

FIRST DIVISION
December 14, 2015

No. 1-14-1512

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL GREEN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	
)	
ANIL R. SHAH, individually and as agent of)	No. 10 L 11724
Scientific Image Center Management, Inc. as)	
Agent of Lifestyle Lift and as Agent of LL IL,)	
P.C., SCIENTIFIC IMAGE CENTER)	
MANAGEMENT, INC., LIFESTYLE LIFT)	
and LL IL, P.C.)	Honorable
)	Irwin J. Solganick,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

ORDER

Held: We hold that the trial court's rulings finding no negligence and denial of *res ipsa loquitur* claim were not against the manifest weight of the evidence. Accordingly, we affirm the trial court's entry of judgment in favor of defendants.

¶ 1 Plaintiff brought a negligence and *res ipsa loquitur* action against defendant-doctor and related business entities based on a fall that occurred during post operative procedures at defendant-doctor's office. Plaintiff contracted with defendant-doctor for several surgeries including a face lift and upper eyelid blepharoplasty. The procedures were performed in an outpatient setting at the doctor's office in Schaumburg, Illinois. Valium and Phenergan were administered to plaintiff both prior to and during the surgery. The record shows that during surgery, plaintiff could engage in high level communications and understand instructions. After the surgery, and despite instructions to remain in the surgical chair, plaintiff stood up under his own power and promptly fell to the floor significantly injuring his shoulder. At trial, plaintiff produced an expert who testified that defendant breached the standard of care. Defendant and his expert testified that the standard of care had been met. At the close of trial, the trial court, sitting as the finder of fact, rejected plaintiff's expert's testimony and entered a finding in favor of defendants.

¶ 2 Before this court, plaintiff raises the following issues: (1) whether the trial court's finding in favor of Dr. Shah was against the manifest weight of the evidence; (2) whether disregarding and failing to consider parties' expert witness testimony on the standard of care applicable to surgical technicians was error; (3) whether the trial court's finding that the plaintiff had not proven his claim of negligence on the part of the surgical technicians was against the manifest weight of the evidence; and (4) whether the trial court's finding that plaintiff did not establish his *res ipsa loquitur* claim was against the manifest weight of the evidence. We find that the trial court committed no error and its finding in favor of defendants was not against the manifest weight of the evidence.

¶ 3

JURISDICTION

¶ 4 This court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. Jan. 1, 2015). The trial court entered judgment on all counts in favor of defendants-appellees on February 3, 2014. On February 28, 2014, Plaintiff-appellant filed a Motion to Vacate and/or Modify Judgment. Plaintiff's Motion to Vacate and/or Modify Judgment was denied on April 22, 2014. On May 15, 2014, Plaintiff filed his Notice of Appeal.

¶ 5

BACKGROUND

¶ 6 In November 2008, plaintiff-appellant Daniel Green went to the offices of defendant-appellee Dr. Anil Shah for several outpatient plastic surgery procedures. Dr. Shah is a board-certified physician in facial surgery and otolaryngology (head and neck surgery). On that date, Dr. Shah performed a face lift, platysma placcation, and an upper eyelid blepharoplasty. The procedures were performed with local anesthetic in an outpatient office setting while Green reclined in a surgical chair (which both parties agree is similar to a dentist's chair).

¶ 7 Prior to Green's surgery, Dr. Shah gave Green two medications, Valium and Phenergan. Valium is a mild sedative used to help relax the patient and put him or her at ease during the procedure. Phenergan is given primarily as an anti-nausea medication; however it can have sedative effects as well.

¶ 8 Green developed some anxiety during the course of the procedure, so Dr. Shah administered additional Valium. In total, prior to and during the course of the procedure, Dr. Shah administered a total of 35 mg of Valium and 25 mg of Phenergan.

¶ 9 Dr. Shah testified that during the course of the procedure, he continually evaluated and assessed Green to ensure that he was comfortable, able to understand what was going on, and

follow his instructions. Green admittedly became somewhat anxious and agitated during the course of the procedure, but this was not uncommon, and not a reason to abandon the surgery. Dr. Shah confirmed Green was willing to continue with the procedure and that he was lucid and able to engage in higher level communications. Dr. Shah testified that during the course of the procedure they discussed Green's occupation and the nature of the small business he owned and operated. Dr. Shah also testified that Green was able to understand his instructions. At one point, either during or just after the procedure, Green attempted to get up out of the surgical chair. Dr. Shah stopped him from doing so, and instructed him to remain seated. Green followed this command and did not attempt to get out of the chair while Dr. Shah remained in the surgical suite.

¶ 10 After the procedure was completed, Dr. Shah left the surgical suite; however, a surgical technician, Jessica Castillo, remained with Green to monitor him and clean the room. At some point prior to Green's fall, another surgical technician, Todd Markus, entered the surgical suite and remained with Green and Castillo. At the time Dr. Shah left the room, Green was able to converse, engage in high-level discussions and was following instructions. Dr. Shah testified that he had worked with both Castillo and Markus on several occasions prior to Green's procedure and both knew his preferences and had ample experience in treating post-operative patients. Furthermore, Markus testified that he had been trained as a surgical technician to keep an eye on the patient following the procedure, and to assist if the patient needed help. Markus also stated that while in the room with Green, he observed that the patient was sitting upright in the surgical chair. To help make sure Green was safe, Markus asked Green to recline in the chair. While Markus did not feel Green to be in any danger, he made the request as a precautionary measure. At the time of trial Markus could not recall whether or not Green was

nauseous, but Green was not wobbling, swaying, shaking or otherwise unsteady while sitting in the surgical chair.

¶ 11 Markus testified that he was only a few feet away and turned his back for a second or two when the fall occurred. Despite the instructions by Dr. Shah and Markus to remain in the chair, Green, under his own power, stood up suddenly and quickly from the surgical chair and immediately fell to the floor. The fall resulted in torn left rotator cuff that required extensive medical treatment and physical therapy.

¶ 12 After the fall, Dr. Shah returned to the surgical suite and examined Green. He confirmed that Green was cognizant and able to understand and follow instructions.

¶ 13 Dr. Shah testified that he fully complied with the standard of care in his treatment of the plaintiff. He further testified that his instructions and expectations of the two surgical technicians who remained with Green in the surgical suite following the surgery complied with the standard of care. The standard of care did not require that he remain in the surgical suite with the patient. The surgical technicians with Green provided adequate care to him. He expected the surgical technicians to monitor and watch the patient post-surgery, but they did not need to hover over the patient, or sit right beside him at all times. Furthermore, Dr. Shah specifically denied that it was not safe for the patient to get up. He testified that after the procedures and while still under sedation, patients will get up and walk.

¶ 14 Dr. Helen Kraus testified that in her opinion Dr. Shah fully complied with the standard of care in every respect. She stated that Green received minimal sedation, and that he was not overly medicated. He was able to understand and follow instruction following the procedure. Based on Dr. Shah's post operative evaluation of the patient, it was appropriate to leave Green in the presence of the surgical technicians, and that Dr. Shah did not need to remain in the room.

The standard of care did not require Dr. Shah to take any further action in ensuring the safety of this patient, nor was he required to provide any additional measures for the post-operative management or observation of the patient. The surgical technicians who treated Green acted appropriately, and provided proper and sufficient monitoring of his condition following surgery. Finally, Dr. Kraus testified that a review of the records and deposition testimony demonstrated that the patient retained control over his body and limbs, and retained the ability to voluntarily get up out of the chair himself.

¶ 15 Green called Dr. Frank Madda, a board certified plastic surgeon as his expert witness to testify as to the standard of care applicable to all defendants. Dr. Madda testified that Shah breached the standard of care by failing to ensure that Green was properly monitored post-operatively, either by doing so himself or by adequately training his staff to do so. He opined that Dr. Shah, Lifestyle Lift, and Scientific Image Center Management, Inc. failed to train the surgical technicians who were left to monitor Green post-operatively.

¶ 16 The case was tried as a bench trial. At the conclusion of the trial, the trial court rendered its verdict and entered a finding in favor of all defendants. The trial court specifically held that the plaintiff failed to prove negligence on the part of the defendants. The trial court noted that it fully rejected the testimony and opinions offered by plaintiff's expert and felt that his testimony and opinions were not believable. Because neither of the experts were surgical technicians, neither was qualified to offer expert testimony of the surgical technicians' actions.

¶ 17 Green timely filed a motion for a new trial. At the hearing on Green's motion, the court reiterated its previous finding that in all respects Green failed to prove his case, including his claim for *res ipsa loquitur*. The court stated that under an ordinary negligence standard, the plaintiff had failed to prove the necessary elements of his claim against any defendant.

¶ 18

ANALYSIS

¶ 19 Plaintiff Green raises four issues for our review: (1) whether the trial court's finding in favor of Dr. Shah was against the manifest weight of the evidence; (2) whether disregarding and failing to consider parties' expert witness testimony on the standard of care applicable to surgical technicians was error; (3) whether the trial court's finding that the plaintiff had not proven his claim of negligence on the part of the surgical technicians was against the manifest weight of the evidence; and (4) whether the trial court's finding that plaintiff did not establish his *res ipsa loquitur* claim was against the manifest weight of the evidence.

¶ 20 Plaintiff argues that the trial court, sitting as the trier of fact, erred when it found in favor of defendants on both the *res ipsa loquitur* count and the professional negligence count. According to plaintiff, after the court rejected the testimony of his expert, Dr. Madda, the testimony of Dr. Shah, Markus, and Dr. Kraus established all the elements of his claim of negligence. Plaintiff maintains that the testimony of surgical technician Markus established that Shah breached the standard of care and that this breach caused plaintiff's injuries. Plaintiff also maintains that the trial court erred when it held that pursuant to the Healing Arts Malpractice Act neither expert could testify as to the standard of care applicable to surgical technicians. Furthermore, plaintiff claims that even if the trial court properly held that Dr. Madda could not testify to the standard of care applicable to surgical technicians, the manifest weight of the evidence demonstrated that the surgical technicians were negligent. Plaintiff also contends that the trial court should have found in his favor on the *res ipsa loquitur* count because in his view the evidence on that claim went un rebutted at trial. Plaintiff asks this court to reverse the entry of judgment in favor of defendants and remand this case to the trial court for entry of judgment in his favor.

¶ 21 In a bench trial, it is the function of the trial judge to weigh the evidence and make findings of fact. *Kalata v. Anheuser-Busch Cos., Inc.*, 144 Ill.2d 425, 433 (1991). In cases where the evidence is close, such as the instant case where expert opinion evidence presented by both sides is conflicting, and where findings of fact must be determined from the credibility of the witnesses, a court of review will defer to the trial court's factual findings unless they are against the manifest weight of the evidence. *Chicago Inv. Corp. v. Dolins*, 107 Ill.2d 120, 123-24 (1985). A judgment in a bench trial is only against the manifest weight of the evidence when the findings are arbitrary, unreasonable and not based on the evidence or when the opposite conclusion is clearly evident from the record. *Bazydlo v. Volant*, 164 Ill.2d 207, 215 (1995). A reviewing court gives deference to the lower court as the finder of fact because the trial court is in the best position to observe the conduct and demeanor of the parties and the witnesses and has a degree of familiarity with the evidence that a reviewing court does not obtain. *People v. Richardson*, 234 Ill.2d 233, 251 (2009). A reviewing court, therefore, must not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *Tully v. McLean*, 409 Ill.App.3d 659, 670-71 (1st Dist. 2011).

¶ 22 Additionally, this case involves the application of *res ipsa loquitur*. Whether the doctrine applies in a given case is a question of law which must be decided by the court, but once this has been answered in the affirmative, it is for the trier of fact to weigh the evidence and determine whether the circumstantial evidence of negligence has been overcome by defendant's proof. *Metz v. Central Illinois Elec. & Gas Co.*, 32 Ill.2d 446, 449-50 (1965). Such determination of fact may be disturbed by a reviewing court only if contrary to the weight of the evidence. *Id.* at 450.

¶ 23 Based on the record before us, we find that the trial court's decision to enter judgment in favor of defendants on both the negligence count and on the *res ipsa loquitur* action was not against the manifest weight of the evidence.

¶ 24 In order for us to reverse the entry of judgment in favor of defendants we must find that the trial court's decision was arbitrary, unreasonable, or not based on the evidence. *Bazydlo*, 164 Ill.2d at 215. In reaching its decision, the trial court specifically noted that it did not believe the testimony of plaintiff's expert Dr. Madda. At the post-trial hearing, the court specifically noted that in its opinion, plaintiff had failed to prove its case in all respects. The trial court further stated whether the surgical technicians' actions were viewed under a professional standard of care or an ordinary standard of care, the plaintiff failed to prove his negligence claim.

¶ 25 In arguing that the entry of judgment in favor of Dr. Shah was against the manifest weight of the evidence, Plaintiff claims the testimony of Dr. Shah, Dr. Kraus and Markus establishes negligence on the part of Dr. Shah. Plaintiff is essentially asking this court to substitute its opinion of the witnesses' testimony in place of the trial court. This is inappropriate because the manifest weight of the evidence standard of review requires this court to give deference to the trial court's observations of the witnesses and the conclusions it draws. *Richardson*, 234 Ill.2d at 251.

¶ 26 Plaintiff contends that the testimony of surgical technician Markus established that Dr. Shah breached his duty to plaintiff. Markus, as a surgical technician, is not qualified to testify as to whether Dr. Shah, a medical doctor, breached the standard of care. Expert testimony is necessary to establish both (1) the standard of care expected of the professional and (2) the professional's deviation from the standard. *Jones v. Chicago HMO Ltd. Of Illinois*, 191 Ill.2d 278, 295 (2000). Before a person may testify as an expert witness in an Illinois court, "a trial

court must determine (1) whether the healthcare professional is a licensed member of the school of medicine about which he or she proposes to testify, and (2) whether the healthcare professional is familiar with the methods, procedures, and treatments ordinarily observed by other healthcare providers in either the defendant's community or a similar community." *Willaby v. Bendersky*, 383 Ill.App.3d 853, 864 (1st Dist. 2008). Markus is not a doctor, so his testimony cannot be considered as to whether Dr. Shah breached the standard of care. Accordingly, we reject plaintiff's contention that Markus's testimony establishes that Dr. Shah breached the standard of care.

¶ 27 Because we are prohibited from substituting our opinion for the trial court's regarding the credibility of the witnesses and Markus could not testify that Dr. Shah breached the standard of care, the trial court's ruling finding a lack of negligence on the part of Dr. Shah was not against the manifest weight of the evidence.

¶ 28 Plaintiff contends that trial court erred when it found that surgical technicians certified by the state are covered by the Healing Art Malpractice Act requiring the standard of care applicable to them be provided by someone qualified in the same school. We need not address this issue because even if the trial court had allowed Dr. Madda to testify as to the standard of care applicable to surgical technicians, the trial court, as the finder of fact, as it did here, rejected that testimony as not credible.

¶ 29 Plaintiff additionally argues that the manifest weight of the evidence supports a finding of negligence on the part of the surgical technicians. As we have previously stated, we must give deference to the trial court as the finder of fact in this matter. At the post-trial hearing on Plaintiff's Motion to Vacate, the trial court specifically noted that regardless of whether a professional standard of care applied to the surgical technicians or an ordinary standard of care

applied, plaintiff failed to prove negligence on the part of the surgical technicians. Again, the standard of review requires us to give deference to the trial court and we will not substitute our opinion for his absent a showing by the plaintiff that the conclusion was arbitrary, unreasonable or not based on the evidence. Plaintiff has not made such a showing. Accordingly, the trial court's finding that plaintiff failed to show the surgical technicians were negligent was not against the manifest weight of the evidence.

¶ 30 Finally, plaintiff contends that the trial court erred in finding that he did not establish his *res ipsa loquitur* claim. "Because Illinois requires fact pleading, *res ipsa loquitur* is often pleaded as a separate claim and, therefore, has been referred to as a cause of action. Nevertheless, *res ipsa loquitur* is simply a rule of evidence relating to the sufficiency of plaintiff's proof." *Darrough v. Glendale Heights Community Hospital*, 234 Ill.App.3d 1055, 1060 (2d Dist. 1992) (internal citations omitted). The *res ipsa loquitur* doctrine is 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 and (2) by an agency of instrumentality within the defendant's exclusive control. *Gatlin v. Ruder*, 137 Ill.2d 284, 295-96 (1990).

¶ 31 "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). When both elements are shown, "the [occurrence] itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from want of proper care." *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill.2d 446, 449 (1965). Whether the doctrine applies in a given case is a question of law which must be decided by the court. *Spidle v. Steward*, 79 Ill.2d 1, 7 (1980). However, once that decision is made, it becomes the function of the trier of fact to weigh the strength of the

inference of general negligence. *Imig v. Beck*, 115 Ill.2d 18, 27 (1986). "The inference may be strong, requiring substantial proof to overcome it, or it may be weak, requiring little or no evidence to refute it. The weight or strength of such inference will necessarily depend on the particular fact to be determined by the jury." *Id.* A determination of fact may be disturbed by a reviewing court only if contrary to the weight of the evidence. *Metz*, 32 Ill.2d at 450.

¶ 32 The record reflects that the trial court rejected plaintiff's *res ipsa loquitur* argument, however, the record is not clear as to whether the trial court found plaintiff failed to prove the two elements or whether plaintiff did prove the two elements and defendant presented enough evidence at trial to overcome the permissive inference raised by *res ipsa loquitur*.

¶ 33 Based on the record before this court, the trial court's decision was not against the manifest weight of the evidence. The burden was on the plaintiff to prove that the accident was caused by some act of negligence by the defendants. The plaintiff chose to sustain their burden by relying on the inference to be drawn from the circumstances of his fall and the use of Dr. Madda's testimony. Defendant presented testimony from himself and that of his expert that his acts and conduct amounted to reasonable care. The trial court, sitting as the finder of fact, weighed the evidence presented by each party and struck the balance in favor of defendant. This court does not find such a decision to be against the manifest weight of the evidence.

¶ 34 Accordingly, we affirm the trial court's decision.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 37 Affirmed.