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IN THE COURT OF APPEALS OF INDIANA

Gregory Wireman,
Appellant-Plaintiff,

v.

LaPorte Hospital Co., LLC,
Appellee-Defendant.

March 13, 2023

Court of Appeals Case No. 22A-CT-2639

Appeal from the LaPorte Circuit Court

The Honorable Jeffrey L. Thorne, Special Judge

Trial Court Cause No. 46C01-2007-CT-1000

Opinion by Judge Tavitas
Chief Judge Altice and Judge Brown concur.

Tavitas, Judge.

Case Summary

[1] In the present case, someone disclosed private, embarrassing medical information regarding Gregory Wireman. Wireman sued LaPorte Hospital

Co., LLC ("the Hospital"), which owns the hospital where Wireman was diagnosed and treated, claiming that the Hospital improperly disclosed Wireman's private health information to a third party. The trial court granted summary judgment in favor of the Hospital. Wireman appeals and claims that the trial court erred by concluding, as a matter of law, that the doctrine of *res ipsa loquitur* did not apply to Wireman's claim against the Hospital. We agree with the trial court, and, accordingly, we affirm.

Issue

[2] Wireman presents one issue, which we restate as: whether the trial court erred by concluding, as a matter of law, that the doctrine of *res ipsa loquitur* does not apply to Wireman's claims against the Hospital.

Facts

[3] At the time relevant to this appeal, Wireman owned and operated an ambulance company. On January 12, 2020, Wireman felt ill and went to the LaPorte County Hospital's emergency room ("ER"), accompanied by his girlfriend, Brittany Ward, and his secretary, Crystal Back. At the ER, Wireman was prescribed oral antibiotics and released. Wireman's symptoms did not improve, so he returned to the ER the following day, again accompanied by Ward and Back. This time, Wireman was admitted to the Hospital and treated for the next eight days.

[4] While being treated in the Hospital, Wireman saw a former employee, Joey Johnson, in the hallway. Johnson, who was working as a driver for

InHealth[1]—another ambulance company—wished Wireman well. Johnson then spoke to the ER transportation scheduler, Terri Edmondson. Johnson told Edmondson that if Wireman needed to be transported, neither Johnson nor his partner could transport Wireman because Johnson and Wireman had been adversaries in a previous lawsuit. Wireman discussed his medical treatment only with Ward and Back.

[5] After Wireman was discharged, he returned to work, where one of his employees, Amy Davis, indicated that she knew Wireman's medical diagnosis. Davis's knowledge of Wireman's diagnosis shocked and embarrassed Wireman, and Wireman asked Davis where she learned this information. Davis told Wireman that she learned about Wireman's medical diagnosis from David Dunderman, an emergency medical technician who works for InHealth. Wireman directed Davis to ask Dunderman how he learned of this information. Dunderman stated that he learned about Wireman's condition from Johnson.

[6] On February 10, 2020, Wireman emailed the Hospital with his concerns that his private health information had been improperly disclosed by the Hospital. Wireman also informed the Hospital that InHealth employees Johnson and Dunderman had knowledge of Wireman's private medical information. The Hospital's Privacy Officer, Rhonda Willis, began an investigation into the matter.

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[1] The corporate name of this ambulance company is RCD, Inc., which does business as InHealth.

[7] Willis's investigation revealed that no one other than Hospital medical staff had accessed Wireman's computerized medical records, as the Hospital's computer system logs the identity of anyone who accesses a patient's medical information. Willis interviewed the medical staff who were working in the ER at the time of Willis's treatment; all indicated that they neither disclosed Wireman's medical information to anyone nor knew who did. Willis's investigation noted that the ER has a tracking board that lists certain information about ER patients, and this tracking board can be seen by those who walk through the ER. The tracking board, however, never contains information regarding a patient's medical diagnosis and could, therefore, not have been the source of Wireman's medical information.

[8] With the approval of InHealth's CEO, Willis also interviewed InHealth employees Dunderman and Johnson, whom Wireman had identified as having knowledge of his medical information. Dunderman confirmed that he learned about Wireman's diagnosis from Johnson. Johnson, in turn, stated that he learned of Wireman's diagnosis from Jim Prater and Larry Brock, both of whom work for Wireman's ambulance company. Ultimately, Willis's investigation concluded that no Hospital employee had disclosed Wireman's medical information and that the Hospital had properly protected Wireman's private medical information.

[9] On July 8, 2020, Wireman filed a complaint against the Hospital and InHealth. Count I alleged invasion of privacy by intrusion, invasion of privacy by public disclosure of private facts, intentional infliction of emotional distress, and

negligent infliction of emotional distress against InHealth, and alleged the Hospital was vicariously liable for the same. Count II alleged negligent training and supervision by the Hospital; and Count III alleged negligence by a breach of a professional duty against the Hospital. Wireman amended his complaint on May 28, 2021, to include *res ipsa loquitur* as a theory of negligence against the Hospital.

[10] The Hospital filed a motion for summary judgment on August 18, 2022, to which Wireman replied the same day. The trial court held a hearing on the motion on October 12, 2022. On the date of the hearing, Wireman voluntarily dismissed all claims against InHealth, leaving only the counts of negligent training and supervision and negligence by breach of a professional duty against the Hospital. The trial court took the matter under advisement and, on November 3, 2022, entered an order granting summary judgment in favor of the Hospital. The trial court's order provided in pertinent part:

> 8. In its Memorandum in Support of Motion for Summary Judgment, [the Hospital] takes the position that no evidence was uncovered through discovery which, in any way, identified any employee of [the Hospital] who divulged [Wireman's] protected medical information. Further, [the Hospital] contends that [Wireman], himself, divulged his protected medical information to individuals not employed by or associated with [the Hospital] to wit: [Wireman's] mother, [Rose Wireman]; his secretary, [Back]; and his girlfriend, [Ward].
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> [The Hospital] also argued that the doctrine of *res ipsa loquitur* is not applicable as [Wireman's] disclosure of his protected medical information to the aforementioned three individuals not affiliated

with [the Hospital] removed [the Hospital] from having sole and exclusive possession of that information.

9. On August 18, 2022, [Wireman] filed Plaintiff's Response in Opposition to [the Hospital]'s Motion for Summary Judgment along with Supporting Memorandum and Designation of Evidence. [Wireman] relies on the doctrine of *res ipsa loquitur* to advance [his] negligence claims against [the Hospital].

10. [Wireman] relies upon a report submitted by [the Hospital]'s investigator which stated in part ". . . more likely than not, either someone from [the Hospital's] [ER] shared the patient's diagnosis with the EMT or the EMT was at [the Hospital]'s [ER] as part of his EMT duties and somehow found out about the issue."

11. It is to be noted that said document was not an Affidavit nor sworn testimony as required to support evidence for, or in opposition to, a Motion for Summary Judgment T.R. 56(E).

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13. Because there is no designated evidence by way of Affidavit or sworn testimony which establishes the identity of the person(s) and/or the manner in which said person(s) divulged [Wireman's] protected medical information, [Wireman] relies on the theory of *res ipsa loquitur*.

14. In order to prevail under this theory, [Wireman] would need to establish two elements. The first element is that the injuring instrumentality, in this case the protected healthcare information, was within the exclusive management and control of [the Hospital] and that the type of injuring event, in this case the disclosure of said protected confidential medical information, does not occur absent some form of negligence. *Gold v. Ishak*, (1999) 720 N.E. 2d 1175.

15. [Wireman's] disclosure of his medical condition and diagnosis to the aforementioned three individuals, removed from

> [the Hospital] the exclusive management and control of said information. The fact that each of the three individuals testified in depositions, under oath, that they did not disclose this information to others does not change the fact that [the Hospital] was deprived of the exclusive management and control of the information, which is a necessary element of a claim under *res ipsa loquitur*.
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> 16. Since all of the remaining issues sound in negligence and the only theory upon which negligence can be attributed to [the Hospital] in this case is by the application of the doctrine *res ipsa loquitur*, the Court finds that the Motion for Summary Judgment filed by [the Hospital] should be granted.

Appellant's App. Vol. II pp. 17-18 (record citation omitted). Wireman now appeals.

Discussion and Decision

A. Summary Judgment

[11] When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court. *Serbon v. City of E. Chicago*, 194 N.E.3d 84, 91 (Ind. Ct. App. 2022) (citing *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021)). "Summary judgment is appropriate only 'if the designated evidentiary matter shows 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.'" *Id*. (quoting *Minser*, 170 N.E.3d at 1098, citing Ind. Trial Rule 56(C)). The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id*. (citing *Minser*, 170 N.E.3d at 1098).

Only if the moving party meets this prima facie burden does the burden then shift to the nonmoving party to show the existence of a genuine issue of material fact. *Id*. (citing *Minser*, 170 N.E.3d at 1098).

B. Res Ipsa Loquitur

[12] Wireman's complaint, as amended, alleged negligent training and supervision and negligence by breach of a professional duty against the Hospital. Because Wireman can point to no direct evidence that any Hospital employee released his private medical information, he relies upon the doctrine of *res ipsa loquitur* to establish negligence.

[13] Our Supreme Court recently summarized the law regarding the doctrine of *res ipsa loquitur* as follows:

> Res ipsa loquitur is translated from Latin as "the thing speaks for itself." The doctrine of *res ipsa loquitur* recognizes that in some situations, an occurrence is so unusual, that absent reasonable justification, the person in control of the situation should be held responsible. The central question in *res ipsa loquitur* cases is whether the incident probably resulted from the defendant's negligence rather than from some other cause. To establish this inference of negligence, a plaintiff must demonstrate: (1) that the injuring instrumentality was within the exclusive management and control of the defendant, and (2) the accident is of the type that ordinarily does not happen if those who have management or control exercise proper care. Whether the doctrine of *res ipsa loquitur* applies in any given negligence case is a mixed question of law and fact.

Griffin v. Menard, Inc., 175 N.E.3d 811, 814-15 (Ind. 2021) (citations omitted); *see also* 57B Am. Jur. 2d Negligence § 1175 (Feb. 2023 Update) ("The doctrine of res ipsa loquitur raises a presumption or inference that there was a breach of duty or lack of proper care, based on circumstantial evidence.").

[14] Although the ultimate determination of whether *res ipsa loquitur* applies in any given negligence case is a mixed question of law and fact, the question of law is whether the plaintiff's evidence includes all of the elements of *res ipsa loquitur*. *St. Mary's Ohio Valley Heart Care, LLC v. Smith*, 112 N.E.3d 1144, 1150 (Ind. Ct. App. 2018) (citing *Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005)). Thus, if there is no evidence that could establish one or more of the elements of *res ipsa loquitur*, then application of the doctrine fails as a matter of law. *See id.*; *see also Griffin v. Menard, Inc.*, 175 N.E.3d 811, 815 (Ind. 2021) (affirming trial court's grant of summary judgment in favor of defendant because *res ipsa loquitur* was inapplicable where the injuring instrumentality was not within the exclusive management and control of the defendant).

C. The Hospital Negated an Element of Res Ipsa Loquitur

[15] On appeal, Wireman argues that the trial court erred in concluding, as a matter of law, that *res ipsa loquitur* cannot apply to Wireman's claims. Wireman claims that he has eliminated any other source of the leak of his medical information and that the only possible source is the Hospital. He, thus, claims that there is a genuine issue of material fact regarding whether the Hospital had exclusive control of the injuring instrumentality that caused his injury—access to Wireman's private medical information and diagnosis. The Hospital disagrees

and argues that there were numerous other people who had access to Wireman's medical information and that the Hospital, by definition, did not have exclusive management or control of the instrumentality or circumstances that led to Wireman's injury. We agree with the Hospital.

[16] The undisputed facts establish that Wireman disclosed his medical diagnosis to three people who were not associated with the Hospital: his mother, his girlfriend, and his secretary. By definition, the Hospital did not have **exclusive** control over Wireman's private medical diagnosis. As noted by the Hospital, the element of exclusive control is required before *res ipsa loquitur* can apply. Although Wireman claims that he eliminated the possibility that someone outside the Hospital was the source of the leak of his medical information, this is not the relevant question. The relevant question is whether the Hospital had exclusive control over Wireman's medical diagnosis. It is undisputed that it did not. The doctrine of *res ipsa loquitur* is, therefore, by definition inapplicable to the present case. *See Slease v. Hughbanks*, 684 N.E.2d 496, 499 (Ind. Ct. App. 1997) ("[I]f the plaintiff cannot specifically identify any potential causes and show that they were within the **exclusive** control of the defendant, his *res ipsa loquitur* claim must fail."); *Maroules v. Jumbo, Inc.*, 452 F.3d 639, 644 (7th Cir. 2006) (applying Indiana law and citing *Slease* for the proposition that "[i]f the plaintiff cannot . . . identify any potential causes and show that they were in the **exclusive** control of the defendant, the *res ipsa loquitur* claim must fail"). Because the Hospital negated an essential element of Wireman's claims of

negligence, which are based on *res ipsa loquitur*, the trial court properly granted summary judgment in favor of the Hospital.[2]

Conclusion

[17] The undisputed evidence shows that the Hospital did not have exclusive control over the instrumentality of Wireman's alleged injuries, i.e., his private medical information and diagnosis. The doctrine of *res ipsa loquitur* is, therefore, inapplicable to Wireman's claims, and the trial court properly granted summary judgment in favor of the Hospital.

[18] Affirmed.

Altice, C.J., and Brown, J., concur.

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[2] In his reply brief, Wireman claims that there is overwhelming circumstantial evidence of the Hospital's negligence even without applying the doctrine of *res ipsa loquitur*. The Hospital has filed a motion to strike this newly-presented argument in Wireman's reply brief. It is well settled that an appellant cannot present an argument for the first time on appeal, nor can an argument be presented for the first time in a reply brief. *Lockerbie Glove Co. Town Home Owner's Ass'n, Inc. v. Indianapolis Historic Pres. Comm'n*, 194 N.E.3d 1175, 1184 (Ind. Ct. App. 2022) (noting that an argument raised for the first time in a reply brief is waived); *In re C.G.*, 157 N.E.3d 543, 547-48 (Ind. Ct. App. 2020) (noting rule that an appellant may not present an issue for the first time on appeal). Because we do not consider Wireman's newly-presented argument, we issue, contemporaneously with this opinion, an order denying as moot the Hospital's motion to strike.