2017 IL App (5th) 160213-U

NO. 5-16-0213

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

GAVIN WELSCH, a Minor, by His Mother and Next Friend, Mary Welsch, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Monroe County.
v.	)	No. 14-L-23
COLUMBIA KINDER COLLEGE, INC., Defendant-Appellee.	)	Honorable Dennis B. Doyle, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Moore and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Where the plaintiff lacks jurisdiction to appeal from the trial court's order dismissing the negligence count of the complaint, we dismiss that portion of the appeal. Where the plaintiff cannot establish both elements of a *res ipsa loquitur* claim, we affirm the judgment of the trial court in favor of the defendant.

¶ 2 Mary Welsch appeals from the trial court's dismissal of the negligence count of her complaint and from entry of summary judgment on the *res ipsa loquitur* count of her complaint filed on behalf of her minor son, Gavin. Gavin sustained injuries while in the care of the providers at a daycare facility, Columbia Kinder College, Inc. For the reasons

that follow, we dismiss the appeal from the dismissal of Mary's negligence count, and affirm the trial court's summary judgment on the *res ipsa loquitur* count.

¶ 3 FACTS

¶ 4 On August 9, 2013, Gavin was 30 months of age and was attending daycare at Columbia Kinder College (daycare). Gavin sustained a broken leg while playing on the daycare playground. In a video recording of the area, Gavin and two other children are seen running, and Gavin and one other child are also playing with a ball. Daycare staff members were present and can be seen on the video, but were mostly seated, occasionally getting up to walk amongst the children. The actual incident that resulted in Gavin breaking his leg was not captured on video.

¶ 5 On November 18, 2014, Mary filed suit against the daycare. In count I of her complaint sounding in negligence, she alleged that the daycare was guilty of negligent or careless acts or omissions in that they failed to supervise Gavin; were inadequately staffed; improperly operated, managed, and controlled the premises; failed to protect Gavin; failed to reasonably inspect the premises; allowed tripping hazards on the premises; and generally failed to monitor Gavin. Mary contended that Gavin sustained injuries as a direct and proximate result of these careless or negligent acts or omissions. In count II of her complaint sounding in *res ipsa loquitur*, Mary alleged that Gavin's injury would not have occurred if the daycare staff had used ordinary care while he was under their supervision and control.

¶ 6 Columbia Kinder College filed a motion to dismiss Mary's complaint pursuant to sections 2-612 and 2-615 of the Code of Civil Procedure (735 ILCS 5/2-612, 2-615 (West

2012)), arguing that neither the negligence count nor the *res ipsa loquitur* count sufficiently stated a cause of action. Specifically, the daycare argued that the complaint lacked any factual detail about what caused Gavin's injury. Regarding the negligence count, the daycare argued that the complaint failed to include sufficient facts in order to reasonably inform it of the claim it must defend. Regarding the *res ipsa loquitur* count, the daycare argued that Mary's complaint was deficient because she alleged no specific agency or instrumentality within the defendant's exclusive control that could have caused Gavin's injury. Additionally, the daycare stated that a broken leg is something that could happen to a toddler without the involvement of negligence. In response, Mary argued that because the daycare maintained exclusive supervision of the children on the date of the injury, Gavin's broken leg must have occurred as a result of some negligent act or omission on the part of the daycare.

¶ 7 On April 20, 2015, the trial court entered its order dismissing the negligence count of Mary's complaint on the basis that she failed to allege sufficient factual allegations about how Gavin was injured in order to reasonably inform the daycare of the negligence claim. The trial court denied the motion to dismiss the remaining *res ipsa loquitur* count.

¶ 8 From the record, it appears that some discovery took place in the form of interrogatories and production of documents. However, none of the discovery is included in the record on appeal.

¶ 9 On October 26, 2015, the daycare filed a motion for summary judgment on the *res ipsa loquitur* count of the complaint. Attached to the motion were two affidavits. Katherine Kessler stated that she was employed by the daycare and was one of the

employees supervising the toddlers on the date of the incident. She stated that there were no cracks, holes, or other damage to the concrete surface in the area where Gavin fell. Kessler stated that Gavin fell while "tripping over his own feet while he was running about on the playground." The second affidavit was that of Deborah Killy, the president of Columbia Kinder College, Inc. She stated that there was a surveillance camera recording the events of that day, but that Gavin fell out of the field of view. Killy also included two photographs of the concrete surface in the area where Gavin fell. She stated that the concrete surface had no structural issues. Finally, Killy stated that on occasion a toddler running on the playground will trip "over himself and fall" and that "toddlers sometimes fall based solely on their still developing physical coordination." The daycare argued that the evidence showed that Gavin fell solely as a result of an accident caused by his tripping over his own feet. Consequently, the daycare contended that although it has a duty to keep the premises in a reasonably safe condition, the evidence established that no condition of the playground caused Gavin's fall. Furthermore, the daycare argued that although accidental falls occur, the steps to prevent such falls–prohibiting running or assigning a spotter to each child–would be irrational and burdensome. Finally, the daycare argued that Gavin was free to run on the playground and therefore, it lacked exclusive control over him, and that Mary could not prove that this type of fall would not happen absent negligence.

¶ 10 In response, Mary stated that Gavin was incapable of contributory negligence as he was under the age of seven on the date of the incident. She argued that the surveillance video supported negligence on the part of the daycare in that they failed to

properly supervise Gavin. As negligence is a component of a cause of action under the theory of *res ipsa loquitur*, she argued that the allegation that the daycare staff failed to properly supervise Gavin raised a genuine issue of material fact.

¶ 11 On December 9, 2015, the trial court heard oral argument on the summary judgment motion. The daycare's attorney argued that young children can fall in the absence of negligence, and therefore, the unrefuted facts of this case did not support a cause of action for *res ipsa loquitur*. He further argued that from the video, Gavin can be seen running to a point that was no longer on camera. While Gavin's fall was not recorded, he informed the court that one of the workers saw Gavin fall over his feet. The court noted that the affidavit filed with the motion for summary judgment was not definitive on that point, and that the question remained as to whether the employee actually witnessed the fall. Mary's attorney argued that the cause of the fall was not known. He asserted that Gavin could have fallen over a ball that was on the playground, or that some other child could have kicked or pushed him. At the end of the hearing, the trial court adjourned the motion to allow the daycare's attorney to obtain a more specific affidavit. On December 21, 2015, the daycare filed a supplemental brief in support of its motion for summary judgment and also filed another affidavit of Katherine Kessler. Kessler stated that she was one of the employees supervising Gavin and the other children on the playground the date that he fell. She also stated that:

> "I saw Gavin fall while he was playing on the playground. He fell as a result of tripping over his own feet while he was running about."

¶ 12 The trial court granted summary judgment on February 3, 2016. The trial court subsequently set aside the judgment on February 9, 2016, in order to allow Mary's attorney to depose Kessler. Kessler's deposition was thereafter scheduled for March 22, 2016. By letter dated April 11, 2016, Mary's attorney advised the court that Kessler's deposition had been taken and that Mary would be standing on the previous briefs submitted to the court. On April 19, 2016, the trial court granted summary judgment, finding that the doctrine of *res ipsa loquitur* did not apply to the undisputed facts of this case. From this order, Mary appeals.

¶ 13 LAW AND ANALYSIS

¶ 14 Order Dismissing Negligence Count I

¶ 15 On appeal, Mary argues that the trial court's order dismissing count I of her complaint (negligence) was inappropriate. However, the notice of appeal Mary filed in this case does not include this order and specifically only references the order granting summary judgment on count II of her complaint, the *res ipsa loquitur* count.

¶ 16 Every appeal "is initiated by filing a notice of appeal." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). The notice must be filed within 30 days after entry of the final judgment from which the appellant seeks relief. Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015). A notice of appeal must "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2). Filing a notice of appeal is "the jurisdictional step which initiates appellate review." *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7, 694 N.E.2d 562, 563 (1998). If the notice of appeal is improper, "the appellate court lacks jurisdiction over the matter and is obliged

to dismiss the appeal." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176, 950 N.E.2d 1136, 1144 (2011) (citing *People v. Smith*, 228 Ill. 2d 95, 104, 885 N.E.2d 1053, 1058 (2008)). An appellate court only has jurisdiction to review the judgment specified in the notice of appeal. *Id.* (citing *People v. Lewis*, 234 Ill. 2d 32, 37, 912 N.E.2d 1220, 1224 (2009)). If the deficiency in the notice of appeal is in form only, where the substance of the appeal is inferred, then the deficiency is not necessarily fatal to the appeal. *Id.* (quoting *Smith*, 228 Ill. 2d at 105, 885 N.E.2d at 1059 (quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 230, 583 N.E.2d 1147, 1150 (1991))). Additionally, if the judgment not included in the notice of appeal is a procedural step that leads to the judgment included in the notice of appeal, then the judgment listed in the notice relates back to the earlier judgment. *Neiman v. Economy Preferred Insurance Co.*, 357 Ill. App. 3d 786, 790-91, 829 N.E.2d 907, 911 (2005).

¶ 17 Here, the judgment dismissing the negligence count of Mary's complaint was entered on April 20, 2015. As the *res ipsa loquitur* count of the complaint was allowed to continue, the judgment dismissing the negligence count was not then final. Mary's notice of appeal states that "she is appealing the April 19, 2016, Order" that "was entered on April 20, 2016, and it granted Defendant's Motion For Summary Judgment." Additionally, the notice states that on appeal she is asking us to reverse and remand "with instructions to the Circuit Court to deny Defendant's Motion For Summary Judgment." There is no reference in the notice of appeal to the judgment dismissing the negligence count of the complaint. Ill. S. Ct. R. 303(b)(2). There is no inference in the notice of appeal to the judgment dismissing the negligence count. *General Motors Corp.*, 242 Ill.

2d at 176, 950 N.E.2d at 1144. Furthermore, the judgment dismissing the negligence count is not procedurally tied to, and not considered a progression towards the later judgment granting summary judgment on the *res ipsa loquitur* count. *Neiman*, 357 Ill. App. 3d at 790-91, 829 N.E.2d at 911. Consequently, we do not have jurisdiction to hear Mary's appeal of the order dismissing the negligence count.

¶ 18 Order Granting Summary Judgment on *Res Ipsa Loquitur* Count II

¶ 19 Section 2-1005(c) of the Code of Civil Procedure provides that a party is entitled to summary judgment as a matter of law when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." 735 ILCS 5/2-1005(c) (West 2014). In determining whether to grant or deny a request for summary judgment, the trial court strictly construes all evidence in the record against the moving party and liberally in favor of the opponent. *Purtill v. Hess*, 111 Ill. 2d 220, 240, 489 N.E.2d 867, 871 (1986); *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723 N.E.2d 321, 323 (1999). On review of an order granting summary judgment, the appellate court must determine if a question of fact remains. *Koziol*, 309 Ill. App. 3d at 476, 723 N.E.2d at 323. Our review is *de novo*. *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992). Summary judgment is considered a drastic remedy. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000). To warrant entry of summary judgment, the movant's right to judgment must be certain and without doubt. *Id.*

¶ 20 The doctrine of *res ipsa loquitur* is based on a common law action for negligence. *Heastie v. Roberts*, 226 Ill. 2d 515, 531, 877 N.E.2d 1064, 1075 (2007). The purpose of a *res ipsa loquitur* claim has been explained by our supreme court as follows:

> "When a thing which caused the injury is shown to be under the control or management of the party charged with negligence and the occurrence is such as in the ordinary course of things would not have happened if the person so charged had used proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from want of proper care. [Citations.] This in essence is the doctrine of *res ipsa loquitur*, and its purpose is to allow proof of negligence by circumstantial evidence when the direct evidence concerning cause of injury is primarily within the knowledge and control of the defendant." *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446, 448-49, 207 N.E.2d 305, 307 (1965).

Once the injured party makes a claim for *res ipsa loquitur*, the opposing party may provide any explanation or rebuttal evidence. *Id.* at 449, 207 N.E.2d at 307. Whether the doctrine of *res ipsa loquitur* applies in a particular case is a question of law to be decided by the trial court. *Id.*; *Imig v. Beck*, 115 Ill. 2d 18, 27, 503 N.E.2d 324, 329 (1986).

¶ 21 In keeping with the explanation provided in *Metz v. Central Illinois Electric & Gas Co.*, a plaintiff pursuing a *res ipsa loquitur* claim "must plead and prove that he or she was injured (1) in an occurrence that ordinarily does not happen in the absence of negligence, (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 (citing *Gatlin v. Ruder*, 137 Ill. 2d 284,

295, 560 N.E.2d 586, 590 (1990)). The plaintiff establishes the first element when "the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from want of proper care." *Metz*, 32 Ill. 2d at 449, 207 N.E.2d at 307. A plaintiff is not required to obtain expert testimony to establish this element "where it is common knowledge that the injury complained of would not have occurred in the absence of negligence." *Taylor v. City of Beardstown*, 142 Ill. App. 3d 584, 593-94, 491 N.E.2d 803, 809-10 (1986) (citing *Ybarra v. Cross*, 22 Ill. App. 3d 638, 645, 317 N.E.2d 621, 626 (1974)). The "control" required in the second element is flexible with the primary question relating to probable cause–whether the probable cause of the injury was something that the defendant was under a duty to guard against or anticipate. *Heastie*, 226 Ill. 2d at 532, 877 N.E.2d at 1076 (citing *Jones v. Minster*, 261 Ill. App. 3d 1056, 1061, 635 N.E.2d 123, 126 (1994); *Darrough v. Glendale Heights Community Hospital*, 234 Ill. App. 3d 1055, 1060, 600 N.E.2d 1248, 1252 (1992)).

¶ 22 On appeal, Mary argues that the trial court was wrong in granting summary judgment because the evidence established an inference that the daycare staff did not properly supervise and/or control the actions of the children in their care. In support, she cites to *Metz v. Central Illinois Electric & Gas Co.*, which states that an inference of negligence does not automatically fail simply because of the discovery of contrary evidence, but should be considered with all other evidence. *Metz*, 32 Ill. 2d at 449, 207 N.E.2d at 307. Essentially, Mary claims that control is inherent in the obligation owed by a daycare to its clients. Specifically, she contends that the daycare is obligated to maintain control of the children, maintain control of the playground, and maintain control

of its staff. As the incident occurred while the daycare maintained control, the inference necessarily is that the daycare failed "to anticipate or guard against" Gavin's injury. *Heastie*, 226 Ill. 2d at 532, 877 N.E.2d at 1076.

¶ 23 We find that Mary's reliance on *Heastie* is misplaced as *Heastie* is readily distinguished. *Heastie* satisfied both necessary *res ipsa loquitur* elements, (1) that the injury would not have ordinarily occurred in the absence of negligence–because patients strapped to a gurney do not ordinarily catch on fire, and (2) that the defendant had exclusive control of the instrumentality that caused the injury–because plaintiff was restrained and exposed to a source of ignition in an environment solely controlled by the hospital. A more relevant case is *Dyback v. Weber*, where the supreme court affirmed the trial court's rejection of the *res ipsa loquitur* doctrine because the origin of a house fire was uncertain and the evidence supported explanations for the fire other than the defendant's negligence. *Dyback v. Weber*, 114 Ill. 2d 232, 500 N.E.2d 8 (1986).

¶ 24 Here, as in *Dyback*, Mary has not shown that the first element is satisfied. A plaintiff must plead and prove both elements of *res ipsa loquitur* in order to invoke the doctrine. *Dyback*, 114 Ill. 2d at 242, 500 N.E.2d at 12. What is glaringly absent in Mary's four-page argument regarding application of the *res ipsa loquitur* doctrine is the mention of *any facts* that would support an inference that the occurrence is one that ordinarily does not occur without negligence. Instead, Mary's entire argument centers around the second element–control of the instrumentality that caused the injury. Mary ends the *res ipsa loquitur* argument with a single two-sentence paragraph stating:

"Plaintiff has made an inference that the childcare center was not properly supervising and controlling the activities of its children. Therefore, the Plaintiff's case should be submitted to the jury."

¶ 25 The application of the *res ipsa loquitur* doctrine is a question of law that must first be decided by the trial court. *Imig*, 115 Ill. 2d at 27, 503 N.E.2d at 329; *Metz*, 32 Ill. 2d at 449, 207 N.E.2d at 307. We are mindful that the *Dyback* case was decided at the close of plaintiff's case and the *Heastie* case was decided on the pleadings. However, here Mary was given ample opportunity through discovery and affidavits to further develop facts which would provide a basis to infer Gavin's injury was the kind that does not ordinarily occur in the absence of negligence, but did not. We are then left to consider Mary's conclusory pleading that, "In the normal course of events, the injury would not have occurred if the Defendant, Columbia Kinder College, Inc., had used ordinary care while the Plaintiff, Gavin Welsch, a minor, was under its control."

¶ 26 A plaintiff is not required to obtain expert testimony to establish the first element if it is common knowledge that the injury would not have occurred in the absence of negligence. *Taylor*, 142 Ill. App. 3d at 593-94, 491 N.E.2d at 809-10 (citing *Ybarra*, 22 Ill. App. 3d at 645, 317 N.E.2d at 626). It is incredible to argue in the instant case that it is common knowledge that young children do not on occasion trip and fall injuring themselves in the absence of negligence. On the contrary, it is common knowledge that a two-year-old may trip and fall simply because of lack of coordination skills−a fact addressed by Katherine Kessler's affidavit when she stated that she saw Gavin fall and he appeared to trip over his own feet. This fact was also addressed in an affidavit filed by

Deborah Killy, the president of Columbia Kinder College, Inc., who stated that "toddlers sometimes fall based solely on their still developing physical coordination." Webster's Dictionary defines a toddler as "one who toddles; *esp[ecially]*, a young child." Webster's Ninth New Collegiate Dictionary 1239 (1988). To toddle is defined as "the act of walking with short, unsteady steps." *Id.* When facts contained in an affidavit in support of a summary judgment motion are not disputed or contradicted by a counteraffidavit, the facts are deemed admitted and the court must consider those facts as true. *Taylor*, 142 Ill. App. 3d at 598, 491 N.E.2d at 813 (citing *Heidelberger v. Jewel Cos.*, 57 Ill. 2d 87, 92-93, 312 N.E.2d 601, 604 (1974)). One cannot infer negligence solely from a bad result. *Id.* at 595, 491 N.E.2d at 810.

¶ 27 In the instant case, Mary provided no facts that establish the inference of negligence and Columbia Kinder College, Inc., provided a reasonable explanation of how Gavin's fall could have occurred in the absence of negligence. *Metz*, 32 Ill. 2d at 449, 207 N.E.2d at 307.

¶ 28 Accordingly, as Mary is not able to present a genuine issue of material fact to establish the first necessary element of the *res ipsa loquitur* doctrine–that the fall would not have ordinarily occurred in the absence of negligence, she cannot invoke the doctrine and we need not consider the second element–Columbia Kinder College, Inc.'s control. We affirm the judgment of the trial court.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we dismiss Mary's appeal of the trial court's order dismissing count I of the complaint, the negligence count, due to lack of jurisdiction. We

affirm the judgment of the Monroe County circuit court ruling for Columbia Kinder College, Inc., on count II of the complaint, the *res ipsa loquitur* count.

¶ 31 Appeal dismissed in part and affirmed in part.