THIRD DIVISION
August 29, 2018

No. 1-17-2454

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH CAMPBELL and SABRINA WILSON-CAMPBELL,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	14 L 7695
MARK GONZALEZ, M.D.; NANCY BURK, M.D.; DEBORAH BUTLER, CRNA; FRANK BOHNENKAMP, M.D.; MATTHEW SIMONS, M.D.; and ANNE-MARIE MARRS, R.N.,	)	
Defendants	)	
(MARK GONZALEZ, M.D., FRANK BOHNENKAMP, M.D., and MATTHEW SIMONS, M.D.	)	Honorable William Edward Gomolinski,
Defendants-Appellants).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting defendants' motion for summary judgment on plaintiffs' claims for negligence in Counts I and II of the complaint is affirmed; plaintiffs failed to refute the trial court's finding plaintiffs' expert

failed to identify a deviation from the standard of care by defendants; plaintiffs could not rely on the doctrine of *res ipsa loquitur* pled in Counts III and IV of the complaint where that theory was pled in separate counts which plaintiffs voluntarily dismissed.

¶ 2 Plaintiffs, Joseph Campbell and Sabrina Wilson-Campbell, filed their first amended complaint (complaint) in four counts against defendants, Drs. Mark Gonzalez, Frank Bohnenkamp, and Matthew Simons, and others, to recover for injuries Joseph Campbell sustained to his left side during a surgical fusion of his right knee. Defendants moved for summary judgment on all counts of plaintiffs' complaint. The trial court granted summary judgment in favor of defendants on Counts I and II based on medical negligence, and plaintiffs then voluntarily dismissed Counts III and IV based on the doctrine of *res ipsa loquitur*. In a separate appeal, this court affirmed defendants' appeal of the trial court's order granting plaintiffs' motion to voluntarily dismiss Counts III and IV before ruling on defendants' motion for summary judgment on those counts. This is an appeal from the trial court's order granting summary judgment in favor of defendants on Counts I and II. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On April 25, 2013 Dr. Mark Gonzalez performed a surgical fusion of John Campbell's right knee at the University of Illinois Medical Center with the assistance of medical residents Drs. Bohnenkamp and Simons, anesthesiologist Dr. Nancy Burk, and members of the nursing staff Deborah Butler and Anne-Marie Marrs. After the surgery, Joseph suffered a focal compression nerve injury on his left side and acute compartment syndrome of the left buttock. On July 23, 2014 plaintiffs filed a complaint naming all of the above-named participants in the surgery as defendants. Count I of the complaint alleged medical negligence against Gonzalez, Burk, Butler, Bohnenkamp, Simons, and Marrs. The complaint alleged Joseph Campbell was

taken into the operating room and was positioned for surgery by defendants Butler, Bohnenkamp, and Marrs. Count I of the complaint alleges each defendant was professionally negligent in that each of them allegedly (a) failed to provide Joseph Campbell with proper and/or sufficient padding and equipment during the operation, (b) failed to properly assess him preoperatively, (c) failed to properly position him, (d) failed to properly monitor his positioning during surgery, (e) failed to properly reassess Joseph Campbell for the need to reposition him during the surgery, (f) failed to properly assess him postoperatively, and (g) failed to reposition him postoperatively. Count II was a claim for loss of consortium by Sabrina Wilson-Campbell based on defendants' medical negligence. Count III of plaintiffs' complaint was titled "*Res ipsa loquitur*" and re-alleged the previous allegations as well as additional allegations not contained in Counts I or II. Specifically, Count III alleged that during the surgery Joseph Campbell "was under the exclusive management, direction, and control of the Defendants, and each of them." Count III further alleged, in pertinent part, that "[i]n the normal or ordinary course of events, the type of injury sustained by [Joseph Campbell] would not have occurred during surgery if the Defendants had used a reasonable professional standard of care."

¶ 5 Plaintiffs later voluntarily dismissed Burk, Butler, and Marrs without prejudice as defendants.

¶ 6 Defendants filed motions for summary judgment on all counts in the complaint. Defendants filed one motion on behalf of Gonzalez and a separate motion on behalf of Bohnenkamp and Simons. The trial court held a hearing on the motions for summary judgment. The court first addressed Count I and informed plaintiffs' counsel "We'll talk about count three by itself." As to plaintiffs' claim of medical negligence against Bohnenkamp and Simons, after defense counsel pointed out that plaintiffs' expert failed to point to any deviation from the

standard of care on their part, plaintiffs' attorney admitted "There isn't direct evidence that our experts can point to that say Dr. Bohnenkamp or Dr. Simons deviated from the standard of care." The trial court granted summary judgment on Counts I and II in favor of Bohnenkamp and Simons. Plaintiffs' counsel then argued that in his Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007) interrogatories their expert stated, in pertinent part, as follows:

> "The positioning of the patient was under the exclusive control of Dr. Gonzalez, even though other physicians were involved in the initial positioning and placement ***. As part of that exclusive control and responsibility, Dr. Gonzalez was required to make sure that the surface area under the contralateral extremity, including the side and buttocks, were not compressed or impeded with unnecessary material, bedding, sheets, or bumping devices or substances. The development of such a severe compressive nerve injury on a padded table should not occur in the absence of one or more negligent acts within the exclusive control of the responsible surgeon."

The trial court asked plaintiffs' counsel where their expert stated Gonzalez deviated from the standard of care or where the expert said Gonzalez did not do any of the things he was supposed to do. Plaintiffs' counsel admitted their expert "did not testify to those facts." Plaintiffs' counsel agreed the expert cannot point to any deviation from the standard of care. The court stated "you need direct testimony regarding a deviation in the standard of care." The court granted summary judgment in favor of Gonzalez on Counts I and II of the complaint. The court also found no just cause to delay enforcement or appeal of the order granting summary judgment in favor of defendants on Counts I and II pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 7 The trial court then turned to a consideration of Counts III and IV based on *res ipsa loquitur*. The trial court initially ruled that plaintiffs had made a *prima facie* case for the application of *res ipsa loquitor*. However, defendants argued plaintiffs could not make out a case in *res ipsa loquitur* as a matter of law because all of the potentially responsible parties were not defendants in this lawsuit. Plaintiffs responded once it is determined that *res ipsa loquitur* applies, it becomes a question of fact whether the trier of fact believes any defendants breached the standard of care. The parties then engaged in extensive argument on the question of who are the proper defendants for plaintiffs' *res ipsa loquitur* counts. After the exchange between the parties, plaintiffs stated their belief they have the defendants that are responsible for the injury based on their expert's testimony. The trial court cited authority it believed indicated plaintiffs did not have all of the proper defendants in the case. Following brief additional comments, the following exchange occurred:

> "THE COURT: I'm going to grant the motion unless you have a motion prior to me granting the motion. I think you don't have the proper entities in the case.
>
> Tell me what you want to do. You have a trial date?
>
> MR. LIPNIK [PLAINTIFFS' ATTORNEY]: We'd like to proceed to trial. That's what we want to do, on our theory. I think we—
>
> THE COURT: Tell me what you want to do because I'm ready to rule. And you have a trial date?
>
> MR. LIPNIK: Correct. You Honor, bring back the defendants in, I guess, then if that's what the Court would like.

THE COURT: You have a trial date. I don't know how I'm going to let you do that. You can't do that at this stage of the game."

The trial court then called a brief recess. When proceedings resumed, plaintiffs continued to argue their counts based on *res ipsa loquitur* could proceed with the remaining defendants. The trial court disagreed. Then the following exchange occurred:

MR. WEINER [PLAINTIFFS' ATTORNEY]: So what we would ask is one of two things, that you allow us to dismiss without prejudice under 21 dash 0009 [*sic*]. We just let those other parties out as a remedy here.

MS. O'BRIEN DALY [DEFENDANTS' ATTORNEY]: I would object to that, Your Honor.

THE COURT: You agree it's solely within my discretion to either allow 1009 or to proceed on the motion?

MS. O'BRIEN DALY: I would have to check the law on that, Your Honor, but I believe if Your Honor—

THE COURT: I will tell you it is solely within my discretion.

MS. O'BRIEN DALY: All right. Well, I would yield to your discretion, Your Honor, and say that there is no way that plaintiff could ever refile this case and make out a claim for *res ipsa* because there's no way they could bring in all of the responsible parties here. Statute of limitations has clearly run and there's no way that they could ever plead a proper *res ipsa* case.

THE COURT: Let me just—I'm not sure about that. All I care about is this, is that, listen, there could be somebody who just walked through the operatory. That's not a person who needs to be brought in.

I'm going to grant the 1009 motion with respect to those other doctors. The motion for summary judgment is granted against direct negligence for Dr. Gonzalez, Dr. Bohnenkamp and Dr. Simons. That's the issue, and those corollary counts with respect to loss of consortium are out.

MS. O'BRIEN DALY: All right.

THE COURT: 304(a) finding on respect to those issues with respect to that one allegation, the *res ipsa*. I'm letting you voluntarily dismiss. That's the issue. That's the ruling."

¶ 8 The trial court entered an order making a Supreme Court Rule 304(a) finding with regard to its order granting summary judgment for defendants on Counts I and II. The trial court granted plaintiffs' oral motion for voluntary dismissal of Counts III and IV without prejudice and without ruling on defendants' motion for summary judgment on those counts. Defendants appealed the latter order in a separate appeal, arguing, in part, the trial court abused its discretion in granting plaintiffs' later-filed motion to voluntarily dismiss Counts III and IV of the complaint before deciding defendants' earlier-filed motion for summary judgment. This court affirmed the trial court's order. *Campbell v. Gonzalez,* 2018 IL App (1st) 172398-U.

¶ 9 This appeal, from the trial court's order granting summary judgment in favor of defendants on Counts I and II of the complaint, followed.

¶ 10 ANALYSIS

¶ 11 This case comes to this court from an order granting summary judgment in favor of the defendants. Summary judgment is only proper 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 and that the moving party is entitled to a judgment as a matter of law. [Citations.]" (Internal

quotation marks omitted.) *Johnson v. Bishof*, 2015 IL App (1st) 131122, ¶ 36. To prevail on their claim for medical negligence, plaintiffs are required to prove "(1) the applicable standard of care, (2) the health-care provider's negligent failure to comply with the applicable standard of care, and (3) a resulting injury proximately caused by the alleged negligence. [Citation.] Unless the physician's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant physician's deviation from that standard. [Citations.]" (Internal quotation marks omitted.) *Private Bank v. Silver Cross Hospital & Medical Centers*, 2017 IL App (1st) 161863, ¶ 43. Plaintiffs also relied on the doctrine of *res ipsa loquitur* in their complaint.

> "*Res ipsa loquitur* literally means 'the thing speaks for itself.' It allows a rebuttable presumption of negligence to arise upon a proper showing that a particular thing happened. The occurrence is, of itself, evidence of negligence. [Citation.] To create a presumption of negligence plaintiff must show that the occurrence actually took place; that the instrumentality of the occurrence was in the exclusive management and control of defendant or his agents; that the occurrence was not of the type which ordinarily happens in the absence of negligence. [Citations.]" *Collgood, Inc. v. Sands Drug Co.*, 5 Ill. App. 3d 910, 914 (1972).

Summary judgment in favor of the defendant is appropriate where the plaintiff in a medical negligence action cannot present expert testimony establishing that the defendant deviated from the proper standard of care. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 623 (2007). "We review the trial court's decision on a motion for summary judgment *de novo*, construing the pleadings,

depositions, admissions and affidavits strictly against the moving party and liberally in favor of the respondent." *Bishof*, 2015 IL App (1st) 131122, ¶ 36.

¶ 12 The trial court granted summary judgment in favor of defendants on the specific claims outlined in Counts I and II of the complaint because plaintiffs' expert did not specifically state that defendants deviated from the standard of care in any of the ways alleged in Count I of the complaint.

¶ 13 On appeal, plaintiffs do not argue the trial court erroneously granted summary judgment in favor of defendants on their claim Gonzalez, Bohnenkamp, and Simons were negligent based on the specific acts or omissions alleged in the complaint. Plaintiffs do not refute the fact their expert did not state how any of them specifically deviated from the standard of care. Instead, plaintiffs argue on appeal that they met their threshold burden to proceed to trial under the doctrine of *res ipsa loquitur*. At the hearing on defendants' motions for summary judgment, the trial court indicated it did not believe plaintiffs could proceed under the doctrine of *res ipsa loquitur* because plaintiffs did not have "all the instrumentality, all the people that you need in the case to go forward on *res ipsa*."

> "The requisite control element of *res ipsa loquitur* is not a rigid standard, but instead is a flexible one in which the key question is whether the probable cause of the plaintiff's injury was a cause that the defendant had a duty to the plaintiff to anticipate or guard against. [Citation.] It is enough that the defendant has the right or power of control as well as the opportunity to exercise that right, or that he is under a duty that he cannot delegate. [Citation.] Nonetheless, it must be shown that the plaintiff's injury can be traced to a specific instrumentality or cause for which the defendant was responsible or that he was responsible for *all*

> *reasonable causes to which the incident could be attributed*. [Citations.] Thus, the defendant's responsibility for a specific cause of an event is proven by eliminating the responsibility of any other person for that cause. [Citation.] A plaintiff is not required, however, to eliminate all other possible causes for the injury. [Citation.] Additionally, the inference may be drawn where the defendant shares control with another individual. [Citations.] Furthermore, where *res ipsa loquitur* is to be applied, *all parties who could have caused the plaintiff's injuries are joined as defendants*. [Citation.]" (Emphases added.) *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶ 46. See also *Loizzo v. St. Francis Hospital*, 121 Ill. App. 3d 172, 179-80 (1984) (in medical malpractice action, *res ipsa loquitur* does not apply where negligence may be attributed to one of several individuals and no principle renders them liable *in solido* or where the injury may have been caused by a person who was not a joint actor or was not in control of an injured patient).

Plaintiffs disagree with the trial court's assessment and argue on appeal that the management of the instrumentality of Joseph's injury, *i.e.*, his positioning and padding, was in the exclusive control of Gonzalez, Bohnenkamp, and Simons.

¶ 14 Before we can decide if plaintiffs have raised a genuine issue of fact as to whether the instrumentality of Joseph Campbell's injury was in the exclusive control of defendants, we must decide whether we may even consider plaintiffs' argument. Defendants argue this court lacks jurisdiction to review the trial court's finding that plaintiffs could not proceed under the doctrine of *res ipsa loquitur* with just the current defendants because the trial court "never entered a final and appealable order as to that finding," and to render such a decision would be to impermissibly

guide future litigation. See *U-Haul Co. of Chicago Metroplex v. Town of Cicero*, 87 Ill. App. 3d 915, 918 (1980) ("Where the issues involved in the trial court no longer exist, a reviewing court will not decide a case merely to answer moot or abstract questions, ([citation]), establish a precedent, or render a judgment to guide potential future litigation."). Defendants also argue the trial court's final and appealable order on Counts I and II do not give this court jurisdiction to review the trial court's findings regarding the availability of *res ipsa loquitur* because the trial court did not make a finding pursuant to Rule 304(a) with regard to Counts III and IV. However, plaintiffs argued that *res ipsa loquitur* is not a separate cause of action. *Krivokuca v. City of Chicago*, 2017 IL App (1st) 152397, ¶ 43 ("*Res 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. [Citation.]"). Plaintiffs argue *res ipsa loquitur* is an "evidentiary vehicle" by which they may now, for the first time on appeal, raise a genuine issue of material fact that each defendant committed medical malpractice *under Counts I and II*, because, plaintiffs assert, they "have a single *cause of action* for medical negligence, notwithstanding the alternative evidentiary vehicles alleged between Counts I and II vis-à-vis Counts III and IV." (Emphasis in original.) We disagree.

¶ 15 Plaintiffs admit their complaint "provided a construct for the trial court to analyze the two sets of counts independently," but argue the trial court erred in separating their cause of action for medical negligence from the evidentiary vehicle of *res ipsa loquitur*. "Because Illinois requires fact pleading [citation] *res ipsa loquitur* is often pleaded as a separate claim [citation] and, therefore, has sometimes been referred to as a cause of action. [Citation.] Nevertheless, *res ipsa loquitur* is 'simply a rule of evidence relating to the sufficiency of plaintiff's proof.'

[Citation.]" (Internal quotation marks omitted.) *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 338 Ill. App. 3d 812, 816 (2003) (quoting *Darrough v. Glendale Heights Community Hospital*, 234 Ill. App. 3d 1055, 1060 (1992)). "Illinois remains a fact-pleading jurisdiction. [Citation.] The plaintiff must allege sufficient facts in the complaint which, if proved, would entitle the plaintiff to relief. [Citations.]" *Hough v. Kalousek*, 279 Ill. App. 3d 855, 863 (1996) (citing *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194 (1995); *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 119 (1996)). "Although pleadings are to be liberally construed, a complaint must state a cause of action by allegation of facts, and the failure to do so cannot be aided by any principle of liberal construction." *Id.* at 859.

¶ 16 In *Hough*, the plaintiff sued a driver who struck and killed the plaintiff's decedent and the city in which the accident occurred. *Id.* at 857. Both the plaintiff and the defendant-driver alleged the street lighting was inadequate in the area of the accident. *Id.* at 857-58. The trial court granted the city's motion to dismiss on the grounds the complaint could not establish the city proximately caused the accident and the complaint had not alleged facts establishing the city owed a duty to the decedent as a pedestrian. *Id.* at 859. The driver in *Hough* asserted the complaint could only be dismissed if there appeared to be no set of facts that would permit recovery and, the driver argued, it could not be said that the allegations in the complaint precluded a recovery by the plaintiff. *Id.* at 862-63. The court rejected that argument, holding that because "a complaint must establish grounds for relief, instead of merely not precluding relief were plaintiff to later add facts necessary for recovery, [the driver's] position is meritless." *Id.* at 863.

¶ 17 In this case, plaintiffs do not dispute the trial court's findings defendants are entitled to summary judgment on plaintiffs' claim of medical negligence "absent application of the doctrine of *res ipsa loquitur*." Plaintiffs have made no arguments they can establish a specific deviation from the standard of care by defendants or that defendants deviated from the standard of care in one of the specific ways enumerated in Count I of the complaint. Thus, any such arguments are waived. See *id.* at 864; Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017).

¶ 18 On appeal, plaintiffs argue Counts I and II for medical negligence in general survive with the invocation of *res ipsa loquitur*. "Illinois law does not require a plaintiff to show the actual force which initiated the motion or set the instrumentality in operation in order to rely on the *res ipsa* doctrine. To the contrary, if the specific and actual force which initiated the motion or set the instrumentality in operation were known unequivocally, leaving no reason for inference that some other unknown negligent act or force was responsible, the *res ipsa* doctrine could not even be invoked." *Heastie v. Roberts*, 226 Ill. 2d 515, 539 (2007). However, neither Count I nor Count II of plaintiffs' complaint contains the factual allegations necessary to invoke the doctrine of *res ipsa loquitur*. "[A] plaintiff seeking to rely on the *res ipsa* 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, (2) by an agency or instrumentality within the defendant's exclusive control." *Heastie*, 226 Ill. 2d at 531-32 (citing *Gatlin v. Ruder*, 137 Ill. 2d 284, 295 (1990)). Moreover, "[a]n action asserting negligence based on the theory of *res ipsa loquitur* may be challenged on the pleadings." *Id.* at 532.

¶ 19 Plaintiffs in effect argue they should be allowed to proceed under Counts I and II of the complaint because they can later add facts necessary for recovery; specifically, the facts that the injury does not ordinarily occur in the absence of negligence and the instrumentality of the injury

was in defendants' exclusive management or control. That position is untenable. See *Hough*, 279 Ill. App. 3d at 863. Admittedly the posture of this case is different, where *Hough* addressed a motion to dismiss for failure to state a claim and here plaintiffs are faced with a judgment against them that they fear forecloses any right to recovery because of plaintiffs' concern they will be precluded from attempting to replead Counts III and IV which plaintiffs voluntarily dismissed but had pled facts necessary to invoke the doctrine of *res ipsa loquitur*. See *Hudson v. City of Chicago*, 228 Ill. 2d 462, 473 (2008) ("a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense"). Plaintiffs argue against the judgment granting summary judgment in favor of defendants on Counts I and II, potentially ending their case, especially given the trial court's findings that plaintiffs had stated a *prima facie* case for application of *res ipsa loquitur*. Regardless, at this stage of the proceedings and given the facts before this court, for us to find that a genuine issue of material fact exists precluding summary judgment on Counts I and II of plaintiffs' complaint would first require rewriting the allegations in those counts to invoke *res ipsa loquitur* (regardless of any finding that plaintiffs did or did not include the proper defendants to invoke the doctrine). We decline the invitation to do so. See *Hough*, 279 Ill. App. 3d at 863 (complaint must establish grounds for relief not merely provide for relief with the addition of facts necessary for recovery). "On review from a grant of summary judgment, this court's inquiry is limited to the record as it existed at the time the trial court ruled ([citation]), and to a determination of whether a genuine issue of fact existed, and if not, whether the judgment was correct as a matter of law. [Citation.]" *Local 1274, Illinois Federation of Teachers, AFT, AFL-CIO v. Niles Township High School, District 219*, 276 Ill. App. 3d 714, 719 (1995).

¶ 20 We cannot find a genuine issue of material fact as to a fact necessary for recovery that is not pled in the count of the complaint that is before the court.

> "A plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in his complaint. The very purpose of a complaint is to advise the defendant of the claim it is called upon to meet. [Citation.] In ruling on a motion for summary judgment, the court looks to the pleadings to determine the issues in controversy. If the defendant is entitled to judgment as a matter of law on the claims as pled by the plaintiff, the motion will be granted without regard to the presence of evidentiary material which might create a right of recovery against the moving defendant on some unpled claim or theory. Under the Code of Civil Procedure, a plaintiff's remedy in such a circumstance is to move to file an amended complaint before the summary judgment is granted under section 2-616(a) or after under section 2-1005(g). [Citations.] Having failed to seek relief under either section, the plaintiff will not be heard to complain that summary judgment was inappropriately granted because of the existence of evidence supporting a theory of recovery that he never pled in his complaint." *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994).

¶ 21 In this case, plaintiffs did plead facts supporting recovery under the doctrine of *res ipsa loquitur* in Counts III and IV. However, there is no dispute that Counts III and IV are not before this court in this appeal. "An order granting a plaintiff's motion to voluntarily dismiss an action without prejudice is final and appealable by the defendant, but not by the plaintiff, except to contest an order taxing costs." *Brentine v. DaimlerChrysler Corp.*, 356 Ill. App. 3d 760, 765

(2005). See also *Wofford v. Tracy*, 2015 IL App (2d) 141220, ¶ 23 ("where the trial court's Rule 304(a) finding is made only with respect to the dismissal with prejudice of some counts but not others, the reviewing court lacks jurisdiction over the counts with respect to which the trial court did not issue a Rule 304(a) finding"). Plaintiffs will not be heard to argue the trial court improperly granted summary judgment in favor of defendants on Counts I and II of their complaint based on evidence (as required by the doctrine of *res ipsa loquitur*; see *Heastie,* 226 Ill. 2d at 531-32) supporting a theory of recovery not pled in those counts.

¶ 22 Plaintiffs failed to meet their burden to elicit expert medical testimony that defendants deviated from the standard of care. The trial court properly granted summary judgment in favor of defendants on Counts I and II of plaintiffs' complaint as pled and before this court. Accordingly, the trial court's judgment is affirmed.

¶ 23 Plaintiffs wrote on appeal that "should [this] Court agree with Defendants, and dismiss this appeal on jurisdictional grounds, the result would presumable assuage the Plaintiffs of the jurisprudential concerns they raise [concerning refiling Counts III and IV,] permitting Plaintiffs to continue to pursue its re-filed case against Defendants."

> "The rule against claim-splitting has been relaxed where there has been an omission due to ignorance, mistake or fraud, or where it would be inequitable to apply the rule. [Citations.] Situations in which it would be inequitable to apply the rule are detailed in section 26(1) of the Restatement (Second) of Judgments (Restatement (Second) of Judgments § 26(1) (1980)). This section provides that the rule against claim-splitting does not apply to bar an independent claim of part of the same cause of action if: (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court

> in the first action expressly reserved the plaintiff's right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. [Citation.]" *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 341 (1996) (citing Restatement (Second) of Judgments § 26(1) (1980)).

We expressly disclaim any findings or judgment on plaintiffs' ability to pursue any refiled claims against defendants as the question is not properly a subject of this appeal. Instead, that is a matter plaintiffs must address to the trial court and one which we will review in due course should the matter return to this court.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.