No. 127942
Consolidated with No. 127944

IN THE

SUPREME COURT OF ILLINOIS

WILLIAM "WES" JOHNSON, Plaintiff-Appellee, v. LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, Defendants-Appellants.	)	On Petition for Leave to Appeal From the Illinois Appellate Court, Fourth District, No. 4-21-0038 There Heard on Appeal From The Eleventh Judicial Circuit, McLean County, Illinois, Trial Court No. 2018 L 126 The Honorable Rebecca S. Foley, Judge Presiding

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REPLY BRIEF OF DEFENDANTS-APPELLANTS SARAH HARDEN AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER

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Argument

More than thirty-five years ago, the Illinois legislature weighed the ease of access for plaintiff patients to pursue their claims for medical malpractice against the cost to defendant treaters and their employers in defending against meritless complaints. The legislature created a statutory scheme that appropriately accounts for those competing interests by requiring plaintiffs to establish the standard of care applicable to each defendant treater by opinion evidence from an appropriately licensed expert in their school of medicine. 735 ILCS 5/8-2501. The legislature did not create a general exception that if the plaintiff intended to rely on the doctrine of *res ipsa loquitur* to prove his case, he did not require expert opinion evidence. To the contrary, the plaintiff's certifying physician must, under 735 ILCS 5/2-622, include in his report if he tends to rely on *res ipsa loquitur*, and then it is still up to the trial court to determine if it applies as a matter of law. *See,* 735 ILCS 5/2-1113.

In this case, Plaintiff has not developed a scintilla of evidence that would support a jury verdict against Tech Harden or Advocate. Nevertheless, if the Fourth District's decision in *Johnson v. Armstrong*, 2021 IL App (4th) 210038, is allowed to stand, a jury will be required to speculate whether Tech Harden *could* have caused Plaintiff's injury based on nothing more than a hypothetical question. Such a policy is not only inconsistent with Illinois law governing medical malpractice claims, but violates the fundamental tenet that trials are intended to resolve factual disputes, not theoretical possibilities.

I. The trial court appropriately relied on *Taylor v. Beardstown* to hold that Plaintiff's failure to disclose expert opinion testimony against Tech Harden required summary judgment.

Any assertion that *Taylor v. City of Beardstown*, 142 Ill.App.3d 584 (4th Dist. 1986), is not relevant to the instant case is unsupportable. First, the trial court relied on *Taylor* in granting summary judgment for Tech Harden and Advocate. (R 12). Second, the appellate court acknowledged that *Taylor* held, "testimony regarding the standard of care and deviation from that standard was required to invoke the *res ipsa* doctrine." *Johnson*, ¶ 69 (citing *Taylor*, 593). Significantly, the Fourth District only declined to follow – not over-rule – *Taylor*, and questioned neither that the holding in *Taylor* was on point nor germane to the issues in this case.

Plaintiff mischaracterizes the facts in *Taylor,* incorrectly contending that summary judgment was affirmed because the plaintiff did not oppose it. The defendants in *Taylor* all filed motions for summary judgment. *Id.*, 590. The day before the hearing, the plaintiff filed a response to those motions as well as a motion for leave to file an amended complaint to plead *res ipsa loquitur*. *Id.* The court denied the plaintiff's motion to amend and granted summary judgment for the defendants, finding that the defendants had established the standard of care applicable and that they had met that standard, and that plaintiff had failed to show any standard of care or present any competent evidence in rebuttal. *Id.*

The plaintiff then filed a motion for reconsideration and a motion for leave to file additional documentation. The trial court denied the motion to reconsider, finding that the addition of a count for *res ipsa loquitur* "didn't raise anything new," but did grant the plaintiff's motion to file additional documentation and ordered that a copy of the proposed amendment be made part of the record. *Id.*

The plaintiff appealed on three grounds: (1) that the trial court erred in denying her leave to file an amended complaint pleading *res ipsa loquitur*; (2) that she was not required to submit expert testimony as to the applicable standard of care in response to the motion for summary judgment; and (3) that she had raised genuine issues of material fact necessitating denial of the motions for summary judgment. *Id.*

When it considered the proposed amended complaint, the appellate court noted that the amendment contained a fatal defect: failure to allege the first element under *res ipsa loquitur*, that the fall and injury of the plaintiff's decedent would not have occurred but for the gross negligence of the defendants. *Id.*, 593. Thus, the focus was whether a confused and elderly patient with a history of falls should have been restrained, and whether that failure to restrain proximately caused the injury. *Id.* Accordingly, *Taylor* asserted that it "must be concerned with the standard of care in such situations." *Id.*

The plaintiff's position was that no expert testimony was necessary because the use of restraints in that case was within the common knowledge exception to the requirement for expert opinion evidence to prove medical malpractice, and that because the plaintiff was under the management and control of the defendants, the burden was on the defendants to demonstrate that they were free of negligence. *Id.* The *Taylor* court disagreed, holding:

> The burden is on the defendant to go forward with the evidence once *res ipsa* is established. Plaintiff must still present proof from which an inference of negligence may be drawn. Again, plaintiff must prove the first element, that the injury would not have occurred but for some negligent act by the defendants, by at least establishing a minimal standard of care.

Id., 593-94.

Put another way, Plaintiff cannot establish the applicability of *res ipsa loquitur* in a medical malpractice case by nothing more than the statement that the injury does not

occur in the absence of negligence. Rather, in a medical malpractice case, to demonstrate that the injury would not have occurred *but for* the negligent act requires proof of the applicable standard of care; that is, expert opinion as to what the defendant *should* have done to explain why the occurrence of the injury allows the jury to infer that the defendant *did not* do so.

The portion of *Taylor* that Plaintiff cites to is not directed at *res ipsa loquitur*, but whether the plaintiff demonstrated a genuine issue of material fact. *Taylor* noted that the defendants supported their motion for summary judgment with an expert affidavit that the defendants all met the applicable standard of care. *Id*., 597. Plaintiff failed to rebut the affidavit with a counter-affidavit, so the averments were taken as true. *Id.*, 598. Nevertheless, Plaintiff did attempt a late introduction as to the applicable standard of care via a 12-page photocopy of recommended standards regarding patient accommodations and care, but with no citation to any relevant portions or how they were breached by the defendants. *Id.*, 599. The appellate court affirmed that such broad statements, without reference to particular provision or precaution, could not serve as a basis to defeat summary judgment. *Id.*

Interestingly, like the plaintiff in *Taylor,* Plaintiff seeks to rely on documents that cannot serve as an evidentiary basis to defeat summary judgment. As set forth in Tech Harden and Advocate's opening brief, Dr. Bal, even *if* competent to opine as to the standard of care for a surgical technologist, did *not* offer an opinion as to the standard of care applicable to Tech Harden, that any action by Tech Harden deviated from that standard of care, or that any action by Tech Harden proximately caused Plaintiff's injury. Plaintiff attempts an end-run around this deficiency by citing instead to his Rule 213(f)(3) disclosure

of Dr. Bal's opinions, which contains a *single* reference to Tech Harden (that "the surgical instruments injuring the patient's femoral nerve were under the control of Lucas Armstrong and his scrub nurse, Sarah Harden, who was acting at his direction"). (C 299). However, a Rule 213(f)(3) disclosure is not competent evidence that a trial court may consider as part of summary judgment because it does not meet the definition of any document that a trial court may consider when ruling on a motion for summary judgment. 735 ILCS 5/2-1005; SCR 191(a); *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶¶ 43-52. In particular, a Rule 213(f)(3) disclosure is not a Rule 191(a) affidavit because it is prepared by a party's attorney and is not sworn to, notarized, made under oath, or even signed by the expert. *Essig*, ¶¶ 43-52. Here, Plaintiff's disclosure specifically states that Dr. Bal prepared no reports, and is signed only by Plaintiff's counsel. (C 300).

That Dr. Bal was shown Plaintiff's Rule 213(f)(3) disclosure at his deposition is not sufficient to transform those opinions into an affidavit. Rule 191(a) strictly requires an affiant to attach sworn or certified copies of the documents he relies on. Here, Dr. Bal's disclosure identifies the documents that he relied on in arriving at his opinions, but attaches only his *curriculum vitae*. (C 298 – C 353). The failure alone to attach the documents that Dr. Bal relied on to form his opinions is fatal to the competency of a Rule 191(a) affidavit. *Lucasey v. Plattner,* 2015 IL App (4th) 140512, ¶¶ 19-23.

Finally, even assuming, *arguendo*, that the Court could properly consider Plaintiff's Rule 213(f)(3) disclosure as evidence in opposition to summary judgment, it does not establish the standard of care applicable to Tech Harden, or that she deviated from it. (C 298 - C 299). Dr. Bal's disclosure asserts only that Dr. Armstrong deviated from the

standard of care, *not* Tech Harden. (*Id.*) Accordingly, Dr. Bal's disclosure does not create a question of fact as to Tech Harden's alleged negligence under any theory of liability.

Until *Johnson*, no Illinois court, including the Supreme Court, declined to follow *Taylor*'s holding that plaintiffs are not generally exempted from proving a claim for medical malpractice by expert opinion testimony simply by invoking the doctrine of *res ipsa loquitur*. *Coffey v. Brodsky*, 165 Ill.App.3d 14 (4th Dist. 1987), cited by the ITLA in its *amicus* brief, did not consider *Taylor* because the *Coffey* plaintiff disclosed expert opinion against the sole defendant as to the applicable standard of care. The issues on appeal in *Coffey* were wholly different than in *Taylor*: whether the trial court erred (1) in granting a directed verdict for the defendant on the *res ipsa* count, and (2) in permitting speculative opinion testimony by the defense expert. *Coffey*, 21, 24. The Fourth District reversed on both counts and remanded for a new trial. The consideration of Supreme Court precedent in *Coffey* on medical malpractice and *res ipsa loquitur* was focused on whether plaintiff was entitled to offer instructions on both *res ipsa* and negligence against the defendant physician, not the total absence of expert evidence against the defendant.

II. *Res ipsa loquitur* is not applicable to Tech Harden because there is neither a question as to the specific cause of Plaintiff's injury nor that Tech Harden was responsible for it.

Plaintiff relies on *Poole v. University of Chicago*, 186 Ill.App.3d 554 (1st Dist. 1989), and *Willis v. Morales*, 2020 IL App (1st) 180718, which Tech Harden and Advocate distinguished beginning at pages 21 and 40, respectively, of their opening brief. Plaintiff also relies on *Adams v. Family Planning Associates Medical Group, Inc.*, 315 Ill.App.3d 533 (1st Dist. 2000), which involved the death of a 13-year-old patient following an abortion under general anesthesia. In her claim for medical malpractice and wrongful

death, the decedent's mother named the physician who performed the abortion, the nurse anesthetist, and several corporate entities. Unlike this case, the *Adams* plaintiff offered competent expert opinion testimony against the doctor and the nurse anesthetist, as well as evidence that both of the defendant treaters made independent decisions and controlled aspects of the decedent's care. Under those facts, the appellate court found that it was error for the trial court to refuse to give a *res ipsa* instruction. *Id.*, 545-547.

Plaintiff's contention that the denial of petitions for leave to appeal on *Adams* and *Willis* can be interpreted as an affirmative decision by the Supreme Court *not* to address the "specific evidence v. *res ipsa loquitur*" argument of *Kolakowski v. Voris*, 83 Ill.2d 388 (1980), is pure speculation. Both petitions for leave to appeal were denied without comment. *See*, *Adams v. Family Planning Associates Medical Group, Inc.*, 193 Ill.2d 583 (Jan. 29, 2001); *Willis v. Morales*, 159 N.E.3d 952 (Table), 442 Ill.Dec. 404 (2020).

Moreover, neither *Adams* nor *Willis* substantively analyze *Kolakowski*. *See, e.g.*, *Adams*, 546; *Willis*, ¶ 41. Rather, page 537 of *Kolakowski* is referenced in both *Adams* and *Willis* only as a general citation that allowed those plaintiff to rely on *res ipsa loquitur* despite the specific evidence from their experts as to defendants' negligence, because there remained a question about the cause of the injury. By contrast, in this case, Plaintiff's expert has identified the specific alleged negligence by Dr. Armstrong as the sole cause of Plaintiff's femoral nerve injury, which Plaintiff's Response acknowledges by explaining exactly *how* Dr. Armstrong's placement of the retractor could have caused the femoral nerve injury. (*See*, Plaintiff's Response Brief, pp.14-15).

The fact remains that Plaintiff had the opportunity to disclose an expert opinion that some action by Tech Harden could have been the proximate cause of his injury. He did not.

Plaintiff cannot avoid summary judgment now by speculating that perhaps the femoral nerve injury was caused after Dr. Armstrong placed the retractor because Tech Harden used "too much pressure when she was handling the retractors," particularly when there is *no* evidence as to the application of pressure by Tech Harden when holding the retractor, or how *she* could have caused the injury in that manner. (*See,* Plaintiff's Response Brief, p. 15).

Even if Plaintiff is allowed to proceed on *res ipsa loquitur* in the alternative against Dr. Armstrong, there is still *no evidence* of negligence by Tech Harden. If Plaintiff is allowed to give a *res ipsa* instruction to the jury in this case, the *only* evidence that they will have to consider, either direct or circumstantial, is that the femoral nerve injury was caused by Dr. Armstrong's placement of the retractor.

In both *Adams* and *Willis*, *res ipsa loquitur* was found to be applicable to surgical cases because there were questions of facts as to whether the anesthesiologist or the surgeon was responsible for the injury. In both of those cases, the plaintiffs offered opinion evidence from both expert anesthetists and surgeons. There is no suggestion in either case that the plaintiffs would still have been entitled to a *res ipsa* instruction if they had only offered expert opinion evidence against *one* of the defendants.

What Plaintiff proposes, and the Fourth District has allowed, is the creation of an untenable hybrid rule in medical malpractice cases which would allow a plaintiff to offer the opinion of *one* expert against *one* treater that a particular injury does not ordinarily occur in the absence of negligence, but then permit the jury to use *that* opinion to infer negligence against *all* treating defendants, regardless of qualification or school of medicine. In a case with multiple defendants, a single expert's opinion as to the standard

of care against one defendant does not suddenly transform the standard of care applicable to treaters from different schools of medicine into common knowledge for which no other expert opinion is necessary.

III. There is no evidence that Tech Harden exercised either management or control over the retractor as required by IPI 105.09

Plaintiff cites to *Samanasky v. Rush-Presbyterian-St. Luke's Medical Center*, 208 Ill.App.3d 377 (1st Dist. 1990), where the plaintiff appealed dismissal of his complaint on the ground that *res ipsa loquitur* was not applicable to his claims. Plaintiff sought damages associated with the surgical removal of a central venous pressure catheter that fractured and remained in his body following a coronary artery bypass. *Id.*, 380-381. He brought claims for negligence pursuant to *res ipsa loquitur* against the hospital, the physicians who performed the surgery, and their professional corporation, and claims for *res ipsa loquitur* and strict products liability against the catheter manufacturer. *Id.*, 381. The trial court found that the plaintiff could not rely on the doctrine of *res ipsa loquitur* because the plaintiff could not demonstrate joint, concurrent control over the catheter. *Id.*, 383.

The appellate court disagreed and reversed, finding that joint, concurrent control over the catheter was not necessary to permit the application of *res ipsa loquitur*. *Id.*, 386-387. Rather, the First District relied on *Gatlin v. Ruder,*137 Ill.2d 284 (1990), discussed in Section IV, *infra*, to hold that a plaintiff may benefit from *res ipsa loquitur* if the plaintiff can present evidence tending to show *consecutive* management or control. *Id.* Unlike *Samansky,* there are no similar questions of fact in this case because there is neither evidence that Tech Harden ever had "control" of the retractor nor that she was negligent in any respect. Further, there is no issue about "consecutive" control because Plaintiff has not

alleged that the retractor was defective and Plaintiff's expert does not attribute the injury to anything other than a placement of the retractor by Dr. Armstrong *during* the surgery.

Plaintiff improperly focuses on the trial court's use of "exclusive control" in granting summary judgment to Tech Harden, but fails to substantively address the lack of evidence that Tech Harden exercised the requisite "management and control" over the retractor to permit application of *res ipsa loquitur.* Instead, Plaintiff asserts that the trial court erred in finding that Tech Harden did not have "exclusive" control over the retractor because Illinois Pattern Jury Instruction 22.01 removed the word "exclusive."

Plaintiff's insistence that IPI 22.01 is the applicable *res ipsa* jury instruction is confounding. The "Notes on Use" for IPI 22.01 clearly state that in professional negligence cases – like this case – IPI 105.09 is to be used. Plaintiff cites no authority to support the rejection of IPI 105.09 (which unlike 22.01 requires the jury to determine liability in part based on the reasonable standard of professional care established by expert testimony presented at trial) in favor of the general *res ipsa* instruction in IPI 22.01.

In *Heastie v. Roberts*, 226 Ill.2d 515, 532 (2007), this Court noted that the second element of *res ipsa*, control, is sometimes referred to as "management and control" rather than "exclusive control," but the terms are interchangeable. To apply *res ipsa loquitur* to the claims against both Dr. Armstrong and Tech Harden, Plaintiff must demonstrate evidence that *each* defendant's contact with the retractor amounted to control – a change in condition or intervening act that could reasonably have caused Plaintiff's injury. *See, e.g.*, *Darrough v. Glendale Heights Community Hospital,* 234 Ill.App.3d 1055, 1060-1061 (2d Dist. 1992). Both Plaintiff and the ITLA *amicus* brief treat Tech Harden's alleged control of the retractor like a foregone conclusion, despite the complete lack of evidence

that Tech Harden changed the condition of the retractor while holding it, or took any independent or intervening action whatsoever. Plaintiff cites no legal authority to support his assertion that Tech Harden simply holding a retractor after placement by Dr. Armstrong demonstrates the requisite control over the retractor necessary for the application of *res ipsa loquitur.*

IV. Affirming summary judgment for Tech Harden and Advocate is consistent with Supreme Court precedent.

Tech Harden and Advocate already addressed several of the Supreme Court decisions cited by Plaintiff in their opening brief. Both *Spidle v. Steward*, 79 Ill.2d 1 (1980), and *Kolakowski v. Voris,* pre-dated the adoption of §2-622, §2-1113 and §8-2501, which are reasonably interpreted as a legislative response to concerns about imposing liability on medical malpractice defendants with nothing more than speculation. In addition, both *Spidle* and *Kolakowski* were distinguishable from the instant matter on the facts, and neither decision was an impediment to the trial court granting Tech Harden and Advocate summary judgment in this case. (*See,* Tech Harden and Advocate's Opening Brief, pp. 16-20).

The Supreme Court did not hear another case that turned on the application of *res ipsa loquitur* to a claim for medical malpractice for ten years, until 1990 in *Gatlin v. Ruder*, where the plaintiff sued her obstetrician, Dr. Ruder, and the hospital, Riverside Medical Center, for injuries sustained by her son (Gatlin) during and/or immediately after his birth, resulting in cerebral palsy. Ruder delivered Gatlin by c-section because he was in a breech position. *Id.*, 288. Gatlin was admitted to the nursery, and three hours after his birth it was noted in his medical chart that he had several large scratches and a bruise on his head. *Id.* A skull x-ray taken three days later demonstrated a possible small, non-displaced fracture

in the right parietal region. *Id.*, 288-289. Five days after birth, an abrasion was found on his right ear. *Id.*, 288.

At deposition, Gatlin's expert opined that the child had sustained his injuries while in the care of the hospital personnel, not during the birth process. *See, Gatlin by Gatlin v. Ruder*, 178 Ill.App.3d 1059, 1060 (3rd Dist. 1989), *reversed by Gatlin v. Ruder*,137 Ill.2d 284 (1990). Ruder moved for summary judgment, supported by his own affidavit that he complied with the standard of care, and the affidavit of Dr. Raimondi, a pediatric neurosurgeon, who opined that Gatlin's skull fracture did not spontaneously occur in the absence of negligence, but must have happened in the hospital setting, not during the birth process. 137 Ill.2d at 289. Ruder and Raimondi's depositions confirmed their affidavits. *Id.* Because the affidavits eliminated Ruder's actions as a cause of Gatlin's injuries, the trial court granted Ruder summary judgment. *Id.*

After Ruder was dismissed, the hospital's expert, Dr. Niwswander, was deposed. In Niwswander's opinion, the skull fracture likely occurred either by the natural forces of labor while being squeezed in the pelvis, or as the result of the obstetrician trying to displace the head. *Id.*, 289-290. Ruder, at his deposition, had admitted to attempting to digitally turn Gatlin's head in the labor room due to his breech position. *Id.*, 290.

Gatlin then moved the trial court to vacate summary judgment based on Ruder's testimony that he tried to move Gatlin's head and Niswander's testimony that a skull fracture could be caused during the birth by an obstetrician trying to displace the head. *Id.*, 290. In response, Ruder submitted an affidavit from Niswander, opining that Ruder performed his duties within the standard of care and that his deposition testimony was not intended as a criticism of Ruder. *Id.*, 291. The trial court denied the motion, and the plaintiff

appealed. *Id.* The appellate court affirmed summary judgment for Dr. Ruder. *Id.* The Supreme Court granted the plaintiff's petition for leave to appeal, and reversed. *Id.*, 294.

First, the Supreme Court found that a genuine issue of material fact existed as to whether Ruder may have proximately caused Gatlin's injuries. *Id.*, 293-294. In particular, Niswander's affidavit did not conflict with his deposition – that is, *Gatlin* does not suggest that Niswander recanted his opinion that the skull fracture mostly likely occurred during the birth. Rather, Niswander's affidavit only asserted that in his opinion, Ruder met the applicable standard of care. Accordingly, summary judgment was inappropriate on the issue of proximate cause alone. *Id.*, 294.

The Supreme Court then considered the application of *res ipsa loquitur*, agreeing with Gatlin that he demonstrated evidence of the necessary elements; first, through the testimony of *Ruder's* expert, Raimondi, that Gatlin's injuries, including the skull fracture, did not occur in the absence of negligence, and that the skull fracture caused Gatlin's neurological problems. *Id.*, 296. Second, the evidence demonstrated that either Ruder (via the hospital's expert, Niswander) or Riverside (via Ruder's expert, Raimondo) had exclusive control over the agency or instrumentality which caused Gatlin's injuries; that is, Gatlin was either injured by Ruder during the birth, or Riverside's employees in the nursery immediately after delivery. *Id.*, 297.

Ruder argued that Gatlin presented no specific evidence that his actions fell below the "appropriate standard of medical care." *Id.*, 299. The Supreme Court held that such evidence was not necessary because Gatlin demonstrated evidence of each requirement of *res ipsa loquitur*. *Id.*, 300. It is not reasonable to interpret that statement as holding that Gatlin did not have to demonstrate evidence as to the applicable standard of care against

Ruder. Rather, there was testimony from a number of experts as to the applicable standard of care, possible proximate causes of Gatlin's skull fracture (which all agreed likely caused the cerebral palsy), and the affidavit and deposition of *Ruder's own expert* that the skull fracture did not occur in the absence of negligence.

The facts in *Gatlin* are very distinct from those in the instant matter. The *Gatlin* defendants sealed their own fates by having their experts essentially point the finger at one another. Gatlin was then entitled to use that conflicting expert evidence – offered by no less than three defense witnesses, Ruder, Raimondo, and Niswander – to demonstrate a question of fact as to proximate cause, and to permit the application of *res ipsa loquitur*.

By comparison, in the case *sub judice*, Plaintiff offered *no* evidence that his injury would not ordinarily occur *but for the negligence of Tech Harden*, or that she exercised control over the instrumentality (the retractor) that caused his injury. Rather, *every* witness opined that Tech Harden's conduct was appropriate under the circumstances and that they would expect her to act exactly as she had. (C 561; C 591; C 670 – C671).

Gatlin does not stand for the proposition that Plaintiff can, in the absence of any other evidence against Tech Harden, boot-strap his claims against a surgical technologist on to his claims against the orthopedic surgeon. *Gatlin* also did not implicitly over-rule *Taylor* or otherwise alter its precedential value because the issue considered in *Taylor* was the absence of *any* expert opinion to establish the elements of *res ipsa loquitur*. Conversely, *Gatlin* considered whether conflicting testimony from a number of experts, taken together, established the elements necessary to allow for the application of *res ipsa loquitur*.

After *Gatlin*, the Supreme Court did not consider the application of *res ipsa loquitur* to claims for medical malpractice for seventeen more years, until *Heastie v. Roberts* in

2007. *Heastie* lays out a number of general principles, but offers no guidance to the specific issue in this case.[1] In *Heastie,* a patient sued the hospital, security guards, emergency room technician and several nurses after he was injured in a fire that occurred while he was restrained in a room due to extreme intoxication and combativeness. After the fire, a lighter was found on the floor in the room where the plaintiff was placed, but there was no direct evidence linking the lighter to the plaintiff. Plaintiff brought a number of claims against the defendants, including a negligence claim pursuant to *res ipsa loquitur*.

The plaintiff's claim for *res ipsa loquitur* was dismissed at the pleading stage under Section 2-615. *Id.*, 525-526. At trial, Plaintiff's *res ipsa loquitur* instruction was refused. *Id*., 528. The jury returned a verdict in favor of the defendants. *Id.* Plaintiff appealed on numerous bases, including the refusal to permit Plaintiff to proceed on his *res ipsa* claim.

Ultimately, following a complex path through the appellate court, the First District held that Plaintiff should have been permitted to proceed on his *res ipsa loquitur* claim, and remanded the case for a new trial. *Id.*, 529. The Supreme Court affirmed the appellate court, considering, in part, the necessity of expert medical testimony to proceed under a *res ipsa* theory. The Supreme Court noted that unlike some organic material, the human body is not susceptible to spontaneous combustion. *Id.*, 533. Accordingly, one needs no specialized knowledge to understand that leaving a restrained patient alone and exposed to a source of ignition does not ordinarily occur in the absence of negligence, eliminating the need for expert testimony. *Id.*, 551. Here, Plaintiff does not dispute (nor did the Fourth

[1] Plaintiff's suggestion in Section I(B) of his response brief that Tech Harden and Advocate mis-stated the origin of a citation in *Heastie* is simply incorrect. Tech Harden and Advocate's citation to *Heastie*, 226 Ill.2d at 539 on page 15 of their opining brief is nearly verbatim and accurately includes *Heastie's* citation to *Collgood, Inc. v. Sands Drug Co.*, 5 Ill.App.3d 910 (5th Dist. 1972) and 65 C.J.S. Negligence § 759, at 555 (2000).

District) that he is required to present expert medical opinion evidence in order to prove his case for professional medical negligence. Accordingly, the specific holding in *Heastie* is not applicable to this case.

Plaintiff also cites to *Metz v. Central Illinois Elec. & Gas Co.*, 32 Ill.2d 446 (1965) and *Dyback v. Weber*, 114 Ill.2d 232 (1986), neither of which provide guidance as to the application of *res ipsa loquitur* to claims for medical malpractice.

In *Metz*, the Supreme Court considered whether the gas company exercised the requisite control over a buried gas main that exploded to apply *res ipsa loquitur*. This Court held that the "usual requirement that the accident-causing instrumentality" be under the exclusive control of the defendant did not, in that situation, mean actual physical control of the dangerous agency (the gas main), but that it was the gas company's responsibility to maintain the main at all times and that responsibility could not be delegated. *Id.*, 450. The evidence in *Metz* demonstrated that for at least seven years prior to the explosion, no one disturbed the area or interfered with the gas company's control in any way. Under that circumstance, the gas company was held to have had control of the instrumentality (the gas main) which caused the injury. *Id.*

Metz has no application here because there has been no suggestion that the retractor by itself is a "dangerous agency." Plaintiff does not dispute that it is not enough to merely handle the retractor during the surgery, as evidenced by his voluntary dismissal of Tech Rolf, whose job it was to hand Dr. Armstrong the retractor. (C 246). Rather, Plaintiff's burden here is to demonstrate actual physical control of the retractor at the time of his injury.

Similarly, *Dyback* offers no guidance. *Dyback* involves a claim of negligence by a homeowner against construction workers for damages sustained in a fire. At the close of plaintiff's case, the trial court directed a verdict for defendants. The Supreme Court held that plaintiff no longer needed to prove that she was free from contributory negligence following the adoption of pure comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1 (1981). Nevertheless, *Dyback* agreed with the trial court that *res ipsa* did not apply because there were multiple other identified possible causes for the fire in addition to the defendant's space heater, none of which the defendant controlled. *Dyback*, 244-245.

Dyback simply does not apply. The issue here is not that there are multiple other possible causes for Plaintiff's injuries under the control of non-party defendants. Rather, there is only one specific cause – the placement of the retractor – by Dr. Armstrong.

V. The trial court properly granted Tech Harden and Advocate summary judgment because Dr. Bal cannot offer criticisms of a surgical technologist, and he did not offer any criticisms of Tech Harden.

Plaintiff relies on 735 ILCS 5/8-2501, *Purtill v. Hess*, 111 Ill.2d 229 (1986), *Sullivan v. Edward Hospital*, 209 Ill.2d 100 (2004), *Iaccino v. Anderson*, 406 Ill.App.3d 397 (1st Dist. 2010), *Wingo v. Rockford Memorial Hospital,* 292 Ill.App.3d 896 (2d Dist. 1997), *Petryshyn v. Slotky,* 387 Ill.App.3d 1112 (4th Dist. 2008), and 225 ILCS 130/55, to support his assertion that only a surgeon can offer an opinion as to the standard of care applicable to a surgical technologist in this case.

First, as noted on pages 25 to 27 of their opening brief, both *Sullivan* and 735 ILCS 5/8-2501 support the trial court's holding that Dr. Bal was not competent to offer standard of care opinions against Tech Harden. Second, Plaintiff refuses to acknowledge that even if Dr. Bal is qualified to criticize Tech Harden, *he did not.*

Plaintiff makes only a general citation to *Purtill v. Hess,* which does not support reversal of summary judgment here. The issue in that case was whether the affidavit of Plaintiff's expert, Dr. Matvuiw, in opposition to summary judgment, sufficiently demonstrated his familiarity with the local standards in Rantoul, Illinois, for a family practice physician. *Id.*, 237-239. Dr. Matvuiw's affidavit set forth that he was familiar with the minimum standards of medical practice in relation to the diagnosis and treatment of the plaintiff's injury (rectovaginal fistulae) and that those minimum standards were uniform throughout the country. In the end, the Supreme Court found that such affidavit complied with Supreme Court Rule 191, and was sufficient to create a question of fact. *Id.*, 244-250. *Purtill* is clearly distinguishable on its face, as Plaintiff did not attempt to establish the applicable standard of care for Tech Harden via an affidavit from a surgical technologist or anyone else.

Plaintiff also cites to *Iaccino v. Anderson*, involving the alleged negligence of two physicians which caused brain damage to the Plaintiffs' child during birth. The plaintiffs appealed a jury verdict for the defendants on a number of bases, including a nurse barred from offering opinions that the baby should have been delivered earlier due to fetal distress or fetal intolerance to labor. Relying on *Sullivan*, the appellate court noted that the nurse could offer testimony on scientific terminology and her interpretation of what she observed on the fetal monitoring strips. *Id.*, 411. However, the appellate court held that she was appropriately barred from offering opinions whether the strips indicated that the baby needed to be delivered earlier, as such issues were outside the nurse's expertise and should be determined by a medical physician. *Id.*, 412. On its face, *Iaccino* supports the trial court's ruling that Dr. Bal could not offer an opinion as to Tech Harden's standard of care.

Next, there is a limited exception – set forth in *Wingo*, recognized in *Sullivan*, and applied in *Petryshyn* – that permits a physician to offer an opinion as to the standard of care for a nurse where the expected communication between the nurse and physician is at issue. That limited exception does not apply here because the communications between Dr. Armstrong and Tech Harden are not at issue.

Finally, Plaintiff cites to the Registered Surgical Assistant and Registered Surgical Technologist Title Protection Act ("the Act"), 225 ILCS 130/*et seq*. As noted by Plaintiff, the Act requires surgical technologists to perform their work under "direct supervision." Plaintiff ignores that the Act also provides that "A registered professional nurse may also provide direct supervision within the scope of his or her license." 225 ILCS 130/10.

That a surgical technologist may only act under the "direct supervision" of other medical providers does not lead to the conclusion that a surgeon can offer an opinion as to the standard of care for a surgical tech, nor does Plaintiff cite any legal authority to support such a reading of the Act. Rather, Tech Harden is entitled to have her conduct tested by the standards of her specific school of medicine, surgical technology. *Dolan v. Galluzo,* 77 Ill.2d 279, 283 (1979). The Act's definition of "registered surgical technologist" – "a person who is not a physician licensed to practice medicine in all of its branches" – simply reinforces that Tech Harden's training and licensing as a surgical technologist is different than Dr. Bal's as an orthopedic surgeon. 225 ILCS 130/10.

Conclusion

For the reasons set forth herein, Defendants-Appellants Advocate Health and Hospitals Corporation, d/b/a Advocate BroMenn Medical Center, and Sarah Harden, ask that this Honorable Court reverse the decision of the Fourth District Appellate Court in *Johnson v. Armstrong*, 2021 IL App (4th) 210038, and affirm the January 5, 2021 Order of the Circuit Court of the Eleventh Judicial District, McLean County, granting summary judgment in their favor.

ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER, AND SARAH HARDEN, Defendants-Appellants,

By: */s/ Stacy K. Shelly*
One of Their Attorneys

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No. 127942
Consolidated with No. 127944

IN THE

SUPREME COURT OF ILLINOIS

WILLIAM "WES" JOHNSON, Plaintiff-Appellee, v. LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, Defendants-Appellants.	)	On Petition for Leave to Appeal From the Illinois Appellate Court, Fourth District, No. 4-21-0038 There Heard on Appeal From The Eleventh Judicial Circuit, McLean County, Illinois, Trial Court No. 2018 L 126 The Honorable Rebecca S. Foley, Judge Presiding

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

/s/ Stacy K. Shelly
Stacy K. Shelly

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NOTICE OF FILING

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PLEASE TAKE NOTICE that on April 19, 2022, the **REPLY BRIEF OF DEFENDANTS-APPELLANTS SARAH HARDEN and ADVOCATE HEALTH AND HOSPITIALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, CERTIFICATE OF COMPLIANCE, and CERTIFICATE OF SERVICE,** is being filed electronically with the Clerk of the Supreme Court of Illinois, a copy of which is attached and served upon you.

By: /s/ Stacy K. Shelly
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The undersigned, an attorney, on oath state I served the foregoing **REPLY BRIEF OF DEFENDANTS-APPELLANTS SARAH HARDEN and ADVOCATE HEALTH AND HOSPITIALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, CERTIFICATE OF COMPLIANCE, and NOTICE OF FILING,** upon counsel listed above via electronic mail on April 19, 2022.

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

Additionally, upon acceptance by the court's electronic filing system, the undersigned will mail thirteen (13) copies of the **REPLY BRIEF OF DEFENDANTS-APPELLANTS SARAH HARDEN and ADVOCATE HEALTH AND HOSPITIALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER** to the Clerk of the Supreme Court, 200 East Capitol Avenue, Springfield, Illinois 62701.

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