No. 127942 (consolidated with 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 Leave to Appeal from the Appellate Court of Illinois,
Fourth Judicial District, No. 4-21-0038.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 18 L 126.
The Honorable **Rebecca Simmons-Foley**, Judge Presiding.

AMICUS CURIAE BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

KEITH A. HEBEISEN
YVETTE C. LOIZON
(ycl@cliffordlaw.com)
Member, *Amicus Curiae* Committee
Illinois Trial Lawyers Association
CLIFFORD LAW OFFICES, P.C.
120 North LaSalle, Suite 3100
Chicago, IL 60602
(312) 899-9090

Counsel for Amicus Curiae
Illinois Trial Lawyers Association

COUNSEL PRESS · (866) 703-9373

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ARGUMENT

For nearly five decades, this Court's precedent has clearly and consistently provided guidance on the elements of proof required in *res ipsa loquitur* actions. The Fourth District Appellate Court adhered to this well-settled precedent when it decided the instant case, its decision did not create a split in authority, and its judgment should be upheld by this Court.

Defendants collectively present multiple issues for this Court's review that seek to distort the doctrine of *res ipsa loquitur* to increase the evidentiary burden on plaintiffs so that virtually no set of proofs could ever be presented by an injured party in a medical malpractice action to state a viable cause of action under the doctrine. But none of Defendants' arguments support a deviation from this Court's established jurisprudence regarding the doctrine of *res ipsa loquitur*. This Court should affirm the lower court's well-reasoned judgment because it correctly applies this Court's precedent and protects consistency and rationality in the application of the *res ipsa loquitur* doctrine.

This case undeniably presents a "textbook" scenario to which the doctrine of *res ipsa loquitur* was intended to apply. As this Court has noted, the phrase *res ipsa loquitur* itself originated in a 19th century English case in which a barrel of flour fell from the defendant's warehouse and onto the head of the plaintiff who was walking beneath the window. *Byrne v. Boadle* , 2 H. & C. 722, 159 Eng.Rep. 299 (Exch. 1863); *Imig v. Beck*, 115 Ill. 2d 18, 25, 503 N.E.2d 324, 328 (1986) ("The Latin phrase, *res ipsa loquitur,* which means nothing more than 'the thing speaks for itself,' is the offspring of a casual statement by Baron Pollack in the course of colloquy with counsel in *Byrne v. Boadle* (Ex. 1863), 2 H. & C. 722, 159 Eng.Rep. 299, a case in which a barrel

of flour rolled out of the defendant's warehouse window and fell on a passing pedestrian").

The English Court of Exchequer articulated this theory again two years later in *Scott v. London & St. Katherine Docks Co.*, 159 Eng. Rep. 665, 667 (Ex. 1865), quoted in *Walker v. Rumer*, 51 Ill. App. 3d 1005, 1008 (4th Dist. 1977):

> "Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care."

Plaintiff here is no different that the unfortunate pedestrian that walked under the warehouse window and encountered a stray barrel of flour, and this Court has cultivated jurisprudence since 1965 refining application of the doctrine in these appropriate scenarios. The appellate court correctly relied upon the relevant precedents of this Court to reach the necessary conclusion that this matter should proceed to a trial on the issue of *res ipsa loquitur* in light of the probability that Plaintiff's injury resulted from Defendants' negligence.

> "When a thing which caused the injury is shown to be under the control or management of the party charged with 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. [Citation.]" *Gatlin v. Ruder*, 137 Ill. 2d 284, 294-95 (1990), quoting *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446, 448–50 (1965).

See also *Walker v. Rumer*, 72 Ill. 2d 495, 500 (1978) (the determination which must be made as a matter of law is whether "the occurrence is such as in the ordinary course of things would not have happened" if the party exercising control or management had exercised proper care). The "thing" that caused Plaintiff's injury here was under Defendants' control and the evidence demonstrates the injury would not have occurred absent negligence. This case fully comports with the "essence" and "purpose" of the *res ipsa loquitur* doctrine such that Plaintiff's claim should survive summary dismissal and be presented to a jury.

A. This Court Should Affirm The Appellate Court's Decision Because It Is Wholly Supported By Illinois Supreme Court Precedent That Unequivocally Dictates That The Claim Of *Res Ipsa Loquitur* Presented In This Cause Of Action Be Decided By A Jury.

Res ipsa loquitur is a rule or "species of circumstantial evidence" related to the sufficiency of the proof presented by a plaintiff that is often pled as a separate claim and construed as a cause of action. *Gatlin*, 137 Ill. 2d at 295. To assert a claim under the doctrine of *res ipsa loquitur*, a plaintiff bears the burden of alleging that it is "more likely than not" that: (1) the occurrence that resulted in injury or death does not usually happen in the absence of negligence; and (2) the defendant was in exclusive control of the instrumentality that caused the injury. *Id.*; see also *Spidle v. Steward*, 79 Ill. 2d 1, 6-7 (1980).

Whether the *res ipsa loquitur* doctrine should apply in a particular case presents a question of law, subject to *de novo* review. *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). The appellate court reversed the trial court's decision granting summary judgment in this matter, and this Court reviews the appellate court's judgement *de novo*. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22. Summary judgment is appropriate when

"the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018); *Monson v. City of Danville*, 2018 IL 122486, ¶ 12.

In this case, Plaintiff presented the expert testimony of Dr. Bal to establish that Plaintiff's injuries probably resulted from Defendants' negligence. On appeal to this Court, Defendants present wildly disparate interpretations of the testimony presented by Dr. Bal, who testified by way of discovery deposition. It is undisputed that Dr. Bal testified that nerve palsies are a recognized complication of hip replacement surgery; that the cause of nerve palsies was often unknown; however, in this case, there was evidence of direct injury to the femoral nerve; that this type of permanent injury to the femoral nerve could not occur without a breach in the standard of care; that such an injury could not occur absent negligence; that Dr. Bal believed the injury was caused by placement of the retractor; the location of the incision contributed to the injury; and that the surgical notes did not demonstrate negligent conduct in making the incision or inserting the retractor. *Johnson v Armstrong*, 2021 IL App (4th) 210038, ¶¶17-19. There is no dispute that Defendant Armstrong placed the retractors and Defendant Harden held the retractors during the surgery. *Id*. at ¶¶13- 14.

Defendant Armstrong insists that Plaintiff's *res ipsa loquitur* claim must fail because Dr. Bal did not identify with specificity the nature of the negligent conduct committed by either defendant and confirmed that there was no evidence that the location of the incision, standing alone, was below the standard of care or that placement of the retractor was improper. Conversely, Defendant Harden asserts that Dr. Bal's testimony

unequivocally sets forth a theory of traditional negligence, therefore barring utilization of the doctrine of *res ipsa locquitor*. Defendant Harden further asserts that Plaintiff presented no expert testimony that demonstrated that she was negligent, and the negligence alleged cannot be readily understood by the average layperson, thus providing another reason why Plaintiff's claim should have been summarily dismissed.

In *Gatlin*, *Spidle*, and *Heastie*, this Court cautioned against the very approach to *res ipsa loquitur* that is urged by Defendants in this case—relying on absolute and conclusive proof and rigid standards that attempt to bar injured plaintiffs from their day in court. Instead, this Court advocated for a flexible approach that "insure[d] that relevant evidence was produced at trial" and combatted "the reluctance of medical personnel to testify against one another." *Spidle*, 79 Ill. 2d at 6; *Gatlin*, 137 Ill. 2d at 300 ("Gatlin presented evidence that may have caused his injuries, such evidence did not conclusively establish the cause of those injuries. ***The trier of fact has to decide what facts and opinions to believe"); *Heastie*, 226 Ill. 2d at 532 ("the requisite control is not a rigid standard, but a flexible one in which the key question where there probable cause of the plaintiff's injury was one which the defendant was under a duty to the plaintiff to anticipate or guard against").

Notably, in *Gatlin*, *supra*, this Court unequivocally declared that "*Spidle*, *Dyback* and *Metz* reflect *the correct analysis* of *res ipsa loquitur*. Therefore, we will apply the *res ipsa loquitur* principles set forth in *Spidle*, *Dyback* and *Metz* to the case at bar." (Emphasis added). *Gatlin*, 137 Ill. 2d at 296. This Court need not look any further than its own precedent to resolve the issues presented in this case. In fact, it should heed its

own directive in *Gatlin* and apply those "*correct*" principles that were followed by the appellate court and dictate affirmance of its decision.

In *Metz, supra*, the plaintiff's home was damaged by a gas explosion resulting from a break in the gas main at its intersection with the water main that had been installed near the Plaintiff's home. Evidence was presented that the mains may have been disturbed when a contractor used a backhoe to install a service pipe in that area. *Id*. at 448. This Court stated:

> "When a thing which caused the injury is shown to be under the control or management of the party charged with 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. (*Feldman v. Chicago Railways Co.*, 289 Ill. 25, 124 N.E. 334, 6 A.L.R. 1291; *Bollenabach v. Bloomenthal*, 341 Ill. 539, 173 N.E. 670.) 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. (*Kylavos v. Polichrones*, 316 Ill.App. 444, 45 N.E.2d 99.)". *Id*. at 449.

The defendants nevertheless maintained that the element of control could not be demonstrated where the gas line was located under a public way and had been disturbed by installation of the water main years prior to the explosion. This Court concluded that the gas main was a dangerous instrumentality and it was the defendant's responsibility to maintain it at all times. *Id*. at 450. This Court also noted that because the gas main was beyond the reach of the general public, "the probability is therefore great that breaks therein are occasioned by defects in the pipes themselves or by improper utilization thereof ***both of which are subject to the complete control of the utility." *Id*. at 451.

Although *Metz* does not contemplate a medical injury, its reasoning nevertheless applies to this case. Here, there is evidence that the plaintiff experienced a permanent,

verifiable injury to his femoral nerve during surgery that was likely caused by improper utilization of the retractor, an instrumentality that Defendants were responsible for maintaining which was, at all times, subject to Defendants' complete control.

In *Dyback v. Weber,* 114 Ill. 2d 232 (1986), the plaintiff asserted her home was damaged by a fire caused by the defendants' negligence in leaving a fuel-oil heater on the premises while making repairs, and alternatively asserted that the defendants were liable under the doctrine of *res ipsa loquitur*. In support of the complaint, the plaintiff's expert conceded that he did not know the cause of the fire, but opined that the fire would not have occurred if the heater had not been left on the premises. This opinion was contradicted by evidence that an accelerant was present in the house and the opinion of another expert that the fire was caused by an unknown person. *Id*. at 236-38. This Court concluded that the plaintiff's *res ipsa loquitur* claim failed because the plaintiff did not prove that the fire would not have occurred in the absence of negligence. Further, the plaintiff's expert provided "guesses" on what may have happened, but conceded he had "no idea" on what started the fire and provided no explanation for the presence of accelerants. *Id*. at 243-44.

Dyback is instructive to the instant case because it demonstrates the strength of the evidence presented here by comparison. Dr. Bal unequivocally opined that while nerve damage was a known complication of hip replacement surgery, the type of permanent nerve damage in this case does not occur in the absence of negligence, and provided an explanation as to the likely cause of the nerve injury. Furthermore, Dr. Bal's opinion was based on years of experience and extensive research, not guesswork and conjecture. As the *Dybak* court noted when distinguishing cases where the doctrine of

res ipsa was held applicable, "there were other surrounding circumstances beyond the fire [injury] itself to support an inference of negligence." *Id*. at 245.

Here too, there were other surrounding facts, such as the utilization of the retractor, the nature of the incision, and the verifiable permanent injury to the femoral nerve that supported an inference of negligence. And while there are other explanations for why a house may catch on fire that may not be indicative of negligence, the expert testimony presented in this case made it abundantly clear that there are no explanations other than negligence for Plaintiff's injury. Plaintiff was solely in Defendants' control and had no preconditions that could have caused his injury. Accordingly, this Court's rationale in *Dybak* fully supports the appellate court's judgement.

Spidle, supra, is particularly instructive because it involves an allegation of medical malpractice. Significantly, *Spidle* was a case that arose from the Fourth District of the Appellate Court, (*Spidle v. Steward,* 68 Ill. App. 3d 134 (4th Dist. 1979)), a significant point given that Defendants here argue so vehemently that the Fourth District's opinion following *Spidle* creates a split and is contrary to established precedent in that District.

In *Spidle,* 79 Ill. 2d at 4, this Court addressed "the quantum and quality of evidentiary proof necessary to maintain medical malpractice actions based on *res ipsa loquitur* and negligence." This Court made clear that *res ipsa loquitur* was a viable theory when evidence demonstrated that the injury sustained by the plaintiff would "ordinarily" or "more probably than not have negligent antecedents." *Id*. at 8-9. The *Spidle* court found that sufficient evidence of negligence was presented where an expert testified that the complication the plaintiff experienced as a result of her hysterectomy

was "a rare and unusual complication," that one would not "normally expect," adding that it was inadvisable to perform the operation during an acute flare up of the plaintiff's pelvic inflammatory disease, and citing evidence that the defendant surgeon admitted he had operated "a little too soon." *Id*. at 8-10. This Court stated:

> "this is evidence of more than a mere unusual occurrence [citation] from which the jury could have inferred negligence under res ipsa loquitur. To be sure, some of the foregoing evidence was controverted. Nevertheless, factual disputes presenting credibility questions or requiring evidence to be weighed should not be decided by the trial judge as a matter of law." *Id*. at 10.

The instant case warrants the same conclusion. The uncontroverted facts demonstrate that Dr. Bal testified that nerve palsies such as that experienced by Plaintiff are a recognized complication of hip replacement surgery, but permanent nerve palsies such as that experienced by Plaintiff do not occur absent negligence. He further opined that Plaintiffs injury was evidence of a deviation from the standard of care and that the injury was most likely caused by movement of the retractor and the medial placement of the incision, although that conclusion would ultimately be a question of fact for the jury. (R. 659-60). His testimony, when compared to that of the expert in *Spidle* is certainly analogous, and clearly demonstrates that the *res ipsa loquitur* count of this complaint should survive summary dismissal.

Spidle, as noted, was unequivocally reaffirmed by this Court in *Gatlin*, *supra*. In *Gatlin*, the plaintiff presented evidence that the skull fracture and neurological damage sustained by her child either during or shortly after childbirth would not have occurred absent negligence. *Id*. at 296. Given the fact of the injury and the evidence that the defendants collectively had exclusive control over the child and the agency or instrumentality that caused the injury, this Court concluded that the elements of *res ipsa*

loquitur were met. *Id*. at 296-97. In doing so, the *Gatlin* court took pains to emphasize that the plaintiff did not have to eliminate all other possible causes of the infant's injury before invoking the doctrine of *res ipsa loquitur*, and rejected the idea that a plaintiff could not rely on *res ipsa loquitur* if he introduced evidence of specific negligence. *Id*. at 298-99.

Gatlin cited *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980), with approval. There, plaintiff was rendered a quadriplegic after back surgery and brought a negligence suit against several doctors and sued the hospital on a *res ipsa loquitur* theory. The hospital asserted that the plaintiff's *res ipsa loquitur* claim was barred because plaintiff introduced evidence of specific negligence. This Court disagreed, stating:

> "Defendant's theory would be accurate if the evidence introduced by plaintiff conclusively established the exact cause of his injuries. Here, the deposition of plaintiff's expert witness, Dr. Fox, reveals that, in his opinion, plaintiff's injuries were the result of the forcing of a bone 'plug' against the spinal cord after the disc was removed. This statement 'was merely the opinion of the [expert] witness, given, as such, upon a state of facts assumed to be true. It still remained for the jury to determine the facts, and the opinion was nevertheless an opinion only, whether it states what did cause the condition or what might cause it.' [Citation.] The inference of negligence raised by the doctrine of *res ipsa loquitur* does not disappear when such specific evidence is admitted. Rather, both the opinion of the expert witness as well as the inference of general negligence arising from the doctrine of *res ipsa loquitur* remain to be considered by the jury with all other evidence in the case. [Citation.] *Id*. at 397.

Metz, *Dyback*, *Spidle*, *Gatlin* and *Kolakowski* all demonstrate that the appellate court's judgment was correct and Plaintiff set forth evidence sufficient to support a claim under the doctrine of *res ipsa loquitur*. Defendants have not provided any cogent reason why this Court should abandon multiple Illinois Supreme Court precedents spanning

more than five decades and reverse the appellate court's judgment when that judgment unquestionably follows Illinois law as consistently declared by this Court.

Plaintiff's position is not at all undermined by Defendants' attempts to present conflicting and self-serving interpretations of fact and law that, if accepted by this Court, would make it impossible for any Plaintiff to successfully assert a viable claim of *res ipsa loquitur*. To be sure, Defendants Harden and Armstrong, while advancing seemingly competing theories, have both plainly invited this Court to defy its well-settled precedent in favor of a new rubric. Defendant Armstrong asserts that experts should be confined to opining that an injury is so out of the ordinary, it must have been the result of negligence, without providing more information of what *may have* caused the injury. Defendant Harden conversely asks this court to conclude that the trial court properly dismissed Plaintiff's complaint because his expert was unable to specifically identify the negligence she committed. Neither Defendant attempts to reconcile their inconsistent assertions with this Court's long-standing precedent.

Defendants' arguments amount to little more than a carefully-crafted trap for Illinois medical malpractice litigants that is based wholly on a willful misconstruction of both Illinois law and the facts presented in this case. If this Court were to rule in Defendants' favor, plaintiffs injured by acts of medical malpractice would find themselves in a "catch-22," in which they were prohibited from providing specific expert opinions on the source of defendants' negligence while simultaneously being required to provide that information to support a claim under the doctrine of *res ipsa loquitur*. Defendants should not be permitted to have it both ways. These positions cannot be

reconciled with each other and more importantly, cannot be reconciled with this Court's precedents.

This Court need not take great pains to reconcile these contradictory positions because it has already provided malpractice litigants with a road map for pleading *res ipsa loquitur* in a manner that comports with Illinois law. In *Heastie, supra*, this Court cautioned:

> "if the specific and actual force which initiated the motion or set the instrumentality in operation were known unequivocally, leaving no reason for inference that some other unknown negligent act or force was responsible, the *res ipsa* doctrine could not even be invoked. *Id.* at 539, citing *Collgood, Inc. v. Sands Drug Co.*, 5 Ill. App. 3d 910, 916 (5th Dist. 1972); see also 65A C.J.S. *Negligence* § 759, at 555 (2000) ("The res ipsa loquitur rule aids the injured party who does not know how the specific cause of the event that results in his or her injury occurs, so if he or she knows how it comes to happen, and just what causes it * * * there is no need for the presumption or inference of the defendant's negligence as afforded by the * * * rule").

Defendants' attempts to alternatively characterize Dr. Bal's testimony as an unequivocal opinion on the nature of the injury and/or an opinion that Defendants did not commit any negligence must be rejected. Both assertions simply manipulate the facts. Dr. Bal's testimony more aptly can be described as an attempt to trace the injury to a probable specific cause that would fall within the ambit of Defendants' overall control. To that end, Dr. Bal provided testimony demonstrating that Defendants' use of the retractor was the probable cause of the uncontested permanent damage to Plaintiff's femoral nerve that would not have resulted in the absence of negligence. However, this testimony did not exclude the possibility of other causes under the control of Defendants.

The scenario presented here when Dr. Bal's testimony is viewed in an accurate context was likewise contemplated by this court in *Heastie*. This court explained:

> "while reliance on the *res ipsa* doctrine may normally require that the injury can be traced to a specific cause for which the defendant is responsible, Illinois law also authorizes use of the doctrine where it can be shown that the defendant was responsible for all reasonable causes to which the accident could be attributed." *Id*. at 538, citing *Napoli v. Hinsdale Hospital,* 213 Ill.App.3d 382, 388 (1st Dist. 1991); see also W. Keeton, Prosser & Keeton on Torts § 39, at 248 (5th ed.1984).

This Court also stated, "Illinois law does not require a plaintiff to show the actual force which initiated the motion or set the instrumentality in operation in order to rely on the *res ipsa* doctrine." *Id*. at 539.

The principles of *res ipsa loquitur* law espoused in *Heastie* are applicable to both scenarios presented to this Court. With respect to Defendant Armstrong, *Heastie* makes clear that Dr. Bal's testimony was appropriately specific to establish the probability that Defendant Armstrong's negligence was the proximate cause of Plaintiff's injury. However, Dr. Bal's testimony was equally sufficient to establish a *prima facie* case of Defendant Harden's negligence under the doctrine of *res ipsa loquitur* because it established that the negligent use of an instrumentality likely caused the injury, and the evidence established that both Defendants Armstrong and Harden had control over that instrumentality in some capacity.

B. *Taylor v. City Of Beardstown* Does Not Present a Split in Authority And Should Otherwise Not Impact This Court's Judgment Because It Is Legally And Factually Inapplicable To This Case.

The appellate court rejected Defendants' assertions that Plaintiff was obligated to present expert testimony establishing the relevant standard of care to support his *res ipsa loquitur* claim against Defendant Harden. Defendants cite *Taylor v. City of Beardstown,* 142 Ill. App. 3d 584 (4th Dist. 1986), as dispositive of this issue and maintain that the

appellate court's judgment created a split in the Fourth District when it declined to follow *Taylor*.

But the appellate court's decision in this case does not create an actual split because the portion of the *Taylor* decision the appellate court declined to follow at best amounted to *dicta*. *Taylor* simply was not intended to create a new requirement regarding proof of the standard of care in *res ipsa loquitur* cases as evidenced by this Court's subsequent decisions in *Dyback, Gatlin,* and *Heastie* addressing the issue of *res ipsa loquitur* without any acknowledgement of *Taylor* or the rule it allegedly espoused.

In *Lebron v. Gottlieb Memorial Hosp.*, 237 Ill. 2d 217, 236 (2010), this Court stated:

> "*[D]ictum* is of two types: *obiter dictum* and judicial *dictum.* [Citation]. *Obiter dictum,* frequently referred to as simply *dictum,* is a remark or opinion that a court uttered as an aside. [Citations]. *Obiter dictum* is not essential to the outcome of the case, is not an integral part of the opinion, and is generally not binding authority or precedent within the *stare decisis* rule. [Citation]. In contrast, an expression of opinion upon a point in a case argued by counsel *and deliberately passed upon by the court,* though not essential to the disposition of the cause, if *dictum,* is a judicial *dictum.* [Citation.] * * * [A] judicial *dictum* is entitled to much weight, and should be followed unless found to be erroneous. (Emphasis added.) [Citations]." (Internal quotations omitted).

There is no indication in the *Taylor* opinion that the court's comments related to proof of a standard of care was fully briefed by the parties and deliberately passed upon by the court, given that the court's discussion of this issue does not contain a single citation to authority. Furthermore, a close analysis of *Taylor* demonstrates that the appellate court's decision to deny the plaintiff's request to amend her complaint to allege *res ipsa loquitur* was not truly based on the lack of expert opinion testimony regarding the standard of care. Rather, the appellate court's opinion was written to narrowly to address the facts and circumstances presented in that case, and to prohibit gamesmanship

on the part of the plaintiff who made an eleventh-hour pleading amendment to include a claim of *res ipsa loquitur*.

The facts that led to the appellate court's decision in *Taylor* are recounted in detail here because they unquestionably prove the adage that *bad facts make bad law*. In *Taylor*, *supra*, the decedent was admitted to the defendant hospital after suffering an epileptic seizure. Two days after admission, he fell from his hospital bed and suffered an abrasion on his nose. Three days after admission, he fell from his hospital bed and broke his hip. He subsequently died more than a year later. *Id*. at 588-89.

The plaintiff alleged that the hospital, admitting physician, and nurse's aide were negligent for failing to protect the decedent by using appropriate restraints and otherwise provide him with immediate and necessary treatment. "Plaintiff also made the bald assertion that 'as a direct and proximate result of the aforesaid wrongful acts and omissions,' [decedent] died. However, there are no allegations supporting any causal link between the broken hip suffered in February 1981 and decedent's death in June of 1982." *Id*. at 589.

A day before the scheduled hearing on the defendants' motions for summary judgment, the plaintiff sought to amend the complaint to allege *res ipsa loquitur*. The court denied the motion, finding that "defendants had established the standard of care applicable to them and had shown they met that standard; plaintiff, on the other hand, had failed to show any standard of care and had failed to present any competent evidence in rebuttal." *Id.* at 589.

The appellate court noted that granting an amendment, "*particularly a late amendment*," was a matter of discretion. (Emphasis added). *Id*. at 591. It likewise noted

that "the test to be applied ***is whether the ends of justice are being furthered by allowing the amendment or rejecting it." *Id*. at 591. The appellate court set forth accurate and supported principles of law related to the doctrine of *res ipsa loquitur*, but then added another consideration related to the standard of care *without any citation to authority*. The court stated:

> "the primary focus of this matter thus centers upon whether a confused and elderly patient, who had apparently fallen from his bed previously, should have been somehow restrained, and whether any failure to restrain proximately caused the injury. Therefore, we must be concerned with the standard of care in such situations. It is undisputed that plaintiff has offered no testimony or evidence concerning the applicable standard of care. ***Again, plaintiff must prove the first element [of res ipsa loquitur] that the injury would not have occurred but for some negligent act by the defendants, by at least establishing *a minimal standard of care*." (Emphasis added). *Id*. at 593.

The *Taylor* court then explained that generally, in a medical malpractice case, a plaintiff is required to establish the standard of care through expert testimony. The court specifically stated that "a plaintiff need not rely upon the testimony of an expert and may invoke the doctrine of *res ipsa loquitur* where it is common knowledge that the injury complained of would not have occurred in the absence of negligence." *Id*. at 594. The court concluded that the facts of the instant case did not present a matter of "gross negligence" and discussed why expert testimony would be necessary to make a determination as to when physical restraint may be needed in a hospital setting. "The decision of how and when to restrain someone, albeit for their own good, is not one to be lightly made. We do not view this as normally within the everyday knowledge and experience of most lay persons. ***There also remains the question of how a patient should be restrained." *Id*.

Arguably, through this discussion, the appellate court demonstrated that it was less concerned about expert testimony regarding the standard of care, and more concerned about what conduct could create an inference of negligence under the circumstances of that case. This interpretation of the court's analysis is buttressed by its ultimate holding:

> "In sum, we hold that the trial court did not abuse its discretion in denying plaintiff leave to amend her complaint to plead *res ipsa loquitur*. Plaintiff simply did not raise anything new in her proposed amendment. She had ample time to amend to raise this issue, but failed to do so. Plaintiff only raised the doctrine the day before the hearing on all defendants' motions for summary judgment. *Nothing was introduced to raise any inference of negligence, and the mere showing of a bad result does not in all instances mean someone was negligent*." (Emphasis added). *Id*. at 594-95.

With respect to the issue of *res ipsa loquitur*, the appellate court's ultimate decision was based on a negligence assessment, not an assessment of the standard of care, and was arguably motivated by the court's disdain for plaintiff's last-minute attempt to salvage her lawsuit by alleging *res ipsa* before facing summary judgment.

In assessing the court's holding in *Taylor*, this Court must not lose sight of the fact that the plaintiff sought to amend her complaint to allege *res ipsa loquitur* on a theory that the decedent died more than a year after a fall that undoubtedly caused him to break his hip but did not appear to have any nexus to his ultimate demise. And, when viewed in the context of all of the other authority cited to and relied upon by the *Taylor* court, it is clear that its comments regarding standard of care were *dicta* and not intended to be binding precedent.

Significantly, *Taylor* was decided on March 31, 1986. Since this time, this Court has rendered decisions related to the doctrine of *res ipsa loquitur* in *Dyback*, (September 17, 1986), *Gatlin* (May 23, 1990), and *Heastie* (November 1, 2007). None of these cases

have adopted the rationale in *Taylor* that Defendants now assert is dispositive of Plaintiff's *res ipsa loquitur* claim. As previously noted, since *Taylor* was decided, this Court specifically directed in *Gatlin* that the correct *res ipsa loquitur* framework could be found in *Metz, Spidle,* and *Dyback.* And, to the extent *Taylor* actually intended to create a requirement that expert evidence of the standard of care is required in *res ipsa loquitur* cases, that decision was implicitly overruled by this Court in *Gatlin*. There, defendant Ruder asserted that the plaintiff's *res ipsa loquitur* claim must fail because plaintiff "presented no specific evidence that Ruder's actions fell below the appropriate standard of medical care." *Gatlin,* 137 Ill. 2d at 299. This Court stated:

> "Under *res ipsa loquitur,* however, Gatlin need not present such evidence. Gatlin must only present evidence on each of the *res ipsa loquitur* requirements. By proving that the injury does not ordinarily occur in the absence of negligence and that defendant had control over the instrumentality which caused plaintiff's injury, plaintiff can present circumstantial evidence from which the jury could infer negligence. (*Metz,* 32 Ill.2d at 448–49, 207 N.E.2d 305.) Consequently, Ruder's contention is without merit. *Id*. at 299-300.

It is also notable that one year after *Taylor* was decided, the Fourth District rendered its opinion in *Coffey v. Brodsky,* 165 Ill. App. 3d 14 (4th Dist. 1987), another medical malpractice case. Justice Lund was on the appellate panel for both decisions, and he concurred in *Taylor* and concurred on the *res ipsa loquitur* issue in *Coffey*. Significantly, in *Coffey*, the Fourth District relied almost entirely on the Illinois Supreme Court precedents previously advocated as dispositive herein in assessing the plaintiff's *res ipsa loquitur* claim, including *Dyback, Spidle,* and *Kolakowski*. The court gave no consideration whatsoever to expert testimony regarding the standard of care and assessed the plaintiff's claim, as this Court's precedent directs, solely within the context of evidence of negligence. It stands to reason that if *Taylor* had intended to create a new

requirement in the Fourth District, the court, and certainly Justice Lund, would have articulated it.

Defendant Armstrong boldly asserts that "[s]ince the Fourth District's Opinion in *Taylor*, the expert witness requirement has been the law in Illinois." (Armstrong Brief at 7). Interestingly, Defendant makes that statement without any acknowledgement of this Court's post-*Taylor* decisions. Further, Defendant cites to a litany of cases that allegedly espouse "the law" purportedly articulated in *Taylor*. However, of the nine cases Defendant cites, only three actually involve a *res ipsa loquitur* issue, and of those three, *none* rely upon *Taylor* to espouse the proposition that expert testimony regarding the standard of care is required.

The only other appellate case that relies on *Taylor* for that purpose is *Smith v. South Shore Hospital*, 187 Ill. App. 3d 847 (1st Dist. 1989). Significantly, like *Taylor*, the *Smith* court ultimately utilized its consideration of the standard of care to make a negligence assessment and concluded that "plaintiff has failed to demonstrate the first element under *res ipsa loquitur* which is the injury would not have occurred in the absence of negligence. This element can be established by presenting expert testimony to support the allegation, or by demonstrating that the defendants conduct was so grossly remiss that it falls within the common knowledge of laymen." *Id*. at 874.

Ultimately, Defendants' reliance on *Taylor* is little more than an academic exercise as *Taylor* has no real bearing on the instant case. It is factually and procedurally inapposite, implicitly overruled by *Gatlin*, and is ultimately a red herring that is being utilized by Defendants to create the appearance of an issue where none actually exists.

C. Plaintiff Established A *Prima Facie* Case Of *Res Ipsa Loquitur* Against Both Defendants, Was Not Required To Present Additional Expert Testimony Related To Defendant Harden, And Otherwise Properly Pleaded This Cause Of Action.

The conclusion in *Gatlin* that expert testimony is not needed to prove a violation of the standard of care where a *prima facie* case of *res ipsa loquitur* has been established defeats Defendant Harden's assertions that summary judgment is proper because there had been no expert testimony establishing that she violated the medical technician standard of care or otherwise committed any negligent act.

The expert testimony presented by Dr. Bal, combined with the nature and circumstances of the injury in this case, was sufficient to demonstrate the first element necessary to establish a claim of *res ipsa loquitur* against both Defendants. Defendant Harden asks this Court to conclude that Dr. Bal is not qualified to provide expert testimony on the standard of care of a surgical technician, but Dr. Bal was qualified to testify that Plaintiff would not have sustained the injury to his femoral muscle absent negligence, and that testimony sufficed to meet Plaintiff's burden evidentiary with respect to both defendants who managed and controlled the instrumentality causing the injury. *Gatlin*, 137 Ill. 2d at 299-300.

Although the issue presented by Defendant Harden here was not addressed head-on in *Heastie*, this Court's analysis in that case fully supports the position that Dr. Bal's testimony was sufficient to establish a viable *res ipsa loquitur* claim and no additional expert testimony was needed. In *Heastie*, the defendant argued that the plaintiff should not have been permitted to invoke the *res ipsa loquitur* doctrine because he presented the expert testimony of a doctor who could not testify to "nursing negligence," as required by *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 121–23 (2004). *Heastie*, 226 Ill. 2d at 535.

This Court concluded that the defendants' argument was flawed because:

> "it presupposes that expert medical testimony is a prerequisite to invocation of the *res ipsa* doctrine. That is clearly not the case. To be sure, the determination as to whether the *res ipsa loquitur* doctrine should apply in a given case may be based on expert testimony. Nothing in Illinois law, however, makes expert testimony a prerequisite to reliance on the doctrine in every case. That is so even in medical malpractice actions. Under section 2–1113 of the Code of Civil Procedure (735 ILCS 5/2–1113 (West 2004)), a trial court is specifically authorized to rely upon *either* 'the common knowledge of laymen, if it determines that to be adequate' *or* upon expert medical testimony. 735 ILCS 5/2–1113 (West 2004). For the reasons we have previously discussed, we believe this is one of those situations where the common knowledge of laymen is sufficient. *Id*. at 537.

Defendant Harden's argument is similarly flawed. The common knowledge of a layperson would likely not be adequate to make the initial assessment that Plaintiff's injury could not occur in the absence of negligence. But once that information is presented through the opinion of Dr. Bal with the facts demonstrating that both Defendants were in control and managed the instrumentality likely responsible for the injury, it is certainly within the common knowledge of a layperson and within the purview of the jury to determine whether one of both Defendants should be liable for Plaintiff's injury.

The appellate court best articulated this concept when it explained that if a sponge had been left in the patient following surgery instead of an injury to the femoral nerve, "it would be no defense for Harden or Armstrong to state that the undisputed evidence shows that neither of them did anything wrong or that Johnson did not present any testimony as to what a reasonably careful surgeon or surgical technician would have done. The sponge was still left in the patient, and *someone's* negligence during operation was responsible for that error." (Emphasis in original). *Johnson*, at ¶66.

This Court's decision in *Sullivan* does not compel a different conclusion. There, this Court held that a doctor could not satisfy the foundational requirements to testify to the nursing standard of care because he was not a licensed member of the nursing profession and could not establish his familiarity with nursing methods, treatments, and procedures in the defendant nurse's community. *Sullivan*, 209 Ill. 2d at 123. *Sullivan* is distinguishable in that it does not contemplate the rule in the context of *res ipsa loquitur*. Rather, *Sullivan* contemplates a scenario where a jury is being asked to consider whether a specific defendant has violated the standard of care for an overall assessment of standard negligence.

The Illinois Appellate Court has acknowledged that the requirements set forth in *Sullivan* are not applicable in certain situations that simply do not necessitate application of the rule. *Petryshyn v. Slotky*, 387 Ill. App. 3d 1112, 1120-21(4th Dist. 2008), is particularly instructive because it considers whether it is appropriate for a doctor to testify to a nurse's standard of care when they are members of the same surgical team. The Fourth District concluded that *Sullivan* is not implicated in cases in which expert testimony lies in the "providing-medical-care-continuum" such as where the expert testified regarding communication amongst surgical team members. See also *Wingo by Wingo v. Rockford Memorial Hospital*, 292 Ill. App. 3d 896, 906 (2nd Dist. 1997) ("In the instant case, the allegations of negligence *** are related to what a nurse is required to communicate to a physician ***. As such the allegations of negligence do not concern an area of medicine about which there would be a different standard between physician and another school of medicine. Furthermore, it was established that the allegations of negligence were well within the testifying doctors' knowledge and experience").

These cases, like *Sullivan*, do not address the circumstances presently before this Court, but they demonstrate that *Sullivan* is not implicated every time an expert testifies to the conduct of a practitioner in another field, and it certainly is not implicated in the instant case. This Court has long-recognized that *res ipsa loquitur* constitutes circumstantial evidence of negligence that must be weighed by the jury. *Metz*, 32 Ill. 2d at 449. Defendants defy the principles of the *res ipsa loquitur* doctrine with their assertions that expert testimony is required to demonstrate the negligence of each defendant when evidence that an injury could not have occurred absent negligence is presented. Defendants' arguments blatantly attempt to divest plaintiffs of the benefits of pleading under the doctrine.

Furthermore, as already noted herein, Plaintiff not only presented sufficient evidence through the testimony of Dr. Bal that he was injured in an occurrence that ordinarily does not happen in the absence of negligence, Plaintiff also demonstrated that his injury resulted from an agency or instrumentality within Defendants' exclusive control. *Gatlin*, 137 Ill. 2d at 29. As this Court has long-held, when a patient submits himself to the care of a hospital and its staff and is rendered unconscious for the purpose of surgery, the control necessary under *res ipsa loquitur* will have been met. *Kolakowski*, 83 Ill. 2d at 396.

Further, in *Heastie*, *supra*, this Court stated that the control element can be established by facts demonstrating the instrumentality that caused the injury was within the defendant's "management and control" rather than "exclusive control." *Id*. at 531-32. In either case, the requisite control is not a rigid standard, but a flexible one in which 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." *Heastie v. Roberts*, 226 Ill. 2d 515, 532 (2007); *Gatlin*, 137 Ill. 2d at 297 (the plaintiff "only had to present enough evidence to raise an issue of fact as to whether [the defendant] had control over the instrumentality which caused [the plaintiff's] injuries").

Here, the uncontested evidence demonstrates that Defendant Armstrong controlled the retractor and its placement in Plaintiff's body during the surgery. However, the retractor was also in Defendant Harden's control during the course of the surgery as she was responsible for handling the instrumentality when it was not being used by Defendant Armstrong. These facts undeniably demonstrate that both Defendants possessed the requisite control articulated in *Heastie* and contemplated by the *res ipsa loquitur* doctrine.

Defendants nevertheless claim that Plaintiff's *res ipsa loquitur* claim is not viable because Plaintiff failed to name all possible defendants who were involved in Plaintiff's surgery. To succeed on a theory of *res ipsa loquitur*, it is true that a plaintiff must join "all parties who could have been the cause of the plaintiff's injuries ... as defendants." *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 257 (1990). Doing so ensures that "liability will surely fall on the actual wrongdoer" and negates the possibility that the defendant actually responsible for the injuries is not before the court." *Id*. In this case, Plaintiff named both individuals who managed and controlled the instrumentality that probably caused his injury and therefore complied with the requirement articulated in *Smith*.

Defendants' manufactured claims of error do not negate the conclusion that is mandated by this Court's clear and long-standing authority and the facts of this case.

Plaintiff adequately presented a claim for *res ipsa* loquitur such that summary judgment should be denied.

CONCLUSION

This *amicus curiae*, the Illinois Trial Lawyers Association, respectfully requests that this Court affirm the appellate court's judgment which strictly adhered to this Court's well-settled and clear precedent regarding the proper application of the *res ipsa loquitur* doctrine. The allegations of error raised by Defendants here are intended only to confuse the straightforward application of the *res ipsa loquitur* doctrine that has been cultivated by this court since its decision in *Metz* in 1965. *Amicus Curiae* asks this Court to reaffirm the continued vitality of its well-settled precedent related to the doctrine of *res ipsa loquitur*, affirm the decision of the appellate court, and reject each of Defendants' claims of error.

Respectfully submitted,

/s/ Keith A. Hebeisen
Keith A. Hebeisen
Yvette C. Loizon
CLIFFORD LAW OFFICES, P.C.
120 North LaSalle, Suite 3600
Chicago, IL 60602
(312) 899-9090
ycl@cliffordlaw.com
Member, *Amicus Curiae* Committee
Illinois Trial Lawyers Association

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(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 25 pages.

/s/ Keith A. Hebeisen
Keith A. Hebeisen

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

WILLIAM "WES" JOHNSON,	)	
	)	
Plaintiff-Appellee,	)	
v.	)	No. 127942 (cons. w/127944)
	)	
LUCAS ARMSTRONG, et al.,	)	
	)	
Defendants-Appellants.	)	

The undersigned, being first duly sworn, deposes and states that on April 6, 2022, there was electronically filed and served upon the Clerk of the above court the *Amicus Curiae* Brief of Illinois Trial Lawyers Association in Support of Plaintiff-Appellee. On April 6, 2022, service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

James P. Ginzkey
GINZKEY LAW OFFICE
service@ginzkeylaw.com
jim@ginzkeylaw.com

Peter W. Brandt
Kevin M. Toth
LEWIS BRISBOIS BISGAARD & SMITH LLP
pbrandt@lbbs.com
ktoth@lbbs.com

Troy A. Lundquist
Scott A. Schoen
Stacy K. Shelly
LANGHENRY, GILLEN, LUNDQUIST & JOHNSON, LLC
tlundquist@lglfirm.com
sschoen@lglfirm.com
sshelly@lglfirm.com

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CYNTHIA A. GRANT
SUPREME COURT CLERK

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Yvette C. Loizon
Yvette C. Loizon

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Yvette C. Loizon
Yvette C. Loizon