UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2077

September Term, 2014

ADAM J. POLIFKA

v.

ANSPACH EFFORT, INC., *et al.*

Eyler, Deborah S.,
Kehoe,
Bair, Gary E.
(Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: February 4, 2016

Adam J. Polifka, M.D., appeals from a judgment of the Circuit Court for Baltimore City granting the motions for summary judgment of appellees, The Johns Hopkins Hospital and The Anspach Effort, Inc. On appeal, Dr. Polifka presents one issue, which we have reworded:

> Did the circuit court err in granting summary judgment on the ground that Dr. Polifka presented no evidence of breach of duty on the part of Hopkins or Anspach?

We will affirm the judgment of the circuit court.

Background

In August 2010, Dr. Polifka was a resident in the University of Maryland Medical Center's neurosurgery department. As part of his residency, Dr. Polifka was assigned to a three-month rotation in Hopkins's pediatric neurosurgery residency program. On August 11, 2010, while at Hopkins, Dr. Polifka was performing a craniotomy[1] on a patient and, as part of that procedure, was drilling a series of closely-space holes in the patient's skull with a "Black Max"—a high speed pneumatic surgical drill manufactured by Anspach.

The tool consisted of at least three elements: the drill mechanism itself, a foot pedal control operated by the surgeon, and a hose. The hose, in turn, had two

[1]"A craniotomy is the surgical removal of part of the bone from the skull to expose the brain. Specialized tools are used to remove the section of bone called the bone flap. The bone flap is temporarily removed, then replaced after the brain surgery has been performed." *What is a Craniotomy?*, JOHNS HOPKINS MEDICINE, http://www.hopkinsmedicine.org/neurology_neurosurgery/centers_clinics/brain_tumor/treatment/surgery/craniotomy.html (last visited October 28, 2015).

components. One portion delivered pressurized nitrogen to the drill to power the drill mechanism. The other hose was under negative pressure, that is, it drew nitrogen away from the drill for disposal.[2] The hose ruptured in the midst of the procedure with a loud bang, injuring Dr. Polifka's ear.[3]

Dr. Polifka filed suit against Hopkins, the drill's owner, and Anspach, its manufacturer, for damages resulting from the injury to his ear. Dr. Polifka alleged that Hopkins, through its agents and employees, failed to properly inspect, test, maintain, and repair the drill system. As to Anspach, Dr. Polifka alleged that it was negligent in the "design, manufacture, promotion, sale[], maintenance, and repair of the . . . drill system," as well as in its failure to warn of the drill's "dangerous and defective condition." Dr. Polifka also asserted claims for strict liability and breach of warranty against Anspach.

During discovery, Dr. Polifka designated four medical experts who would testify to his injury but none as to breach of duty or causation. Neither Hopkins nor Anspach

[2]At least, this is how we think the drill operated. All three parties have been a bit frugal with information in this regard. This may have been dictated by perfectly legitimate tactical considerations at the trial court level, but it has an unfortunate result. Appellate judges, particularly judges of intermediate appellate courts, have finite time and resources and "therefore [are] bound to know far less about the parties, the product or service involved, and the context than the advocate does." Richard A. Posner, *Reflections on Judging* at 269 (2015). So, counsel, if we've gotten this aspect of the case wrong, don't blame us.

[3]The record does not indicate whether the patient was affected by this incident.

took the position that Dr. Polifka was at fault. After the close of discovery, both defendants moved for summary judgment.

Hopkins and Anspach pointed out that Dr. Polifka failed to designate an expert who could testify as to (1) the nature and scope of the Hospital's duty to maintain, inspect, and repair the nitrogen supply hose and (2) any manufacturing or design defect in the hose. They asserted that the only viable theory of recovery remaining to Dr. Polifka was *res ipsa loquitur*. The defendants presented several reasons why the doctrine of *res ipsa loquitur* was unavailable to Dr. Polifka. For his part, Dr. Polifka confirmed that he was proceeding under the theory of *res ipsa loquitur* and argued in favor of its applicability. (The parties' contentions to the circuit court are substantially the same as those raised before this Court. We will discuss them in detail later.)

After a hearing, the circuit court granted the motions, stating (emphasis added):

> *What we have here is a situation in which you have a complex device, a device which is beyond the understanding of a lay person*, although I would note not necessarily beyond the understanding of a surgical resident, but certainly beyond the understanding of a lay person involving, you know, pressure in a hose going in two directions and we have the device certainly at some point in the control -- exclusive control of Johns Hopkins or its employees . . . .
>
> * * * *
>
> *I think this is clearly a case where . . . there needed to be some exploration by an expert witness* of what exactly happened to this device such that it would blow up. Clearly it blowing up is an indication that something went badly wrong. But in order to avoid Hopkins being held

> liable if it was Anspach's fault or Anspach being held liable where it was Hopkins' fault or a mixed fault between the two parties or some third party intervention in the device caused the problem, without anything of that type *I don't think a jury could fairly be asked to decide the facts in this case without expert testimony on the part of [Dr. Polifka] as to this device and what happened and the like*.
>
> I don't think res ipsa applies because, number one, we don't know that negligence was the cause of the incident and, number two, because clearly there was not exclusive control of the device throughout the entire period of time that might be relevant with respect to the device that would eliminate one party or all other explanations other than negligence by a particular party.
>
> An expert witness could have come on and said this device -- the incident took place because there was this failing, there was this mistake, there was this omission or whatever that would tie the failure of the device to something that somebody did or did not do.

Dr. Polifka filed a timely appeal.

Standard of Review

"Summary judgment is appropriate where there is no genuine dispute as to any material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law." *Crickenberger v. Hyundai*, 404 Md. 37, 45 (2008) (quotation marks and citations omitted). In undertaking appellate review of summary judgment motions, "'we consider the facts, and any reasonable inferences drawn from those facts, in the light most favorable to the non-moving party,'" *Norris v. Ross*, 159 Md. App. 323, 329 (2004) (quoting *Bell v. Heitkamp, Inc.*, 126 Md. App. 211, 221-22 (1999)), and we review the court's grant of such motions *de novo*. *Crickenberger*, 404 Md. at 45.

Analysis

On appeal, Dr. Polifka contends that the circuit court erred in granting the motions for summary judgment because the drill was being used in a normal, foreseeable, and non-negligent manner at the time the hose ruptured, and thus he was entitled to an inference of negligence on the part of Hopkins and Anspach, under the doctrine of *res ipsa loquitur*. Dr. Polifka advances separate arguments as to each appellee. His contentions are premised on the fact that neither Hopkins nor Anspach asserts that he was at fault.

With regard to Hopkins, Dr. Polifka asserts that the doctrine of *res ipsa loquitur* is applicable because the rupture of the hose was the sort of event that would not occur in the absence of negligence, particularly where the drill was being used in a normal and foreseeable manner. Further, Dr. Polifka asserts that, with the exception of the approximately ten minutes during which he used the drill, it was in Hopkins's exclusive control. In response, Hopkins counters that *res ipsa loquitur* is not applicable where, as here: (1) expert testimony is necessary to develop an inference of negligence among the jurors; (2) the elements necessary to prove a prima facie case of *res ipsa loquitur* cannot be satisfied; and (3) there are multiple defendants who are "wholly independent of [each] other."

As to Anspach, Dr. Polikfa asserts that he was entitled to an inference of negligence because the hose ruptured while he was using the drill "in a normal, intended[,] and foreseeable manner," and Anspach does not contend that any other party, person, or entity is responsible for the defect or occurrence. In response, Anspach asserts that summary judgment was proper because Dr. Polifka produced no direct or circumstantial evidence that there was a defect in the drill's design or manufacture. Anspach contends that expert testimony was necessary to "determine whether the rupture was caused by negligent design or manufacture, or design defect, or some other cause occasioned by a third party, or if it simply occurred without negligence on the part of anyone."

The principle of *res ipsa loquitur*, was first articulated by Charles Edward Baron Pollock in *Byrne v. Boadle*, 159 Eng. Rep. 299 (1863). The *"res"* to which Baron Pollock referred was not necessarily a singular event but rather to the facts before the tribunal. If applicable, the rule can permit a plaintiff to recover even if he or she is incapable of proving the traditional elements of negligence when the circumstances surrounding "an accident are . . . of such a character as to justify a [court or] jury in inferring negligence as the cause of that accident." *Dover Elevator Co. v. Swann*, 334 Md. 231, 236 (1994) (internal quotation marks and citation omitted). As the Court of Appeals has explained, "[t]his is the case when 'the common knowledge of jurors [is]

sufficient to support an inference or finding of negligence on the part of' a defendant." *Holzhauer v. Saks & Co.*, 346 Md. 328, 338 (1997) (quoting *Meda v. Brown*, 318 Md. 418, 428 (1990)). Thus, *res ipsa loquitur* is unavailable to plaintiffs in cases where expert testimony is required to resolve complex issues of fact. *Id*. at 340.

Additionally, "in order to create an inference of negligence on the part of a defendant," a plaintiff must prove the following three elements: "(1) a casualty of a kind that does not ordinarily occur absent negligence, (2) that was caused by an instrumentality exclusively in the defendant's control, *and* (3) that was not caused by an act or omission of the plaintiff." *Id.* at 334 (emphasis added).

In a case similar to the one before us, the Court of Appeals was confronted with the invocation of *res ipsa loquitur* where an escalator stopped abruptly, resulting in an injury to a passenger. *Id*. at 331. Holzhauer, the passenger, did not offer any direct evidence of negligence on the part of the owner of the escalator or the maintenance company, and the only expert he designated was a medical doctor. *Id*. at 332. Among other reasons for concluding that *res ipsa loquitur* was inapplicable, the Court explained that "[i]n some cases . . . 'because of the complexity of the subject matter, expert testimony is required to establish negligence and causation.'" *Id*. at 339 (quoting *Meda*, 318 Md. at 428). The Court identified an escalator as such a "complex machine" and concluded: "whether an escalator is likely to stop abruptly in the absence of someone's

negligence is a question that laymen cannot answer based on common knowledge. The answer requires knowledge of 'complicated matters' such as mechanics, electricity, circuits, engineering, and metallurgy. *Res ipsa loquitur* does not apply under these circumstances." *Id*. at 341. *Compare Virgil v. "Kash N' Karry" Serv. Corp*., 61 Md. App. 23, 30 (1984) ("Expert testimony is hardly necessary to establish that a thermos bottle that explodes or implodes when coffee and milk are poured into it is defective. When a product fails to meet the reasonable expectations of the user, the inference is that there was some sort of a defect, a precise definition of which is unnecessary." (internal quotation marks and citation omitted)).

As we have stated, the record does not contain a complete description of how the drill operates. It is evident, however, that the drill is a complex system comprised of a handheld device, two hoses, a nitrogen tank, and a foot-actuated control device. This is not a device that is within the common knowledge of lay persons, and is far more complex than a defective thermos. *Holzhauer* instructs that the drill involved in this case is the sort of complex machinery that is beyond the common knowledge of laymen. Accordingly, *res ipsa loquitur* is not available to Dr. Polifka.

Moreover, even if this case had fallen within the scope of *res ipsa loquitur*, Dr. Polifka failed to present evidence sufficient to set forth a prima facie case of negligence

under the doctrine. Because neither Hopkins nor Anspach allege that Dr. Polifka was negligent, we limit our discussion to the first two elements.

With regard to the first element, Dr. Polifka had the burden of proving that the hose would not have ruptured if Hopkins or Anspach had not been negligent. *See Holzhauer*, 346 Md. at 336. As the Court of Appeals has stated, "'[t]he doctrine of *res ipsa loquitur* is applicable only when the facts and surrounding circumstances tend to show that the injury was the result of some condition or act which ordinarily does not happen if those who have the control or management thereof exercise proper care.'" *Id*. (quoting *Greeley v. Balt. Transit Co.*, 180 Md. 10, 12 (1941)). Before the circuit court, and in his contentions to this Court, Dr. Polifka relied entirely on the fact that the hose ruptured as evidence of negligence. Considering the facts, as well as the inferences drawn reasonably therefrom, in the light most favorable to Dr. Polifka, we conclude that the rupture of a hose that is part of a drill system used to perform brain surgery is surely the sort of event that does not occur in the absence of someone's negligence. Thus, on the basis of the record before us, the first element is satisfied.

As to the second element, exclusive control, Dr. Polifka was required to present evidence sufficient to "demonstrate that no third-party or other intervening force contributed more probably than not to the accident." *D.C. v. Singleton*, 425 Md. 398, 408 (2012). As the Court explained in *Holzhauer*, "'[t]he element of control has an

important bearing as negativing the hypothesis of an intervening cause beyond the defendant's control, and also tending to show affirmatively that the cause was one within the power of the defendant to prevent by the exercise of care.'" 346 Md. at 337 (quoting *Lee v. Housing Auth. of Balt.*, 203 Md. 453, 462 (1954)). We address Dr. Polifka's claim as to Anspach first. Anspach sold the drill to Hopkins in 2004, and the hose ruptured on August 11, 2010. At the time the incident occurred the drill had been out of Anspach's control for approximately six years. Moreover, Dr. Polifka offered no evidence from which an inference that the drill was defective at the time it left Anspach's possession could be derived. We cannot conclude that Anspach had exclusive control of the drill.

As to Hopkins, the case for exclusive control is closer. We recognize, as Hopkins argues, that the drill was in Dr. Polifka's control at the time the hose ruptured. The relevant time period for establishing exclusive control, however, is "*the time of the alleged negligent act*." *Norris v. Ross*, 159 Md. App. 323, 334 (2004) (emphasis in original). It is uncontested that Hopkins owned the drill for approximately six years prior to the incident, that its agents provided the drill to Dr. Polifka, at his request, while he was performing the craniotomy, and that Dr. Polifka did not detect any irregularity when he tested the drill, before using it on the patient. Again taking the facts and inferences in the light most favorable to Dr. Polifka, we conclude that Hopkins had exclusive control of the drill at the relevant time.

The difficulty with Dr. Polifka's case is that the application of *res ipsa loquitur* would give the jury no basis to decide whether the hose ruptured as the result of a manufacturing or design defect or because of some failure on Hopkins's part or some combination of the two. In other words, based on the record before the summary judgment court, a fact-finder could only speculate as to which defendant was liable. For this reason, the Court of Appeals has "decline[d] to extend the doctrine of *res ipsa loquitur* to a case against multiple defendants absent a showing that their liability was joint or that they were in joint or exclusive control of the injury producing factor[.]" *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 602 (1975). Dr. Polifka presents no evidence, or argument, which so much as suggests that Hopkins and Anspach are jointly liable or that they had "joint or exclusive control" over the drill.

The circuit court did not err when it concluded that the doctrine of *res ipsa loquitur* was inapplicable in this case.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY COSTS.