No. 2—10—0148
Order filed April 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARK REINESTO and CYNTHIA REINESTO,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 06—L—952
ROBERT PASCIAK and Du PAGE UROLOGY ASSOCIATES, LTD.,	)	Honorable Hollis L. Webster,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: The trial court properly granted defendants' motion for summary judgment where doctrine of *res ipsa loquitur* did not apply in medical malpractice claim and where opinion of plaintiffs' expert was based on mere surmise.

Plaintiffs, Mark and Cynthia Reinesto, appeal the trial court order granting summary judgment in favor of defendants, Dr. Robert Pasciak and Du Page Urology Associates, Ltd. Plaintiffs filed a complaint against defendants, alleging that Dr. Pasciak negligently performed surgery on plaintiff, Mark Reinesto, to remove penile condylomata (genital warts), which led to additional plastic surgery and painful treatment, permanent penile disfigurement, and painful

erections. Counts one and two of the complaint were based on the doctrine of *res ipsa loquitur*; counts three and four alleged that defendants failed to exercise reasonable care in performing the surgery; and counts five and six alleged loss of consortium by Cynthia. Defendants moved for summary judgment pursuant to section 2—1005 of the Code of Civil Procedure (735 ILCS 5/2—1005 (West 2008)), and the trial court granted that motion. Plaintiffs now appeal, alleging that they presented sufficient evidence that Mark's injuries arose from defendants' negligence to survive a summary judgment attack. We affirm.

I. PROCEDURAL BACKGROUND

On September 20, 2006, plaintiffs filed a six-count complaint relating to Mark's surgery, performed by Dr. Pasciak at the Du Page Urology Associates' facility in Hinsdale, to remove multiple penile condylomata on July 10, 2000. Counts one and two alleged that Mark suffered damage to his nervous system and permanent damage to his penis as a result of defendants' negligent conduct, and plaintiffs relied on the doctrine of *res ipsa loquitur*. Counts three and four alleged that defendants owed Mark a duty of care, breached their standard of care in performing the surgery on Mark, and proximately causing his permanent injuries. Counts five and six alleged loss of consortium by Cynthia.

On December 22, 2009, defendants moved for summary judgment as to the *res ipsa loquitur claims* in counts one and two and the negligence claims that alleged re-injury of Mark's back, stating the following.[1] According to defendants' motions, plaintiffs alleged that Dr. Pasciak negligently performed surgery on Mark to treat genital warts, specifically that Dr. Pasciak mistakenly injected

[1] It is unclear from plaintiffs' complaint and the ensuing motions whether plaintiffs' general negligence claims also alleged that the mistaken injection of acetic acid caused injuries to Mark's penis in addition to his back injury. However, the result on appeal is unaffected as discussed later in this order.

4% diluted acetic acid (table vinegar) instead of lidocaine (an anesthetic) into Mark's penis, causing pain, dysfunction, permanent disfigurement and scarring. Plaintiffs also alleged that the procedure caused Mark to arch his back in pain, aggravating a preexisting back injury. Defendants argued that plaintiffs failed to meet their burden of proof to provide expert testimony regarding his back injury. Plaintiffs' expert witness, Dr. Michael Hallet, was a urologist and not an orthopedic specialist. Accordingly, defendants argued that Dr. Hallet lacked the education, experience, and knowledge to render an opinion regarding Mark's alleged back injury. Defendants presented Dr. Mark Hutchinson, an orthopedic surgeon, who opined that Mark's back injury was not related to the penile surgery but was the result of the normal, expected progression of his longstanding back issues. Thus, defendants argued that they were entitled to summary judgment on Mark's claims that the conduct of defendants caused his back injuries.

Defendants also argued that they were entitled to summary judgment because the doctrine of *res ipsa loquitur* did not apply where the injury complained of occurred in the absence of negligence, the injury can be attributed to factors other than negligence, and where the defendant did not have exclusive control over the instrumentality. The injuries that Mark complained of, including pain, swelling, skin necrosis requiring debridement, and scarring, ordinarily occur after surgery without physician negligence. Defendants argued that Dr. Hallet himself testified that any breakage of skin during surgery may result in infection, swelling and necrotic tissue without a negligent act by the doctor. Defendants further argued that the opinion of Dr. Hallet that Dr. Pasciak injected vinegar instead of lidocaine was based on speculation and mere conjecture.

On February 3, 2010, the trial court heard the arguments of the parties and made the following findings. The court determined that, based on the depositions and evidence on record,

there were simply no facts for a jury to conclude that there was a mix-up in the lidocaine and acetic acid when Dr. Pasciak injected Mark. Because the court determined that there was no evidence leading to a conclusion of such a mix-up, it did not need to consider whether acetic acid could even cause the injuries being complained of in this case. Specifically, the court stated that it found Dr. Hallet's opinion that there was a mix-up "too speculative." Further, Dr. Hallet was not qualified to give an opinion regarding Mark's back injury. The court granted summary judgment in favor of defendants on all counts.

II. FACTUAL BACKGROUND

The following relevant testimony is taken from deposition transcripts contained in the record. Mark testified that he previously worked for Argonne, aligning components of the accelerator which involved heavy lifting. Because of his back injury, he has not been working since July 2000.

Mark testified that he first noticed genital warts around the time he married Cynthia in 1983. He first saw treatment for the condition in 1996. Initially, the physician treating him prescribed topical medication, which did not work well. The warts were consistently present from 1996 through the time of the surgery in 2000. Prior to the July 2000 surgery, he had never undergone a surgical procedure to remove warts. Mark's physician, Dr. Lisa Fortman, referred him to Dr. Pasciak for the surgical removal of the warts. Dr. Pasciak suggested the surgical removal and also a biopsy to make sure the growths were not cancerous because genital warts have been known to turn cancerous. At the time of the surgery, Mark had five or six warts.

Mark arrived at the surgical center on the day of the surgery early in the morning. A nurse walked him into a waiting room. He was then brought into a surgery room, but he did not recall who took him. Mark was not sure who was in the room, one or two nurses maybe. He did not recall

whether the nurses handled any medication, and he did not recall any conversations. After about 10 or 15 minutes, Dr. Pasciak came into the room, exposed Mark's groin, and stated he could not see the warts. Dr. Pasciak moved the table higher and increased the light. He then heard Dr. Pasciak say "oh there they are." He did not recall Dr. Pasciak saying anything else. The next thing Mark recalled was getting the first shot and the doctor saying that he would feel a pinch. Mark did not recall Dr. Pasciak describing anything else that he was going to do; he did not recall whether there was any draping shielding his view; and he never observed what Dr. Pasciak was doing. Mark had his eyes closed on and off during the procedure.

Mark felt the first shot at the base of his penis and "it was the most painful thing [he'd] ever felt." There was a nurse at each arm and one near his legs, telling him to stay down and trying to keep him relaxed. Mark was torquing his body because of the intense pain. The pain felt like a "jagged rusty razor blade" that was "cutting [his] penis off." He felt a changing sensation, "like acid was eating through [his] penis." He did not verbally tell anyone in the room that he was in pain. The second shot was also painful, causing Mark to torque and twist in pain. Mark did not indicate that he wanted the procedure to stop and did not advise anyone in the room that he was in pain. The third shot hurt worse than the first two. This time, Mark screamed in pain and the nurses had to hold him down. He did not ask for the procedure to stop because he figured the pain was normal but just more than he had expected. Dr. Pasciak suggested to Mark that he could stop the procedure and come back for general anesthesia because usually the shots were not as painful as they seemed to be for him. Mark felt that his penis was swelling and felt a burning sensation. He did not recall feeling numbness. He did not look at or touch his penis during the procedure. Mark agreed to have the fourth shot, which did not cause the painful reaction he had on the first three shots but he felt

pressure. He did not feel the actual injection on the fourth shot. Mark believed he had a total of seven or eight shots. He did not feel the needle going in beginning with the fourth shot. He did not recall feeling a scalpel being used on him during the procedure. Mark did not know any of the warts were cut off but believed they were being frozen off. He did not feel the burning off of any tissue, which was the method Dr. Pasciak used to remove the remaining warts.

Mark knew the procedure ended when he heard a nurse ask Dr. Pasciak if she should put gauze on his penis. He could not recall if all of the nurses remained in the room during the entire procedure. He was taken into a recovery room. After 30 to 45 minutes, Mark was able to leave the facility. Upon discharge, he spoke with a nurse about follow-up procedures. Mark called the doctor's office that night because he thought something was wrong. His penis had swelled up to the size of a "large Idaho potato" and his testicles seemed like the size of tennis balls. Mark could not recall whether he took any pain medications or whether he iced the area. The doctor's office phoned in a prescription for pain medication for him. Mark also noticed a blackened area at the base of his penis, and the nurse advised that this was normal.

The next morning, the swelling was worse. Mark called the doctor's office and the office prescribed an antibiotic. Mark believed that he went to see Dr. Pasciak either the day of or the day after the antibiotic was prescribed. Dr. Pasciak advised him to continue taking the antibiotics and the swelling should go down. He told Mark that he was going on vacation and to call his partner if there was a problem. On July 22, Mark called Dr. Pasciak's associate, Dr. Bockrath, and met him at Hinsdale Hospital's emergency room. Dr. Bockrath examined him, thought the condition would heal, and changed his antibiotic prescription. Mark saw Dr. Bockrath the following week, and Dr. Bockrath thought the condition was improving. Mark disagreed and felt his penis was deformed and

the area where it was black now appeared to be an open wound. Dr. Bockrath referred him to Dr. Fortman for a plastic surgery consultation. Mark had a skin debridement procedure at some point after seeing Dr. Fortman.

Dr. Robert Pasciak testified that he was a board certified urologist, practicing with Du Page Urology Associates. Dr. Pasciak first saw Mark in July 2000 for genital warts upon a referral from Dr. Fortman. They discussed the various removal methods, including scalpel removal, electrocautery, and lasers. He recommended that Mark have the warts removed because they had been present for so long, were sexually transmittable, and had a small potential in men to become cancerous. Based on his consultation with Mark, the plan was excision and fulguration (cauterization) of the warts in the outpatient center. Dr. Pasciak has performed this type of procedure approximately 20 to 30 times before Mark's, not including office excision of warts.

When Dr. Pasciak entered the surgery room, Mark was already gowned and prepped. He introduced himself and explained the procedure again, which meant that he would biopsy and cauterize the warts as they discussed before. Mark seemed agreeable to proceed, so Dr. Pasciak wiped the penis with a vinegar solution, which naturally highlights the area of the skin that has the presence of warts. The vinegar solution, a 4% diluted acetic acid solution, was applied using a four-inch by four-inch sponge. The nurse poured the solution from a bottle onto a sponge in Dr. Pasciak's presence. The sponge was contained in a sterile paper wrapper, which was opened. Dr. Pasciak held the sponge with his gloved hands as the nurse poured the vinegar solution to moisten the sponge. There was no medicine cup used with the acetic acid. He then used the sponge to apply the solution to the penis. Dr. Pasciak agreed that the vinegar solution was a colorless liquid with a distinct odor. Approximately three or four minutes later, the warts changed color, and Dr. Pasciak observed about

six or seven warts. Dr. Pasciak did not recall Mark reacting with discomfort to this part of the procedure.

Next, the area was cleansed with Betadine and covered with sterile drapes. Betadine is an antiseptic solution with a brownish color. Dr. Pasciak then began to administer the lidocaine with a syringe. The lidocaine was poured from a bottle that was checked by himself and the nurse to confirm it was lidocaine. The nurse poured the lidocaine into a sterile medicine cup on the sterile "mayo" table, which is a fold-away table next to the surgical table. He then used a syringe to draw up the lidocaine. He agreed that visually, lidocaine would be indistinguishable from acetic acid, but stated that acetic acid had a distinct odor whereas lidocaine was odorless. The needle held about 10 ccs. After flushing out about two ccs from the needle, Dr. Pasciak told Mark that he would begin the injection. He injected the base of the penis, just slightly off the midline. After the first injection, Dr. Pasciak proceeded with the second injection quickly thereafter. Mark did not react out of the ordinary, some wincing as the needle went in. Dr. Pasciak did not sense that there was any extraordinary type of discomfort on Mark's part from the initial injection. After the second injection, Mark expressed some discomfort. The amount of discomfort seemed reasonable. He injected about five to six ccs of lidocaine each time.

After the first two injections, Dr. Pasciak checked with Mark to see if he was feeling numbness yet. Mark still had feeling so Dr. Pasciak performed a third injection. Mark seemed to say that he had discomfort. At that point, Dr. Pasciak asked Mark if he would like to stop because he would not continue with a procedure if the patient was experiencing more discomfort than he anticipated. In the past, Dr. Pasciak had a patient who had opted to stop a similar procedure to come back for general anesthesia. Mark did not express an interest in stopping the procedure so Dr.

Pasciak continued. Dr. Pasciak proceeded with a fourth, fifth, and sixth injection. Four injections were at the base of the penis. Dr. Pasciak refilled the needle one time so he used a total of approximately 20 ccs of lidocaine for the shots. He distinctly recalled not having to have the medicine cup of lidocaine refilled and was "quite confident" that he did not have to refill the syringe a third time. At no time did Mark scream out in pain or require the nurses to hold him down to the table.

Dr. Pasciak next proceeded to surgically remove one wart using a scalpel and cauterized the remaining warts. Mark did not voice any complaints during the procedure. Before removing any wart, Dr. Pasciak touched the area to ensure that the area was numb. It appeared that the areas were numb on Mark prior to each removal. After completing the wart removal procedure, the penis was wiped with some water to wipe off the staining from the Betadine. An antibiotic ointment was applied to the treated areas, and the areas were loosely covered with four-inch dressings. Dr. Pasciak's notes confirmed that no complications were noted and that 22 ccs of lidocaine were used during the procedure. He denied that he mistakenly injected acetic acid instead of lidocaine, stating that it was impossible because the lidocaine was in a medicine cup, and the acetic acid was poured on to a sponge.

Dr. Pasciak saw Mark for a follow-up appointment on July 12, 2000, after Mark had called the office complaining of some swelling. He had some edema on the shaft of the penis and bruising at the base of the penis. Dr. Pasciak explained to Mark that there was some swelling (edema) and bruising and that there could be the start of an infection. He prescribed an antibiotic and did not believe that there was anything unusual about Mark's progress. He next saw Mark on July 18 for a follow-up. The penis was still swollen though Dr. Pasciak had had patients that had swelling after

this type of procedure for weeks. However, there was some redness in the area so Dr. Pasciak switched Mark to another antibiotic and prescribed a topical ointment as well. The plan was to continue with the antibiotics and reassess in a couple of weeks. He thought Mark had cellulitis, which is an infection of the skin, where the warts were removed. Dr. Pasciak was going to be on vacation for two weeks but he advised Mark to contact his partner if he had any problems while he was gone. Upon his return from vacation, his partner, Dr. Bockrath, advised him that Mark underwent a skin debridement procedure and was healing. Dr. Bockrath advised that some of the skin at the base of Mark's penis had become gangrenous and needed to be debrided. Dr. Bockrath thought that Mark may have had cellulitis or a reaction to the lidocaine. Dr. Pasicak believed that Mark had some type of infection but how that was introduced to him, he did not know. Dr. Pasciak assumed that the lidocaine bottle was sterile and that his instruments were sterile. Upon being shown photographs of Mark's penis before and after the debridement, Dr. Pasciak believed the "before" photos showed necrotic and infected skin and the "after" photos showed a normal penis with healthy skin.

Regina Saviano, a nurse present during Mark's procedure, testified as follows. Saviano identified her operative notes from Mark's procedure. She noted that 22 ccs of lidocaine were used during the procedure. She had no recollection of Mark or his procedure. Her testimony came strictly from her operating room notes and normal procedures at the surgical center. As the circulating nurse for the operating room, Saviano was responsible for charting what was happening, supplying the scrub nurse with medication that had been checked by the surgeon, and prepping and monitoring the patient.

Saviano would have asked Dr. Pasciak what anesthetic he wanted and she would have retrieved it from a central area where medication is kept. She was familiar with plain lidocaine, which would be in a bottle with a label on it. After retrieving the bottle, Saviano would have shown the bottle to the scrub nurse and the doctor. Then she would have opened the bottle and poured the sterile contents into a sterile basin or bowl, called a local cup, which the scrub nurse would have been holding. Either the scrub nurse or the doctor would have used a sterile syringe to draw up the lidocaine into the needle.

Saviano was aware of the purpose of using acetic acid in a wart removal procedure. She had no reason to disagree with Dr. Pasciak's testimony that she poured the acetic acid from its bottle to a sterile sponge. However, she did not have any specific recollection of Mark's procedure. After a sponge was used, it was thrown in the trash. Saviano had never seen a doctor draw up acetic acid into a syringe. She did not see a way in which acetic acid could have been mistaken for lidocaine because injectable medications are kept separate from acetic acid. If acetic acid was poured into a container, it would not have been poured into a medicine cup. After pouring acetic acid onto a sponge, the container would be placed back where it came from. Acetic acid would not be sitting on the mayo table with the medication because the bottle was not sterile and the table with medication was a sterile field. It would be impossible to draw up acetic acid into the needle from the sponge. Saviano would have written down in her notes if the patient was screaming in pain or had to be held down during the procedure. If a patient appeared to be in pain or complained of back pain, Saviano would have noted that in the chart.

Normal procedures for a procedure such as Mark's would have included bringing the patient to the room and placing him on the table. Next, the doctor would shave the area, Saviano would

prep the area with betadine, the area would be draped, and then the acetic acid would be sponged over the area. Saviano did not know how many injections Dr. Pasciak performed.

Dr. Michael Hallet, plaintiffs' expert witness, was deposed as follows. Dr. Hallet was a board certified urologist and reviewed Mark's medical records. Dr. Hallet had used 4% acetic acid to highlight the presence of genital warts in the past during a cauterization procedure. He also normally used 1% lidocaine to numb the area. Typically, he would inject one-half to one cc up to three to six ccs of lidocaine for one wart. For a penile block, he would inject six ccs up to 8-10 ccs, though it would be rare for him to do a penile block. According to Dr. Hallet, a penile block would be appropriate when the warts are scattered across the penis.

Dr. Hallet testified that possible complications from a cauterization procedure on genital warts included scarring, excessive burning of tissue, infection, bleeding, and hematoma. Although he agreed that cellulitis is an infection, Dr. Hallet testified that he was not aware that cellulitis could result from a wart removal procedure. A possible complication from the use of lidocaine included a local allergic reaction, such as redness and hives. Dr. Hallet agreed that one would not get cellulitis as a reaction to lidocaine. However, Dr. Hallet agreed that anytime that there is a break in skin, one could get cellulitis. He agreed that cellulitis could result in the absence of any negligence when skin is broken during any type of procedure. Dr. Hallet testified that signs or symptoms of an infection following a genital wart removal procedure would include swelling, redness, warmth, poor wound healing, and possibly discharge. Dr. Hallet agreed that when performing a procedure at an outpatient surgical center, a doctor relies upon the facility to provide sterile equipment and to maintain a sterile field. He also agreed that cauterization of the warts does not remove the

underlying viral infection that causes the warts; therefore, the recurrence of warts after their removal is not the result of an unsuccessful wart removal procedure.

Dr. Hallet testified that "based on review of the case, was that it was 22 ccs, was not 100 percent lidocaine," but instead "a percentage of that was actually acetic acid." He continued to explain his opinion:

> "And based on review of the case and review of what took place, I'm surmising–and how he responded to the first syringe, as far as how he responded to the second syringe, my opinion is that the first syringe was acetic acid; the second syringe was lidocaine."

When asked how the acetic acid got into the first syringe, Dr. Hallet answered it would have been drawn up into the syringe. The following questioning took place:

> "Q: From what?
>
> A. From reviewing the depositions in the case, one of the nurses noted that there were two containers on the table next to each other. One that contained the lidocaine, and one that contained the acetic acid. I surmise that an error in technique was made. That the first time the syringe was loaded up with the acetic acid, and the second time it was loaded up with lidocaine."

Dr. Hallet explained that injecting acetic acid under the skin would lead to pain, inflammation, necrosis, and vascular compromise, which Mark demonstrated. He knew that acetic acid would cause this from "reviewing information," and "different things that [he] read." Dr. Hallet stated that Dr. Pasciak did not remember a second container on the tray but that the nurse indicated there were two medicine cups, one with acetic acid and one with lidocaine. He denied that the nurse testified in her deposition that she could not recall Mark's procedure but spoke in terms of normal

operating procedure. Dr. Hallet declined to attribute Mark's subsequent complications to an infection, such as cellulitis or an allergic reaction to lidocaine. He came to this conclusion because cellulitis would not normally cause necrosis so quickly. Mark stated in his deposition the base of his penis looked black upon leaving the surgery center. Dr. Hallet testified that cellulitis would not occur so quickly and would not cause necrosis immediately. He stated that acetic acid was a sclerotherapy agent, which means it could cause vessels to sclerose and no longer carry blood. Dr. Hallet explained when that takes place quickly, skin death or necrosis could occur quickly. He admitted that bruised skin is also darkened.

Dr. John Bockrath, an associate of Dr. Pasciak, testified that he was a board certified urologist and he recalled treating Mark for complications following his wart removal procedure. He first saw Mark at the emergency room at Hinsdale Hospital after Mark called complaining of swelling, pain, and discoloration at the base of his penis. Dr. Bockrath ordered a different antibiotic in case there was an infection festering and asked Mark to come back to the office two days later so he could observe any changes. He believed that Mark had cellulitis near the injection site, possibly related to the lidocaine. When Mark returned two days later, on July 24, Dr. Bockrath observed a decrease in swelling but that there was still some edema in the shaft and some blackened area near the base of the penis. Dr. Bockrath consulted with Mark's primary care physician, Dr. Lisa Fortman, regarding a plastic surgery consult. Dr. Bockrath anticipated the need for a skin debridement procedure and wanted to know if anything more would need to be done, such as skin grafting. Dr. Bockrath did not think that acetic acid was injected into Mark's penis because he did not know how that could have occurred. He was unfamiliar with what injecting acetic acid into the penis would

have caused. He agreed that injecting acetic acid could cause pain, could cause tissue death, nerve death, and could cause the patient to be susceptible to infections.

Dr. Bockrath next saw Mark on July 26 for a skin debridement procedure. He performed the procedure at Hinsdale Hospital under general anesthesia and successfully removed the blackened skin. He saw Mark again on August 2 for a follow up. Mark had decreased edema but still reported pain and partial erection. Dr. Bockrath wanted Mark to see the plastic surgeon to make sure no skin grafting would be needed. Dr. Bockrath did not see Mark again. The pathology report from the skin debridement showed the presence of a yeast. He regarded Mark's condition as an expected complication of any surgery because any time that there was a break in skin, there was the potential for problems with the healing process. Postoperative infections of any kind could result, including from the patient's own personal hygienic habits. Mark could have also reacted poorly to the lidocaine. Dr. Bockrath agreed that the condition of Mark's penis could have resulted in the absence of any negligent conduct by a physician.

Dr. Mark Robert Hutchinson was presented for defendants. Dr. Hutchinson, a board certified orthopedic surgeon, testified that he reviewed Mark's orthopedic history, which included a laminectomy in 1997 and a fusion surgery in 1999. He opined that the wart procedure could not have caused a reinjury of Mark's back because he did not complain of back pain for three months following his alleged torquing on the surgical table. Had Mark reinjured his back during the procedure, he would have had immediate pain and complaints. Mark's MRI in 2006 showed a bulging disc, which Dr. Hutchinson considered the normal progression of his original injury.

Dr. Thomas Turk, a urologist treating Mark following the procedure in 2000, testified that necrosis of the skin can follow any surgery because of the trauma to the area, poor blood supply, an

adverse reaction to medication, or infection. Tissue necrosis can occur in the absence of any negligent conduct by a physician. He did not have an opinion as to whether Dr. Pasciak met the standard of care. Dr. Turk tested Mark for an allergy to lidocaine but it was negative. Dr. Turk performed a scar excision procedure and another doctor performed a skin flap procedure. He testified that Mark currently was still having some pain at the base of the penis, was able to have erections with the help of Viaga, was able to have intercourse, and reported some deviation of the penis to the left without curvature. Dr. Turk determined that the base of the penis was well-healed. Mark's injury was limited to the skin of the penis and no internal part of the penis was affected.

Dr. Darl Vandevender, a plastic surgeon who treated Mark after the wart removal, testified that he performed a skin flap procedure on Mark in November 2003. He agreed with the rest of the testifying physicians that skin necrosis may follow a surgery in the absence of physician negligence for the same reasons: infection, lack of blood flow, medications, or pressure. He performed a skin flap procedure to try to correct the problem of scar tissue at the base of the penis, which Mark complained caused his erections to be painful. Scar tissue is normal after a wound has healed; Dr. Vandevender had no way of knowing whether Mark's scar tissue resulted from the surgery or an infection. He just knew there was scar tissue at the base of the penis.

Dr. Richard Kopolivic saw Mark on December 13, 2000. When he saw Mark following the debridement, Dr. Kopolivic did not note the presence of cellulitis or infection because there was no redness and no signs of pus under the skin. Only the skin of the penis was involved in the necrosis, so Dr. Kopolivic expected the wound to heal on its own. When he next saw Mark, he noted that the wound was healed but there was still some swelling and Mark reported painful erections. He recommended that Mark massage the scar tissue to help release it from the deeper structure and to

follow up in three months. Dr. Kopolivic thought Mark's condition may have been caused by sensitivity to a local anesthetic or preservative.

Dr. Dennis Pessis, a board certified urologist, testified as an expert witness for defendants and opined that Dr. Pasciak did not inject acetic acid into Mark's penis. He believed Mark's condition was the result of surgical complications. Dr. Pessis had never seen acetic acid injected and did not know the pathological results of injecting acetic acid. His opinion was based on Dr. Pasciak's testimony and Saviano's testimony of what had occurred and normal procedures of the operating room. Dr. Pessis opined that the evidence supported that proper procedures were followed in handling the acetic acid and lidocaine. He believed that Mark's complications often occurred in the absence of negligence following a surgery. Dr. Pessis testified that there was always a risk of cellulitis, infection, and necrosis following a break in the skin. He could not determine whether an infection was present prior to the antibiotics because there was no culture taken until after Mark took antibiotics. However, based on the redness, inflammation, and swelling, Dr. Pessis believed that Mark had an infection following the surgery. Dr. Pessis opined that a nonsterile instrument may have been used during Mark's surgery, or infection could have occurred during postoperative care due to poor hygiene. Dr. Pessis also opined that Mark could have had an allergic reaction to the lidocaine, which irritated the area and led to an infection. He did not believe the initial discoloration of the area that Mark noticed before leaving the surgical center was abnormal due to the nature of the procedure. The areas treated would have been discolored from the cauterization and the injections but should have settled down within a few days.

III. ANALYSIS

On appeal, plaintiffs argue that: (1) the doctrine of *res ipsa loquitur* applies in this case; (2) the opinion of Dr. Hallet was based on review of the evidence and more likely true than not; and (3) Dr. Hallet's testimony that the injection of acetic acid caused or contributed to Mark's back injury was sufficient to withstand a motion for summary judgment. Summary judgment is appropriate where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions and admissions on file, together with any affidavits on record, show there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower court relied upon that ground. *Id.* The purpose of summary judgment is to dispose of litigation in an expeditious way; however, it is a drastic remedy and should be granted only where the movant's right to judgment is free and clear from doubt. *Land v. Board of Education*, 202 Ill. 2d 414, 432 (2002). A motion for summary judgment does not ask the court to try a question of fact but rather to determine if a question of material fact exists that would preclude the entry of judgment as a matter of law. *Id.* While the nonmoving party is not required to prove his case, the nonmovant must present a factual basis arguably entitling that party to judgment. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8-9 (2004). If the moving party supplies facts, that if not contradicted, would warrant judgment in its favor as a matter of law, the opponent cannot rest on his pleadings to create a genuine issue of material fact. *Land*, 202 Ill. 2d at 432. Our review of a circuit court's judgment is *de novo*. *Horwitz*, 212 Ill. 2d at 9.

The doctrine of *res ipsa loquitur* is a species of circumstantial evidence that permits the trier of fact to draw an inference of negligence where the occurrence is one that ordinarily does not occur

in the absence of negligence and by an agency or instrumentality within the defendant's exclusive control. *Spidle v. Steward*, 79 Ill. 2d 1,5 (1980). Section 2—113 of the Code provides for claims based on *res ipsa loquitur*:

> "Medical malpractice—res ipsa loquitur. 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."

The question of whether the *res ipsa loquitur* doctrine should apply in a particular case presents a question of law, so *de novo* review applies. *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). The nature and purpose of the *res ipsa loquitur* doctrine was stated in *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446, 448-49 (1965) and quoted in *Heastie,* 226 Ill. 2d at 531:

> " 'When a thing which caused the injury is shown to be under the control or management of the party charged with the 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.' "

Thus, plaintiffs seeking relief using a *res ipsa loquitur* theory must plead and prove that they were 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. The requisite "control" is not a rigid standard, but a flexible one. *Id.* at 532. The key question is whether the probable cause of the plaintiff's injury was one which the defendant was under a duty to the plaintiff to anticipate or guard against. *Id.* As to the first element, the plaintiff is not required to show that the injury never happens without negligence, only that it does not ordinarily happen without negligence. *Adams v. Family Planning Associates Medical Group*, 315 Ill. App. 3d 533, 545 (2000). "A plaintiff need only present evidence reasonably showing facts exist that allow an inference that the occurrence is one that ordinarily does not occur in the absence of negligence. [Citation]. Such an inference cannot be based solely upon the fact of a rare and unusual result, but such evidence must be coupled with proof of a negligent act." *Id.* at 545-46. If the defendant controverts the plaintiff's evidence that the injury in question does not ordinarily occur in the absence of negligence, that dispute does not provide grounds for removing the issue from the province of the jury. *Id.* Factual disputes should not be decided by the trial court as a matter of law. *Id.*

In *Adams*, a 13-year-old girl died after complications from an abortion procedure. *Id.* at 539. At trial, the defendants argued that the patient died from an amniotic fluid embolism; however, the autopsy was inconclusive. *Id.* The plaintiffs argued that the defendants negligently administered more than twice the recommended dose of anesthesia to the patient during the procedure. *Id.* at 540.

The plaintiffs also presented expert medical testimony from three doctors who all testified that they did not believe that the patient would have died in the absence of negligence under the facts that the patient was healthy, deaths during abortions were rare, the amount of anesthesia administered was unusually high, and the follow-up monitoring and resuscitation attempts did not meet the standard of care. *Id.* at 546-47. Following the close of evidence, the trial court dismissed the plaintiffs' *res ipsa loquitur* claim, and the appellate court reversed, finding that the plaintiffs presented evidence that the injury would not have ordinarily happened in the absence of negligence and that the defendants had exclusive control of the instrumentality since the patient was unconscious. *Adams,* 315 Ill. App. 3d at 543, 546. Thus, the *res ipsa loquitur* claim should have gone to the jury. *Id.*

In *Raleigh v. Alcon Laboratories, Inc.*, 403 Ill. App. 3d 863, 865 (2010), the plaintiff alleged medical malpractice under the *res ipsa loquitur* doctrine after developing a fungal infection in his eye following cataract surgery. The defendant physician testified that the fungal infection was a rare but known complication of cataract surgeries. *Id.* at 866. The plaintiff's expert testified that environmental molds should not be contaminating the prosthetic lens that was implanted into the plaintiff's eye and that the defendants deviated from the standard of care by either improperly sterilizing the medical instruments used or in the handling of the lens. *Id.* at 867. The expert opined that the infection probably began either from the lens and its manufacturing or post-manufacturing packaging or from the forceps used by the physician implanting the device. *Id.* A second expert for plaintiff testified that the most likely source of the fungus was the lens but acknowledged that other sources, including operating room personnel, opthalmic solutions used during the procedure, the surgical instruments, and the room's environment, could also have caused the fungal infection. *Id.* The second expert also testified that a fungal infection is a risk of cataract surgery and does not

necessarily result from negligent conduct by the medical practitioners. *Id.* The trial court granted summary judgment in favor of the defendant medical center, and the appellate court affirmed, finding that the plaintiff failed to prove that his injury was the type that would not have normally occurred in the absence of negligence on behalf of the defendant medical center. *Id.* at 870.

Unlike in *Adams*, plaintiffs' expert in this case agreed that anytime there was a break in the skin, an infection could arise, even in the absence of negligence. In this regard, we find the facts of our case more akin to the facts in *Raleigh*, although we acknowledge the plaintiff in *Raleigh* did not name the individual physicians in his complaint and the court only considered his claim against the medical center where the surgery was performed. Regardless, we find Dr. Hallet's opinion to be based on conjecture. While Dr. Hallet refused to conclude that Mark's condition was the result of an infection or reaction to lidocaine, his conclusion that Dr. Pasciak injected the penis with vinegar instead of lidocaine was unsupported by the evidence. Dr. Pasciak testified that the vinegar was poured into the wrapper holding the sponge; nurse Saviano could not recall Mark's procedure at all; and Mark did not see Dr. Pasciak or the nurses doing anything as his eyes were closed on and off during the procedure.

More importantly, Dr. Hallet's conclusion appeared to have been based on Saviano testifying that there were two cups on the mayo table, one with lidocaine and one with acetic acid. That was an incorrect recollection of Saviano's testimony. Saviano specifically testified that she could not recall Mark's particular procedure and had no reason to dispute Dr. Pasciak's recount that she poured the acetic acid onto the sponge. She testified merely that it was possible that if she did pour the acetic acid into a container she would not have poured it into a medicine cup but rather a kidney-shaped basin. She explained that medicine cups were only used for medications. Dr. Hallet also

acknowledged that anytime there was a break in the skin, infection was possible without any negligent conduct by defendants. Dr. Hallet also agreed that a patient may have an adverse reaction to lidocaine. Dr. Hallet's opinion that Dr. Pasciak injected acetic acid is therefore based on mere conjecture, and we agree with the trial court that Dr. Hallet's opinion that an error occurred was not supported by any evidence in the record.

We disagree with plaintiffs' analysis of *Spidle*, which plaintiffs rely on for support that they are not required to demonstrate that Mark's complications could occur in the absence of negligence but only that such complications are not normally the product of negligence. In *Spidle*, the plaintiff underwent a supracervical hysterectomy after recurrent attacks of pelvic inflammatory disease and developed vaginal fecal fistula at the lower part of the surgical incision. *Spidle*, 79 Ill. 2d at 4-5. The plaintiff's expert was asked whether a hysterectomy could lead to a fistula in the absence of negligence, to which the expert answered it was a "rare and unusual complication." *Id.* at 8. The court determined that this answer, combined with other testimony, was sufficient to present a jury question regarding the probability of negligence. *Id.* The court stated that it could not, based on the expert's indirect answer alone, conclude that a fistula after a hysterectomy was usually the result of negligence or could equally occur as an unfortunate complication despite due care. *Id.* at 9. However, the court had other testimony that indicated that it was inadvisable that the hysterectomy be performed while the plaintiff's pelvic inflammatory disease was flared up, and even the defendant agreed that such an operation was ill advised during an acute stage of the disease. *Id.* Evidence existed establishing that the plaintiff was in an acute stage, and that the defendant physician commented after the surgery that he had " 'operated a little too soon.' " *Id.* at 9-10. The facts of our case are distinguishable from *Spidle*. In this case, plaintiffs' expert has no facts to support his

conclusion that Dr. Pasciak mistakenly injected acetic acid or that Mark's necrosis was caused by acetic acid rather than an adverse reaction to lidocaine or infection, both of which all experts and treating physicians agreed were potential complications to the procedure.

Similarly distinguishable is *Barkei v. Delnor Hospital*, 176 Ill. 2d 681, 679-80 (1989), where an infant suffered a spinal cord injury sometime after birth. The issue in *Barkei* was not whether the injury suffered usually occurred in the absence of negligence because the defendant hospital agreed that such an injury did not normally occur in the absence of negligent conduct. *Id.* at 688. The defendant hospital, however, argued that the plaintiffs did not show that the hospital had exclusive control over the instrumentality which caused the trauma. *Id.* The appellate court disagreed, finding that the plaintiffs established, and the defendant agreed, that the infant suffered some type of head trauma from the time of her birth until the time of the discovery of the injuries four days later by hospital personnel, and it did not matter whether the injury took place while in the care of the physician or the hospital. *Id.* at 689-90. The court stated that the question was not whether the plaintiffs conclusively eliminated all other causes of the baby's injury; rather, the question was whether there was evidence that made it more probable than not that she was under the hospital's control when the trauma took place. *Id.* at 690. The experts that testified ruled out genetic or congenital defects as the source of the infant's problems and showed that the injury resulted from a trauma. *Id.* Further, there was no testimony from any of the persons in the room at the time of the infant's birth that there was any trauma inflicted on the baby in the delivery room or any particular complication during the breech delivery. *Id.* The delivery room physician and the parents of the child considered it to be a normal breech delivery, and the baby showed no signs of trauma for a few days, which was unlikely due to the severity of the injury. *Id.* Therefore, the court determined that

the plaintiffs satisfied the requirements of *res ipsa loquitur* to survive a directed verdict attack, allowing the case to proceed to a jury. *Id.*

Unlike in *Barkei*, the main issue in the case at bar involves the first requirement, that the injury suffered is one not normally occurring in the absence of negligence. Plaintiffs have failed to establish that Mark's injury was one not normally occurring in the absence of negligence. Plaintiffs rely on the idea that the injury was caused by the injection of acetic acid but there is no evidence in the record to support this claim. As stated, plaintiffs' expert surmises that this occurred based on a misreading of Saviano's testimony. See also *Jones v. Minster*, 261 Ill. App. 3d 1056 (1994) (distinguishable from case at bar where summary judgment was inappropriate where the plaintiff's expert testified that the plaintiff's injury could not have occurred during the type of surgery performed in the absence of negligence and where the plaintiff was in the exclusive control of the defendants during the surgery). Plaintiffs argue that Dr. Hallet's opinion, based on a review of the record, was sufficient to create a triable issue of fact. However, "an expert may not guess, surmise, or conjecture as to a possible cause for the injury based on matters which could not be shown to have existed." *Baird v. Adeli*, 214 Ill. App. 3d 47,65 (1991). "Where there are differing possible causes of an accident and a plaintiff cannot establish that it was defendant's actions which caused the accident, *res ipsa loquitu*r will not be applicable." *Napoli v. Hinsdale Hospital*, 213 Ill. App.3d 382, 388 (1991). Further, the trier of fact may not draw an inference of negligence based solely on the happening of a rare or unusual result. *Smith v. South Shore Hospital*, 187 Ill. App. 3d 847, 858 (1989). Here, Dr. Hallet's opinion that Dr. Pasciak injected acetic acid was not supported by anything in the record and was based only on surmise, conjecture, or guesswork. Moreover, multiple physicians, either treating or expert physicians, testified that the complications following

Mark's procedure could likely occur in the absence of negligence because infection or an adverse reaction to medication were common occurrences following any type of surgery. No one in the room at the time of the surgery testified that there was any other fluid on the mayo table besides lidocaine. The testimony of Saviano that if acetic acid were poured into a container, it would be poured into a different type of container and not a medicine cup was in response to hypothetical questioning. Dr. Hallet took this testimony and further altered it to mean that two medicine cups were sitting side by side on the mayo table, and Dr. Pasciak injected acetic acid instead of lidocaine. This opinion was simply not supported by any of the evidence in the record.

Because we find that plaintiffs did not satisfy the first requirement of *res ipsa loquitur*, we need not address whether the instrumentalities of Mark's alleged injury were in the sole control of defendants. We also find that the trial court correctly determined that defendants were entitled to summary judgment on the remaining general negligence claims, which were in turn relying upon the theory that Mark was injected with the wrong substance. As the trial court stated, Mark's claim that his back was re-injured as a result of the acetic acid injections was moot because it had just concluded that there was no evidence to support the claim that he was mistakenly injected with acetic acid. Thus, Mark's back problems could not have been proximately caused by the claimed breach of duty which the trial court just concluded was unsupported by the record evidence.

Even if we were to address this claim, plaintiffs did not present any expert testimony regarding Mark's back injury. Dr. Hallet was not an orthopedic physician and could not testify as to the extent or cause of Mark's back injuries. Regardless, Dr. Hallet did not even provide any relevant testimony as to Mark's back injury other than to opine that his movements during the procedure could have aggravated a pre-existing condition. Thus, even if we were to address the

proximate cause of this claim, summary judgment in favor of defendants would still have been appropriate. To the extent Mark's general negligence claims in counts three and four also claimed injuries relating to his penis, summary judgment was still appropriate for the same reason that the back injuries cannot survive; that is, there was no evidence to support the claimed breach of duty—that acetic acid was injected instead of lidocaine. Accordingly, we affirm the judgment of the circuit court on all counts.

IV. CONCLUSION

Plaintiffs failed to establish that application of *res ipsa loquitur* was appropriate in this case, and thus, for the reasons stated, we affirm the judgment of the circuit court of Du Page County.

Affirmed.