MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ada Sparkman, Individually and as Personal Representative of the Estate of Robert E. Sparkman, Deceased,

Appellant-Plaintiff,

v.

Community Health Network, Inc., d/b/a Community Hospitals of Indiana, Inc.,

Appellee-Defendant.

July 7, 2023

Court of Appeals Case No. 23A-CT-146

Appeal from the Marion Superior Court

The Honorable John M.T. Chavis, II, Judge

Trial Court Cause No. 49D05-2110-CT-35087

Memorandum Decision by Judge Tavitas
Judges Vaidik and Foley concur.

Tavitas, Judge.

Case Summary

[1] Ada Sparkman, individually and as personal representative of the Estate of Robert Sparkman (collectively "Sparkman"), appeals the trial court's grant of summary judgment in favor of Community Health Network, Inc., d/b/a Community Hospitals of Indiana, Inc. ("Community Health") in Sparkman's medical malpractice claim against Community Health. Sparkman argues that: (1) the trial court abused its discretion by denying her motion to strike portions of the affidavit of one of Community Health's witnesses, and (2) the trial court erred by determining that Sparkman failed to designate expert evidence to rebut the unfavorable opinion of the Medical Review Panel and failed to show that the *res ipsa loquitur* exception to the requirement for expert testimony applied. We disagree and, accordingly, affirm.

Issues

[2] Sparkman raises two issues, which we restate as:

I. Whether the trial court abused its discretion by denying Sparkman's motion to strike portions of the affidavit of Dr. Thomas Grayson, one of the members of the Medical Review Panel, whose affidavit Community Health designated in support of its motion for summary judgment.

II. Whether the trial court erred by concluding that Sparkman failed to designate expert evidence to rebut the unfavorable opinion of the Medical Review Panel and failed to show

that the *res ipsa loquitur* exception to the requirement for expert testimony was applicable.

Facts

[3] On August 30, 2017, then sixty-four-year-old Robert Sparkman ("Robert") underwent a surgical procedure at Community North Hospital. Specifically, Dr. Deepak Guttikonda performed a procedure to replace an above-knee femoral popliteal bypass in Robert's left leg. Two electrical cautery grounding pads, known as Bovie pads, were attached to Robert's buttocks. In addition, a warming device known as a Bair Hugger was placed on Robert's upper body and set to a temperature of 109 degrees Fahrenheit.

[4] While in the recovery room after surgery, Robert complained that his back was itching and burning. Sparkman, Robert's wife, looked at his back and saw blisters. Sparkman asked a nurse why Robert's back was burned, and the nurse responded that a heating pad had been placed on Robert's back during the surgery, apparently in reference to the Bair Hugger. On the day Robert was scheduled to be released, Dr. Guttikonda saw Robert. Dr. Guttikonda had not been informed of Robert's burns and asked Robert about the burns. Dr. Guttikonda referred Robert to Dr. Howard Dash, a plastic surgeon.

[5] Dr. Dash "unroof[ed] the blisters of the burns as a lot of them ha[d] popped. . . . and the wounds were washed off and then dressed" with antibiotics. Appellant's App. Vol. II p. 112. Dr. Dash noted that Robert's lower back "show[ed] partial thickness burns in various spots. This is approximately 2% of

total body surface area. There is nothing that appears to be deeper than superficial partial-thickness burns." *Id.* Robert, however, claimed that Dr. Dash told him that the burns were second and third degree burns and described the burns as a "deep wound." *Id.* at 100, Deposition p. 67. After being released from the hospital, Robert had trouble sleeping due to the pain caused from the burns.

[6] On January 9, 2018, Robert filed a pro se proposed complaint against Community Health with the Indiana Department of Insurance. The proposed complaint alleged that a nurse practitioner placed a heating pad on Robert's back during surgery, which caused third degree burns. The complaint alleged that the burns were inflicted by "negligen[ce] and fell below the appropriate standard of care," and that Robert "suffered extreme pain, incurred medical expenses, additional treatment, related expenses, and intangible damages of a nature as to require compensation." *Id.* at 54. On August 23, 2019, Robert and Sparkman, now represented by counsel, filed an amended proposed complaint that included claims of negligence based on the theory of *res ipsa loquitur*.

[7] A Medical Review Panel ("the Panel") was formed consisting of Physician Thomas Grayson ("Dr. Grayson"), Physician Philip Rettenmaier, and Registered Nurse Courtney Kitchell. The Panel convened on June 7, 2021, and issued a unanimous opinion on July 29, 2021. The Panel's opinion concluded that "the evidence does not support the conclusion that [Community Health] failed to meet the applicable standard of care [] and that its conduct was not a factor of the resultant damages." *Id.* at 44.

[8] Undeterred by the unanimous opinion of the Panel, Sparkman[1] filed a complaint in the trial court on October 18, 2021. The complaint alleged two counts: one for a survivorship action for Robert's injuries that alleged negligence and claimed that *res ipsa loquitur* applied; and another count for damages incurred by Sparkman for nursing care, loss of consortium, and "other losses and damages accruing up to the time of [Robert]'s death." *Id*. at 30.

[9] On November 19, 2021, Community Health filed a motion for summary judgment, along with its designation of evidence. The evidence designated by Community Health included the opinion of the Panel and an affidavit of Dr. Grayson. Dr. Grayson opined in his affidavit that the burns Robert suffered were a recognized surgical complication that can occur even absent negligence. Sparkman filed her brief in opposition to summary judgment, along with her designation of evidence on December 13, 2021. Among the evidence designated by Sparkman was the deposition testimony of Dr. Grayson.

[10] On June 11, 2022, even though she had designated Dr. Grayson's deposition testimony in opposition to summary judgment, Sparkman filed a motion to strike portions of Dr. Grayson's affidavit, claiming that: (1) his opinions lacked a scientific foundation; (2) he lacked personal experience with intra-operative burns; and (3) his opinions were, therefore, inadmissible under Indiana Evidence Rule 702.

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[1] Robert passed away before the filing of the complaint in the trial court. There is no allegation that Robert's death was related to the burns he sustained during the surgery.

[11] The trial court held a summary judgment hearing on September 19, 2022. On October 4, 2022, the trial court denied Sparkman's motion to strike. The trial court's order further provided:

> Because [Sparkman] has not produced expert testimony refuting the Medical Review Panel Opinion, and because the doctrine of *res ipsa loquitur* does not serve to negate the requirement for such expert testimony, the Court finds that there is no genuine issue of material fact that there is no evidence that the medical care Community Health provided to [Robert] was below the standard of care, and no genuine issue of material fact that no substandard care by Community Health caused injury to [Robert] or damage to [Sparkman]. Therefore, Community Health is entitled to summary judgment as a matter of law.

Appellant's App. Vol. II p. 223. Sparkman now appeals.

Discussion and Decision

I. Motion to Strike

[12] Sparkman first argues that the trial court erred by denying her motion to strike portions of Dr. Grayson's affidavit, which Community Health designated in support of its motion for summary judgment. Sparkman contends that Dr. Grayson's affidavit contains expert opinions for which Community Health did not lay a proper foundation. Sparkman argues, therefore, that Dr. Grayson's opinions should have been stricken as not complying with Indiana Evidence Rule 702, which governs the admissibility of expert testimony. We decline to address this argument because, even if the trial court should have stricken the

relevant portions of Dr. Grayson's affidavit, it would not require us to reverse the trial court's judgment.

[13] In support of its motion for summary judgment, Community Health not only designated the affidavit of Dr. Grayson; it also designated the opinion of the Panel, which was unfavorable to Sparkman's claims. The opinion of the Panel, standing alone, was sufficient to establish, prima facie, that Community Health was entitled to summary judgment. *See Stafford v. Szymanowski*, 31 N.E.3d 959, 961 (Ind. 2015) ("[A] unanimous opinion of the medical review panel that the physician did not breach the applicable standard of care is ordinarily sufficient to establish prima facie evidence negating the existence of a genuine issue of material fact entitling the physician to summary judgment.").

[14] Once Community Health designated the Panel's opinion, the burden then shifted to Sparkman to designate expert medical testimony to counter the Panel's opinion, thereby creating a genuine issue of material fact for trial. *See id.* As discussed below, Sparkman did not designate any medical expert testimony to counter the opinion of the Panel, nor does the *res ipsa loquitur* exception to the requirement of expert testimony apply here. We, therefore, decline to address whether the trial court erred by denying Sparkman's motion to strike, because, even if it erred, our ultimate decision would not be altered.

II. Summary Judgment

[15] Sparkman next argues that the trial court erred by granting summary judgment in favor of Community Health. Specifically, she claims that she did designate

expert testimony to rebut the Panel's opinion and that the *res ipsa loquitur* exception to the requirement for expert testimony applies.

A. Standard of Review

[16] 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). Findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *Minser*, 170 N.E.3d at 1098 (citing *In re Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018)).[2]

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[2] Sparkman notes that the trial court appears to have adopted the proposed findings of fact and conclusions thereon that were submitted by Community Health. Although we do not encourage trial courts to adopt proposed findings of fact wholesale, "we recognize that this practice is a practical response to the need to keep the docket moving despite an enormous volume of cases and a lack of law clerks and other resources

B. Medical Malpractice

[17] A plaintiff in a medical malpractice action, like a plaintiff in any negligence action, must prove that the defendant: (1) owed the plaintiff a duty, (2) the defendant breached that duty, and (3) this breach proximately caused an injury to the plaintiff. *St. Mary's Ohio Valley Heart Care, LLC v. Smith*, 112 N.E.3d 1144, 1149 (Ind. Ct. App. 2018). Physicians are not held to a standard of perfect care; instead, the physician must exercise "the degree of skill and care ordinarily possessed and exercised by a reasonably skillful and careful practitioner under the same or similar circumstances." *Id*.

[18] In a medical malpractice claim, the unanimous opinion of the medical review panel that the medical care provider did not breach the applicable standard of care is ordinarily sufficient to establish prima facie evidence negating the existence of a genuine issue of material fact entitling the medical care provider to summary judgment. *Stafford*, 31 N.E.3d at 961. "[I]n such situations, the burden shifts to the plaintiff, who may rebut with expert medical testimony." *Id*. "Expert testimony is generally required to establish the applicable standard of care and to show a breach of that standard." *St. Mary's*, 112 N.E.3d at 1149.

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that might make the practice unnecessary." *Ind. Dep't of Ins. v. Everhart,* 960 N.E.2d 129, 140 (Ind. 2012) (citing *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 273 n.1 (Ind. 2003); *Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001)). Moreover, as noted, such findings are not binding on appeal from summary judgment.

C. Dr. Grayson's Deposition Testimony

[19] Sparkman claims that the deposition testimony of Dr. Grayson, which she designated in opposition to Community Health's motion for summary judgment, was expert testimony that rebutted the opinion of the Panel and create a genuine issue of material fact for trial. We disagree.

[20] In his deposition testimony, Dr. Grayson stated that he was of the opinion that Robert's burns were caused by the Bovie pads. He explained that, if the pads do not adhere to the skin, then the electrical current that is supposed to be diffused over a large area can become concentrated in a smaller area and produce burns. Dr. Grayson believed this happened in Robert's case. Dr. Grayson explained that, although there was no evidence that the pads were properly "adhesed" to Robert's skin, there was also no evidence that they were not properly "adhesed." Appellant's App. Vol. II p. 191, Deposition p. 60. Dr. Grayson acknowledged that that the pads could have become loose due to bodily fluids but opined that the surgery performed on Robert would not typically result in fluids in that location.

[21] More importantly, Dr. Grayson explained that burns caused by Bovie pads "can occur in the course of ordinary events," and, although they are uncommon, such burns are a "known entity among surgeons." *Id*. at 181, Deposition p. 19. He also explained that "Bovie grounding pad burns can happen regardless of doing everything we try to do to minimize the chance of that happening." *Id*. at 186, Deposition pp. 39-40. Dr. Grayson stated that he did not think that Robert's burns were "necessarily [caused] from not providing

standard . . . care," and that merely because Robert suffered burns did not mean that "something was done wrong" or incorrectly. *Id*. at 184, Deposition pp. 31-32. Indeed, we have held before that, because medicine is an "inexact science," absent proof of some negligent act, an inference of negligence will not arise simply because there is a bad result. *St. Mary's*, 112 N.E.3d at 1149.

[22] More importantly, Dr. Grayson stood by the unanimous opinion of the Panel of which he was a member and stated that "my opinion is still that the evidence does not support the conclusion that [Community Health] failed to meet the standard of care." *Id*. at 190, Deposition p. 55. Given the content of Dr. Grayson's deposition testimony, we cannot say that it created a genuine issue of material fact. To the contrary, Dr. Grayson's deposition, as a whole, confirmed the opinion of the Panel, which was unfavorable to Sparkman. Accordingly, Sparkman's designation of Dr. Grayson's deposition testimony did not rebut the Panel opinion and create a genuine issue of material fact for trial.

D. The Res Ipsa Loquitur Exception

[23] As noted above, if a medical defendant designates the opinion of a medical review panel that is unfavorable to the plaintiff, the burden then shifts to the plaintiff to rebut the opinion of the panel and create a genuine issue of material fact. And, generally, expert testimony is needed to establish the applicable standard of care and to show a breach of that standard. *St. Mary's*, 112 N.E.3d at 1149. One exception to the requirement of expert testimony to rebut the opinion of a medical review panel is the doctrine of *res ipsa loquitur*.

> 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**. . . .

Griffin v. Menard, Inc., 175 N.E.3d 811, 814-15 (Ind. 2021) (emphasis added) (citations omitted). Although the ultimate determination of whether *res ipsa loquitur* applies in a given case is a mixed question of law and fact, the question of whether the plaintiff's evidence includes all of the elements of *res ipsa loquitur* is a question of law. *St. Mary's*, 112 N.E.3d at 1150 (citing *Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005)).

[24] In *St. Mary's*, we summarized the *res ipsa loquitur* exception to the requirement for expert testimony as follows:

> In the medical malpractice context, application of this exception is limited to situations in which the defendant's conduct is so obviously substandard that a jury need not possess medical expertise in order to recognize the defendant's breach of the applicable standard of care. [E]xpert testimony is not required when the fact-finder can understand that the physician's conduct fell below the applicable standard of care without technical input from an expert witness. . . .

112 N.E.3d at 1150 (citations and internal quotations omitted).

[25] The conduct at issue here—the use and placement of Bovie pads and heating pads and the risks associated therewith—are outside the scope of a layperson's knowledge. *Cf. Boston v. GYN, Ltd.*, 785 N.E.2d 1187, 1191 (Ind. Ct. App. 2003) (holding that *res ipsa loquitur* exception was inapplicable in medical malpractice cases in which a previously placed contraceptive clip was not removed following patient's hysterectomy even though the clip no longer served a purpose because "the medical implications of leaving the [] clip in [the plaintiff's] body and the risks of searching for it during a surgical procedure are outside the scope of a layperson's knowledge."); *Tucker v. Harrison*, 973 N.E.2d 46, 57 (Ind. Ct. App. 2012) (holding that plaintiff was not entitled to jury instruction on *res ipsa loquitur* where the plaintiff's ovarian failure and subsequent infertility following a surgical procedure were not situations in which jurors could know from common experience if the conditions were obviously caused by substandard conduct).

[26] The cases in which our courts have determined that the *res ipsa loquitur* exception applied involved conduct that was so obviously substandard that it was not beyond the ken of an average juror. *See, e.g.*, *Wright v. Carter*, 622 N.E.2d 170 (Ind. 1993) (where defendant left a wire in the plaintiff's body after a biopsy); *Thomson v. St. Joseph Reg'l Med. Ctr.*, 26 N.E.3d 89 (Ind. Ct. App. 2015) (where arm-board supporting patient's arm during surgery became detached, leaving the patient's arm dangling for such a period that the patient suffered nerve injury); *Cleary v. Manning*, 884 N.E.2d 335 (Ind. Ct. App. 2008)

(where a spark from a Bovie pad ignited a fire in the blow-by oxygen system that supplied oxygen to the patient's face); *Gold v. Ishak*, 720 N.E.2d 1175 (Ind. Ct. App. 1999) (where spark from a Bovie pad ignited a fire in the patient's oxygen mask), *trans. denied*; *see also Tucker*, 973 N.E.2d at 56-57 (citing similar cases); *Ziobron v. Squires*, 907 N.E.2d 118, 126-27 (Ind. Ct. App. 2008) (same).

[27] Sparkman argues that *Cleary* and *Gold* support her claim that burn injuries caused by the improper use of Bovie pads are not so complex as to require expert testimony. We find these cases readily distinguishable. The burns in *Cleary* and *Gold* were caused when the use of Bovie pads caused fires in the patients' oxygen supplies. *See Cleary*, 884 N.E.2d at 340 ("[The plaintiff] was not required to present expert testimony that the fire was something that does not happen in the ordinary course of things if proper care is used."); *Gold*, 720 N.E.2d at 1183 ("[W]e conclude that expert testimony is not required because a fire occurring during surgery where an instrument that emits a spark is used near a source of oxygen is not beyond the realm of the lay person to understand.").

[28] At issue here, however, is not a spark that caused a fire during surgery. Obviously, fires should not happen during surgery absent negligence. Instead, at issue here is the proper placement and use of Bovie pads, which involves issues regarding electrical current, adhesion, and placement that are well beyond the knowledge of a layman. Accordingly, we cannot say that *Cleary* and *Gold* support Sparkman's argument that expert testimony was not required in the present case.

[29] Sparkman also relies on *Slease v. Hughbanks*, 684 N.E.2d 496 (Ind. Ct. App. 1997). In that case, the plaintiff, Hughbanks, suffered burns during ankle surgery and alleged that the burns resulted from malpractice. The medical review panel in that case issued a unanimous decision in favor of the medical provider. Hughbanks then sued the provider claiming medical malpractice. The provider moved for summary judgment and designated the opinion of the medical review panel in support of its motion. Hughbanks designated no expert evidence to counter the panel's opinion, and the trial court granted summary judgment in favor of the provider. On appeal, Hughbanks argued that the *res ipsa loquitur* exception to the requirement for an expert opinion applied in his case. We disagreed.

[30] As for the *res ipsa loquitur* exception, we wrote:

> Hughbanks presented no evidence concerning possible causes of the burn. Although he points to a "bovie pad" used during the surgery as a potential cause of his burn, there is nothing in the designated evidence to show that this instrument has the potential to cause a burn such as he received. At a minimum, Hughbanks was required to point to an instrument in the control of the defendant which was a probable cause of his burn. Because Hughbanks failed to present any evidence concerning this cause, he failed to sustain his burden of showing that a genuine issue of material fact existed; thus precluding summary judgment.

Id. at 500 (citations omitted).

[31] Sparkman claims that, unlike the plaintiff in *Slease*, she did designate evidence to show that the Bovie pad or the Bair hugger used during Robert's surgery could have caused Robert's burns. Be that as it may, it does not alter our conclusion that the use of Bovie pads and heating pads and the risks associated with the uses of these devices involve issues that are outside the scope of a layperson's knowledge. To the contrary, this is a case where "[a] jury cannot understand the proper tools and techniques to be used during surgery without the assistance of expert testimony." *Id.* at 499.

[32] Under these circumstances, the trial court properly determined that *res ipsa loquitur* does not apply. Sparkman, therefore, failed to rebut the Panel's opinion which established, prima facie, that Community Health was entitled to judgment as a matter of law. Accordingly, we cannot say that the trial court erred by granting summary judgment to Community Health.

Conclusion

[33] We need not consider whether the trial court erred by denying Sparkman's motion to strike portions of Dr. Grayson's affidavit because Community Health's designation of the opinion of the Panel was, by itself, sufficient to establish, prima facie, that Community Health was entitled to summary judgment. We also conclude that Sparkman failed to designate expert testimony to rebut the opinion of the Panel, which concluded that Community Health did not violate the applicable standard of care and was not the proximate cause of Robert's injuries. Lastly, the *res ipsa loquitur* exception to the

requirement for expert testimony is inapplicable. Accordingly, we affirm the judgment of the trial court.

[34] Affirmed.

Vaidik, J., and Foley, J., concur.