IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Dale Anderson,)
)
Plaintiff,)
)
v.) No. 20 L 5148
)
Adventist LaGrange Memorial Hospital and)
Slobodan D. Vucicevic, M.D.,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

The *res ipsa loquitur* doctrine stands for the proposition that a party may prove through circumstantial evidence that which it cannot prove through direct evidence. The plaintiff has mistakenly brought a cause of action for *res ipsa loquitur* when such a cause of action does not exist. On the other hand, the plaintiff has sufficiently pleaded a cause of action for negligence. As a result, the defendant's summary judgment motion must be granted, in part, and denied, in part.

Facts

On March 30, 2016, Dale Anderson underwent a total left knee replacement surgery. Dr. Slobodan Vucicevic conducted the surgery at Adventist LaGrange Memorial Hospital. Anderson initially recovered well, but by May 2016 complained of aches in his left knee with effusion. In August 2016 and March 2017, Vucicevic drained fluid from Anderson's left knee.

In May 2018, Anderson consulted with Dr. Ryan Pizinger for a second opinion. On July 18, 2018, Anderson presented to Presence St. Joseph Hospital for a revision surgery to his left knee. During the surgery, Pizinger discovered a plastic foreign body measuring three centimeters in length and 0.5 centimeters in width located in the suprapatellar region under the distal quadriceps tendon. Pizinger removed the plastic body, but did not retain it.

On May 11, 2020, Anderson filed a three-count complaint against the defendants. Count one is directed against LaGrange Hospital and is brought under the *res ipsa loquitur* doctrine and is not at issue here. Count two is directed against Vucicevic also under the *res ipsa loquitur* doctrine. In count

two, Anderson alleges the defendants had exclusive control over the instruments, materials, and prosthesis in the operating room and that Vucicevic and the surgical team were the only persons engaged in Anderson's knee replacement surgery. Count three is directed against Vucicevic under a negligence theory. Based on the same set of facts, Anderson claims Vucicevic breached the standard of care by failing to: protect the surgical field from foreign objects; protect the knee by not leaving foreign objects inside; clear the surgical field of all foreign objects before closing; and failing to observe a plastic piece left inside Anderson's knee.

On January 7, 2022, Vucicevic filed a summary judgment motion as to counts two and three. The parties fully briefed the motion.

Analysis

The Code of Civil Procedure authorizes the issuance of summary judgment "if 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 and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). A defendant moving for summary judgment may disprove a plaintiff's case by establishing that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

If the defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly

against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004).

Vucicevic's motion and Anderson's response argue over the sufficiency of the evidence to establish a *res ipsa loquitur* cause of action. The entire line of argument is irrelevant because, as a matter of law, *res ipsa loquitur* is not a recognized cause of action. As has been explained, "[*r*]*es ipsa loquitur*, although often pleaded separately from an ordinary negligence claim, is not truly an independent cause of action, but rather a 'rule of evidence relating to the sufficiency of plaintiff's proof' to establish a defendant's negligence." *Krivokuca v. City of Chicago*, 2017 IL App (1st) 152397, ¶ 43 (citing *Collins v. Superior Air-Ground Ambulance Serv., Inc.*, 338 Ill. App. 3d 812, 816 (1st Dist. 2003)). *Darrough v. Glendale Heights Comm. Hosp.*, 234 Ill. App. 3d 1055, 1060 (2d Dist. 1992) (*res ipsa loquitur* is "simply a rule of evidence relating to the sufficiency of plaintiff's proof" (citation omitted)).

Seen properly, the *res ipsa loquitur* doctrine is merely "a species of circumstantial evidence permitting the trier of fact to draw an inference of negligence if plaintiff demonstrates 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. . . ." *Krivokuca*, 2017 IL App (1st) 152397, ¶ 43 (internal quotations and citations omitted.) The purpose of the doctrine "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." *Id.* "When *res ipsa loquitur* is invoked the plaintiff bears the burden of proving all of its elements." *Dyback v. Weber*, 114 Ill. 2d 232, 242 (1986).

In short, Anderson does not have a cause of action in count two for *res ipsa loquitur* because no such cause of action exists. Such a conclusion does not, however, foreclose Anderson from introducing circumstantial evidence under the *res ipsa loquitur* doctrine to establish Vucicevic's negligence. Such a judgment as to the admissibility of such evidence is, however, for a trial judge.

Anderson may have the opportunity to raise circumstantial evidence at trial through count three—the simple negligence count against Vucicevic. As to that cause of action, Vucicevic argues that Anderson impermissibly relies on the captain of the ship doctrine, which Illinois law does not recognize. *See Forsberg v. Edward Hosp.*, 389 Ill. App. 434, 444-45 (2d Dist. 2009); *Foster v. Englewood Hosp. Ass'n*, 19 Ill. App. 3d 1055, 1061 (1st Dist. 1974). Vucicevic is correct in pointing out that a surgeon may not be liable for a nursing staff's negligence without proof that the surgeon was independently negligent in

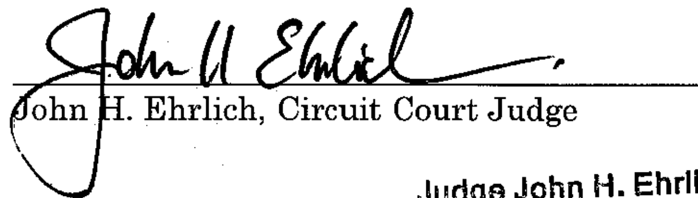
relying on the nursing staff. *Forsberg*, 389 Ill. App. 3d at 445. That argument is, however, off point.

Count three does not suggest Vucicevic was negligent by relying on the nursing staff. Rather, Anderson claims Vucicevic, individually, breached the standard of care by failing to: protect the surgical field from foreign objects; protect the knee by not leaving foreign objects inside; clear the surgical field of all foreign objects before closing; and failing to observe a plastic piece left inside Anderson's knee. Those negligence claims do not depend on the activity of others involved in the surgery. Whether the evidence in the record ultimately supports Anderson's cause of action remains to be seen, but since this court must read the record strictly against the moving party and liberally in favor of the opponent, the only conclusion is that count three survives summary judgment.

Conclusion

Based on the foregoing, it is ordered that:

1. Vucicevic's summary judgment motion as to count two is granted;
2. Count two is dismissed with prejudice;
3. Vucicevic's summary judgment motion as to count three is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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