064, 1075 (2007).

¶ 25 Having established the appropriate standards of review, we now turn to the merits of plaintiffs' appeal.

¶ 26 B. The Statute

¶ 27 Section 2-1113 of the Code of Civil Procedure (735 ILCS 5/2-1113 (West 2014)) provides:

> "In all cases of alleged medical or dental malpractice, where the plaintiff relies upon the doctrine of *res ipsa loquitur*, the court shall determine whether that doctrine applies. In making that determination, the court shall rely upon either the common knowledge of laymen, if it determines that to be adequate, or upon expert medical testimony, that the medical result complained of would not have ordinarily occurred in the absence of negligence on the part of the defendant. Proof of an unusual, unexpected or untoward medical result which ordinarily does not occur in the absence of negligence will suffice in the application of the doctrine."

¶ 28 Plaintiffs assert nothing in the statutory language requires them to remove "all other possible" causes of Kristen's injury to support a *res ipsa loquitur* claim. While not specifically stated within the statute, our supreme court has provided further instruction as to how to determine "the medical result complained of would not have ordinarily occurred in the

absence of negligence on the part of the defendant." According to the supreme court, "a plaintiff seeking to rely on the *res ipsa* [*loquitur*] doctrine must plead and prove that he or she was injured[:] (1) in an occurrence that ordinarily does not happen in the absence of negligence, [and] (2) by an agency or instrumentality within the defendant's exclusive control." *Heastie*, 226 Ill. 2d at 531-32, 877 N.E.2d at 1076; see also *Spidle v. Steward*, 79 Ill. 2d 1, 5, 402 N.E.2d 216, 218 (1980).

¶ 29 In the case before us, the trial court granted partial summary judgment based on the second element. In reaching its decision, the trial court found plaintiffs' failure to join all possible defendants, such as Dr. Taimoorazy, fatal to their *res ipsa loquitur* claims. "Before *res ipsa loquitur* can be applied, it must be shown that the injury can be traced to a specific instrumentality or cause for which the defendant is responsible or that the defendant was responsible for all reasonable causes to which the accident could be attributed." (Internal quotation marks omitted.) *Raleigh*, 403 Ill. App. 3d at 869, 934 N.E.2d at 536. Moreover, "[a] plaintiff's failure to name as defendants all of the entities who might have caused his injuries is fatal to the action since the plaintiff must eliminate the possibility that the accident was caused by someone other than any defendant." (Internal quotation marks omitted.) *Id.* Therefore, the plaintiff must join as defendants all parties that could have been the cause of the plaintiff's injury. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 257, 560 N.E.2d 324, 339-40 (1990).

¶ 30 In his deposition, Dr. Marcus testified it was possible Dr. Taimoorazy introduced bacteria into Kristen's catheter. Dr. Dauber also stated he could not rule out the negligence of Dr. Taimoorazy, even though the "overwhelming likelihood" was that Dr. Kochiu's negligent actions alone caused the epidural abscess. Dr. Dauber's testimony leaves open the possibility that Kristen's abscess occurred while under Dr. Taimoorazy's control.

¶ 31 Plaintiffs argue that they need not join all "possible" defendants, but, consistent with the burden of proof in civil cases, they would only need to join any individuals who "probably" caused Kristen's injury. Following this line of reasoning, given Dr. Dauber's testimony that Dr. Kochiu probably caused Kristen's injury, plaintiffs assert they provided a sufficient question of fact to survive a motion for summary judgment. We disagree.

¶ 32 The first element of a *res ipsa loquitur* claim, which requires a plaintiff to demonstrate the occurrence ordinarily does not happen in the absence of negligence, requires evidence that the defendant more likely than not negligently caused the injury. See *Spidle*, 79 Ill. 2d at 5, 9, 402 N.E.2d at 218, 219. To satisfy the second element, the plaintiff must show the agency or instrumentality was within the defendant's *exclusive* control. See *Heastie*, 226 Ill. 2d at 531-32, 877 N.E.2d at 1076. Here, because the evidence presented to the court suggests the possibility that another individual is responsible for Kristen's injury, plaintiffs were required to name that person(s) in order to allow the jury to determine the question of fact of who proximately caused plaintiff's injury.

¶ 33 Plaintiffs argue language contained in *Spidle*, specifically, "We see no reason to treat the probability component of *res ipsa loquitur* differently from the control component," stands for the proposition that they need only show a probability that Dr. Kochiu caused the injury. See *Spidle*, 79 Ill. 2d at 11, 402 N.E.2d at 230 (citing *Drewick v. Interstate Terminals, Inc.*, 42 Ill. 2d 345, 247 N.E.2d 877 (1969)). We do not disagree with plaintiff. As indicated by plaintiff, the burden in civil cases is more probably true than not. Even so, our agreement with plaintiff's statement fails to change the requirement that any person or entity that may have caused plaintiff's injury must be joined as a party. We are dealing with two distinct issues; the burden of proof and who must be named as parties. Ultimately, the jury is to decide who, if

anyone, has been shown to have more probably than not caused plaintiff's injury. Moreover, in the *Spidle* case, the plaintiff joined all those possibly responsible for his injury, and the determination of ultimate responsibility for the plaintiff's injury should have been submitted to the jury. Here, we do not have all who are possibly responsible joined as parties. Also, *Drewick*, to which the *Spidle* court refers, notes the purpose of the second element is "to limit the application of the doctrine to those cases where the negligence, if any, must reasonably have been that of the defendant." *Drewick*, 42 Ill. 2d at 348, 247 N.E.2d at 879. Such a statement infers the plaintiff must join anyone that reasonably could have caused the injury.

¶ 34 As a result of Kristen taking antibiotics that prevented the bacteria from culturing in a lab, plaintiffs could produce no evidence to show the bacteria that created her abscess was introduced when Dr. Kochiu placed the catheter, which was necessary to demonstrate the injury occurred solely while under Dr. Kochiu's exclusive control. Accordingly, the *possibility* exists that the injury occurred while Dr. Taimoorazy had control over the catheter, either in the maintenance or removal of the catheter.

¶ 35 In *Raleigh*, 403 Ill. App. 3d at 865 934 N.E.2d at 533, the plaintiff filed a complaint against the hospital where he suffered an eye injury following a surgical procedure to place a lens in his eye. The plaintiff asserted a claim of *res ipsa loquitur* against the hospital and argued the instrumentality that caused his infection was within the exclusive control of the hospital. *Id.* at 867-68, 934 N.E.2d at 535. Despite expert testimony indicating the lens used in the surgery may have contained bacteria upon leaving the manufacturer, the plaintiff did not name the lens manufacturer under the *res ipsa loquitur* claim. *Id*. The hospital moved to dismiss the *res ipsa loquitur* claim, and the trial court granted the motion. *Id.* at 868, 934 N.E.2d at 535.

¶ 36 On appeal, the appellate court found the plaintiff's failure to add the lens manufacturer to the *res ipsa loquitur* count was fatal to the claim, as the possibility existed that the lens was not under the exclusive control of the hospital, but had also been under the control of the manufacturer. *Id.* at 869, 934 N.E.2d at 536. The court reasoned, "[b]efore *res ipsa loquitur* can be applied, it must be shown that the injury can be traced to a specific instrumentality or cause for which the defendant is responsible or that the defendant was responsible for all *reasonable causes* to which the accident could be attributed." (Emphasis added and internal quotation marks omitted.) *Id.* "A plaintiff's failure to name as defendants all of the entities who might have caused his injuries is fatal to the action since the plaintiff must eliminate the *possibility* that the accident was caused by someone other than any defendant." (Emphasis added and internal quotation marks omitted.) *Id.* Accordingly, the appellate court affirmed the trial court. *Id.* at 870, 934 N.E.2d at 537.

¶ 37 Plaintiffs assert *Raleigh* is distinguishable because the plaintiff failed to include the surgeon in his claim; however, nothing in the case indicates that fact entered into the analysis. Additionally, plaintiffs assert the evidence suggested the lens manufacturer, who was not joined as a defendant in the *res ipsa loquitur* claim, was "more likely than not" the cause of the infection, whereas the experts in this case found Dr. Kochiu, the named defendant, was the most likely cause of Kristen's infection. While we agree this is a factual difference, the analysis remains the same. The plaintiff must name all entities that possibly could have caused the injury. In this case, some evidence suggested Dr. Taimoorazy possibly caused Kristen's infection because of his contact with Kristen's catheter and, therefore, he should have been joined in the action.

¶ 38 Plaintiffs rely on *Gatlin*, 137 Ill. 2d at 298, 560 N.E.2d at 592, for the proposition that a plaintiff need not eliminate "all other possible" causes of his injuries because that is an issue for the jury. However, *Gatlin* does not require us to reach a different result. In *Gatlin*, the plaintiff sustained head injuries either during his birth or while in the care of the hospital nursery. *Id.* at 287, 560 N.E.2d at 587. The plaintiff filed a complaint, alleging *res ipsa loquitur* claims against both the doctor who performed the Caesarean section and the hospital for hiring negligent staff in the nursery. *Id*. The doctor moved for summary judgment, asserting no evidence suggested he acted negligently, which the trial court subsequently granted. *Id*. at 288, 560 N.E.2d at 587. The plaintiff filed a motion to vacate the order for summary judgment after deposing a witness who testified the doctor may have negligently caused the plaintiff's head injury. *Id.* at 289, 560 N.E.2d at 587.

¶ 39 The supreme court held the expert witness's deposition gave rise to a genuine issue of material fact for the jury and, therefore, the trial court erred by denying the plaintiff's motion to vacate the order for summary judgment. *Id.* at 299, 560 N.E.2d at 592. In reaching its decision, the supreme court stated, "By proving that the injury does not ordinarily occur in the absence of negligence and that defendant had control over the instrumentality which caused plaintiff's injury, plaintiff can present circumstantial evidence from which the jury could infer negligence." *Id.* at 300, 560 N.E.2d at 593.

¶ 40 The present case is distinguishable. Contrary to the present case, the plaintiff in *Gatlin* joined all defendants who possibly caused the plaintiff's injury, and it was then for the jury to decide whether the doctor or the hospital negligently caused the injury. Here, plaintiffs failed to join all possible contributors to Kristen's injury to allow the jury to choose which, if any, potentially responsible person and/or entity provided negligent care.

¶ 41 Plaintiffs reliance on *Adams v. Family Planning Associates Medical Group, Inc.*, 315 Ill. App. 3d 533, 546, 733 N.E.2d 766, 776 (2000), is inapplicable to the present case, as it discusses the extent to which a *res ipsa loquitur* claim must demonstrate negligence, the first element of the *res ipsa loquitur* test, rather than the second element which is at issue here.

¶ 42 Accordingly, we conclude the appropriate course of action would have been for plaintiffs to name as defendants Dr. Taimoorazy and any other possible individuals with control over the catheter. As the trial court found, the failure to join all possible defendants was fatal to the claim. See *Raleigh*, 403 Ill. App. 3d at 870, 934 N.E.2d at 537.

¶ 43 C. Due Process

¶ 44 Plaintiffs also argue requiring them to remove "all other possible" causes for Kristen's injury violates their procedural right to due process. Dr. Kochiu asserts this argument is forfeited, as plaintiffs failed to raise it before the trial court. "A party's failure to challenge the constitutionality of a statute in the circuit court normally forfeits that challenge on appeal in a civil case." *Forest Preserve District v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 27, 961 N.E.2d 775. Because plaintiffs failed to raise this issue before the trial court, we hold this issue is forfeited.

¶ 45 Accordingly, we conclude the trial court properly granted Dr. Kochiu's motion for partial summary judgment on the *res ipsa loquitur* counts.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm the trial court's judgment.

¶ 48 Affirmed.