NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 1011

JAMES L. NELSON

VERSUS

JAMES A. FROELICH, M.D.

DATE OF JUDGMENT: APR 15 2016

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER C605012, DIVISION D, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE JANICE CLARK, JUDGE

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

Disposition: AFFIRMED.

Guidry, J. concurs in the result.

CHUTZ, J.

Plaintiff-appellant, James L. Nelson, appeals the trial court's grant of summary judgment, dismissing all of his claims against defendants-appellees, Dr. James A. Froelich and The Baton Rouge Clinic, AMC (BRC), arising out of his gallbladder removal surgery. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 6, 2009, Dr. Froelich, a general surgeon practicing at BRC, performed a laproscopic cholecystectomy (gallbladder removal surgery) with an intraoperative cholangiography (IOC).[1] Several hours after he was discharged from Our Lady of the Lake Hospital (OLOL), where the surgery had been performed, Nelson began to experience pain in his lower abdomen, stomach, and sternum. When the prescribed pain medication did not alleviate his symptoms, Nelson returned to OLOL, where the emergency room physician advised him that he was suffering from pancreatitis. Nelson was admitted for care in conjunction with the pancreatitis and released four days later.

In May 2010, Nelson requested the formation of a medical review panel, averring that Dr. Froelich had committed medical malpractice when he allowed contrast dye from the IOC to enter Nelson's pancreatic duct, resulting in pancreatitis. He also claimed that he was never informed that one of the risks of the IOC was that dye could enter into the pancreas.

In May 2011, the three-doctor medical review panel rendered a unanimous opinion, finding that the evidence did not support the conclusion Dr. Froelich failed to meet the applicable standard of care as charged in Nelson's complaint. The panel expressly found that Dr. Froelich performed the proper procedure; the IOC was warranted; and that the procedure was correctly performed without any deviations from the standard of care.

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[1] An IOC is the injection of contrast dye into the bile duct and taking of radiographic images.

The panel stated that the pancreatitis from which Nelson suffered postoperatively, "although a potential complication of an [IOC], is rarely seen," and that "[t]here are other potential causes for [Nelson's] postoperative pancreatitis which are at least equal in probability as the causative agent and may have nothing to do with the procedure itself." The panel determined that the passage of contrast dye into the pancreatic duct during the IOC was independent of the technique Dr. Froelich had employed "but [was] as a result of [Nelson's] anatomy."

On September 8, 2011, Nelson filed this lawsuit, averring that Dr. Froelich had committed medical malpractice, failed to obtain his informed consent to perform the IOC, and spoliated evidence to hide his acts and omissions of negligence. Nelson sought damages for, among other things, fear of developing cancer and costs of future medical monitoring. Nelson subsequently amended his petition to allege that that BRC is vicariously liable to him for the negligent actions of Dr. Froelich, a practicing physician with BRC.

Dr. Froelich and BRC answered the lawsuit and filed a motion for summary judgment. The trial court deferred ruling on the motion for summary judgment to allow for additional discovery.[2] Subsequently, Dr. Froelich and BRC re-urged their motion for summary judgment. After a hearing on December 8, 2014, the trial court granted the motion and dismissed Nelson's claims. This appeal followed.

DISCUSSION

Nelson attached numerous deposition excerpts and documents to his appellate brief. Most of those items were not admitted into evidence for the purpose of summary judgment and, as such, are outside the record. See La. C.C.P. art. 966F(2) (prior to its amendment by 2015 La. Acts No. 422, §1); ***Neimann v.***

[2] Defendants also filed declinatory, dilatory, and peremptory exceptions, all of which the trial court overruled.

Crosby Development Co., 1011-1337 (La. App. 1st Cir. 5/3/12), 92 So.3d 1039, 1045. Because an appellate court has no jurisdiction to receive new evidence, on appeal, we are limited to reviewing evidence in the record as set by the trial court. ***Neimann***, 92 So.3d at 1044-45.

Nelson first contends that the trial court erred in granting the motion to dismiss his claims of medical malpractice. He concedes Dr. Froelich and BRC presented sufficient evidence to demonstrate that he does not have a medical expert to testify in support of his medical malpractice. See La. C.C.P. art. 966C (prior to its amendment by 2015 La. Acts No. 422, §1). Nevertheless, Nelson maintains that the testimony of Dr. Froelich and Dr. Gerald Thomas Arbour, a gastroenterologist who treated Nelson for pancreatitis, sufficiently established factual support to satisfy his evidentiary burden of proof at trial.

Medical Malpractice Claim

Excerpts of the deposition testimony of Dr. Froelich and Dr. Arbour were introduced into evidence at the hearing. Our review of this evidence shows that nothing in Dr. Froelich's excerpted testimony provides factual support for establishing a standard of care, a breach of that standard, or that such a breach caused the pancreatitis from which Nelson suffered after the gallbladder removal surgery. And while Dr. Arbour testified that the onset of pancreatitis was a widely known and accepted complication that could occur from both laproscopic cholecystectomy and an IOC, he stated that regardless of the cause, its onset postoperatively was typically not a breach of the standard of care. Dr. Arbour also testified that he was not a general surgeon and, therefore, did not feel qualified to answer any questions about malpractice relative to Dr. Froelich, who is a general surgeon.

Based on the evidence contained in this record, Nelson failed to produce sufficient factual support to establish he can satisfy his evidentiary burden of proof

at trial. Thus, the trial court correctly granted summary judgment dismissing Nelson's medical malpractice claims against Dr. Froelich. See La. R.S. 40:1231.1A(13) (defining medical malpractice); La. R.S. 9:2794 (setting forth plaintiff's burden of proof in a malpractice action based on the negligence of a physician licensed to practice medicine/surgery); ***Schultz v. Guoth***, 2010-0343 (La. 1/19/11), 57 So.3d 1002, 1007 and 1009-10 (where medical malpractice action was not a case of obvious negligence, expert testimony was required to show physician's fault).

Nelson asserts the doctrine of *res ipsa loquitur* should be applied to find Dr. Froelich was negligent in this case. *Res ipsa loquitur* is applicable only when the injury complained of is of the type which does not ordinarily occur without negligence. ***Jackson v. Suazo-Vasquez***, 2012-1377 (La. App. 1st Cir. 4/26/13), 116 So.3d 773, 777 n.1. The expert medical evidence established it was equally as probable that Nelson's postoperative pancreatitis was not caused by the procedure but was simply as a result of his anatomy. Thus, because Nelson cannot show that he would not have suffered pancreatitis but for Dr. Froelich's negligence, *res ipsa loquitur* is inapplicable.

Fear of Cancer Claim

Nelson suggests that the bout of postoperative pancreatitis he suffered after gallbladder removal surgery placed him at greater risk for the development of pancreatic cancer. He complains that the summary judgment dismissal of his claim for this item of damages was error by the trial court.

Fear of cancer damages have been awarded without an injury or property damage. See e.g. ***Straughan v. Ahmed***, 618 So.2d 1225, 1228-29 (La. App. 5th Cir.), writ denied, 625 So.2d 1033 (La. 1993) (although physician's negligence was not the cause of plaintiff's injury, plaintiff was entitled to damages for mental

anguish where her state of mind and cancerphobia were directly caused by negligence of physician).

The record is devoid of evidence establishing that Nelson sought medical care for his fear of developing cancer or that he suffered any mental anguish as a result of a fear of developing pancreatic cancer. Additionally, through the testimony of Dr. Arbour, Dr. Froelich and BRC established that a single isolated incident of acute pancreatitis has not been medically correlated to cause pancreatic cancer. Nelson failed to rebut that showing. Thus, Nelson produced no factual support to establish either the extent of his state of mind or fear of cancer; or that any fear from which he suffered was directly caused by Dr. Froelich. The trial court's dismissal of his claim for this item of damages by summary judgment was not erroneous.

Lack of Informed Consent Claim

Asking this court to examine the two consent forms he signed before the gallbladder surgery, Nelson relies on a statement in the medical review panel's findings as well as Dr. Arbour's testimony to suggest that the dismissal of his claim for a lack of informed consent to have the IOC performed was error. In so contending, Nelson concedes that the consent form he signed on October 26, 2009, which was also signed by Dr. Froelich, advised him that pancreatitis is a known complication of a laparoscopic cholecystectomy. He contends, however, that neither the October 26, 2009 consent form, a December 6, 2009, OLOL consent form, nor any communications from Dr. Froelich advised him that pancreatitis was a known complication of an IOC.

While Nelson has accurately pointed out that the medical review panel indicated postoperative pancreatitis was a known complication of an IOC, the panel described that complication as "rarely seen." And Nelson is correct that Dr. Arbour's excerpted deposition testimony included a statement indicating that the

onset of postoperative pancreatitis was a known complication, which can occur after a patient has had an IOC, although he expressly limited his opinions to those of a gastroenterologist.

We find Nelson's showing is insufficient factual support to establish that he will be able to satisfy his evidentiary burden of proof at trial. See generally La. R.S. 40:1157.1 (providing for consent for medical treatment and methods of obtaining consent). Rare or remote risks need not be disclosed. Indeed, only a risk that is medically known and of a magnitude that would be material in a reasonable patient's decision to undergo treatment is required to be disclosed. ***Cherry v. Herques***, 623 So.2d 131, 136 (La. App. 1st Cir. 1993) (citing ***Hondroulis v. Schuhmacher***, 553 So.2d 398, 403-04 (La. 1988)). Thus, a doctor's duty is to disclose all risks which are "material."

A risk is material when a reasonable person, in what the doctor knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy. The factors contributing significance to a medical risk are the incidence of injury and the degree of the harm threatened. If the harm threatened is great, the risk may be significant even though the statistical possibility of its taking effect is very small. But if the chance of harm is slight enough, and the potential benefits of the therapy or the detriments of the existing malady great enough, the risk involved may not be significant even though the harm threatened is very great. ***Snider v. Louisiana Med. Mut. Ins. Co.***, 2013-0579 (La. 12/10/13), 130 So.3d 922, 930 n.7.

The determination of materiality is a two-step process. The first step is to define the existence and nature of the risk and the likelihood of its occurrence. Some expert testimony is necessary to establish this aspect of materiality because only a physician or other qualified expert is capable of judging what risk exists and the likelihood of occurrence. The second prong is for the trier of fact to decide

whether the probability of that type of harm is a risk that a reasonable patient would consider in deciding on treatment. ***Id.*** The focus is on whether a reasonable person in the patient's position probably would attach significance to the specific risk. This determination of materiality does not require expert testimony. Further, there must be a causal relationship between the doctor's failure to disclose material information and material risk of injury to the patient. Because of the likelihood of a patient's bias in testifying in hindsight on this hypothetical matter, the courts have adopted an objective standard of causation: whether a reasonable patient in the plaintiff's position would have consented to the treatment or procedure had the material information and risks been disclosed. ***Id.***

Based on the evidence adduced at the hearing on the motion for summary judgment, we conclude that Nelson has failed to demonstrate that the incidence of postoperative pancreatitis from undergoing an IOC during a gallbladder removal surgery was a material one that needed to be disclosed in the consent form he signed on October 26, 2009. Despite the evidence to which Nelson has pointed, nothing in this record establishes the incidence of pancreatitis as a result of undergoing an IOC or the degree of the harm to which Nelson was threatened so as to support a determination of the significance a reasonable person would attach to the risk of developing pancreatitis postoperatively in deciding whether to forgo an IOC.

Accordingly, Nelson has failed to produce factual support from which a trier of fact could define the existence and nature of the risk and the likelihood of its occurrence so as to conclude that the risk of postoperative pancreatitis after an IOC was a material one that should have been disclosed in the October 26, 2009 consent

form. Accordingly, the trial court properly dismissed Nelson's lack of informed consent claim against Dr. Froelich.[3]

Spoliation of Evidence Claim

In his last challenge of the trial court's grant of summary judgment and dismissal of his claims against Dr. Froelich, Nelson maintains that the evidence attached to his memorandum in opposition to the motion permits the trier of fact to infer that Dr. Froelich intentionally spoliated medical records. He claims that the testimony of an OLOL radiology department employee establishes that spot films taken during his IOC disappeared without any plausible explanation and that this missing evidence was the reason he was unable to obtain a medical expert to support his medical malpractice claim. Nelson also contends that Dr. Froelich immediately dictated an operative report after surgery on November 6, 2009, and intentionally failed to submit it for transmission because it would have revealed his negligent performance during the gallbladder removal surgery.

Nelson has failed to support his contentions with evidence. An OLOL radiology department employee testified to the sequence of events that resulted in an untimely production of the IOC spot films to Nelson. But importantly, there is nothing in her testimony that suggested any act or omission by Dr. Froelich that resulted in missing evidence. Similarly, the record is devoid of any evidence that a dictated-but-never-transcribed operative report was created by Dr. Froelich immediately after the November 6, 2009 surgery. Admitted into evidence were deposition testimony excerpts, which indicated that no operative report had been dictated on November 6, 2009 and that the system in place did not permit a

[3] Nelson urges that Dr. Froelich could not alternatively rely on a second form, dated November 6, 2009, and provided by OLOL, wherein Nelson expressly consented to have a laparoscopic cholecystectomy with an IOC procedure performed. Because we find that Nelson has failed to produce sufficient evidence to show that postoperative pancreatitis was a material risk of an IOC procedure such that Dr. Froelich had a duty to disclose it in the October 26, 2009 consent form, we find it unnecessary to address whether the November 6, 2009 form also shielded Dr. Froelich from liability for Nelson's lack of informed consent claim.

physician to modify a dictation after it was completed without a record of the time and substance of the modification.

Dr. Nelson has failed to rebut the showing Dr. Froelich and BRC made with evidence sufficient to establish a spoliation claim against Dr. Froelich. See ***Clavier v. Our Lady of the Lake Hosp. Inc.***, 2012-0560 (La. App. 1st Cir. 12/28/12), 112 So.3d 881, 885, writ denied, 2013-0264 (La. 3/15/13), 109 So.3d 384 (spoliation of evidence refers to an intentional destruction of evidence for purpose of depriving opposing parties of its use). Accordingly, the trial court correctly dismissed Nelson's claim for spoliation of evidence.

Vicarious Liability of BRC Claim

Having failed to assert a claim against Dr. Froelich, any viable claim of vicarious liability Nelson alleged against BRC is not supported by the evidence. See generally La. C.C. art. 2320 (masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed); see also ***Heacock v. Cook***, 45, 868 (La. App. 2nd Cir. 12/29/10), 60 So.3d 624, 631 (a medical corporation is vicariously liable for its doctor's negligent actions). The trial court's grant of summary judgment in favor of BRC and dismissal of Nelson's claims against BRC were proper in light of the lack of factual support offered by Nelson in response to the evidence Dr. Froelich and BRC introduced.

DECREE

For all these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against plaintiff-appellant, James L. Nelson.

AFFIRMED.