[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10951
Non-Argument Calendar

D.C. Docket No. 1:14-cv-00178-MW-GRJ

KEVIN HUNTOON,

Plaintiff - Appellant,

LOU ANN HUNTOON,

Plaintiff,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(January 16, 2019)

Before ROSENBAUM, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

In August 2010, Plaintiff-Appellant Kevin Huntoon had nasal surgery under anesthesia at the Malcom Randall Veterans Administration Hospital in Gainesville, Florida. When he awoke after the surgery, he noticed swelling and severe pain in his right arm, which was later diagnosed as Complex Regional Pain Syndrome ("CRPS"), also referred to in the record as Reflex Sympathetic Dystrophy. After the VA denied his administrative claim for damages, he sued the United States under the Federal Tort Claims Act ("FTCA") for the negligence of its employees involved in the surgery. The United States defended the lawsuit on grounds that Huntoon's injuries, if any, were caused by the independent-contractor surgeons for whom, Huntoon concedes, the United States is not liable.

Because Huntoon was unconscious during the surgery and did not know how he received the right-arm injury, he sought to establish negligence through the legal doctrine of *res ipsa loquitur*, which is Latin for "the thing speaks for itself." *See Marrero v. Goldsmith*, 486 So. 2d 530, 533 (Fla. 1986) (stating that the doctrine may apply where a patient submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment). Although the United States contended that *res ipsa loquitur* did not apply, the district court agreed with Huntoon, and it therefore found that Huntoon was entitled to a presumption of negligence. Nevertheless, after holding a bench trial, the district court found the United States had rebutted the presumption and had

established that there was "no negligence attributable to any employee of the United States." The court then denied Huntoon's motion for a new trial, and this appeal followed. After careful review, we affirm.

I.

Following a district court's decision after a bench trial, we review the district court's conclusions of law *de novo* and its findings of fact for clear error. *Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1254–55 (11th Cir. 2016). A factual finding is clearly erroneous when, based on a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *Id.* at 1255. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (quotation marks omitted).

The FTCA permits the United States to be sued under state law for the negligence of federal employees acting within the scope of their employment. *Zelaya v. United States*, 781 F.3d 1315, 1323 (11th Cir. 2015); *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 843 (11th Cir. 2013); *see* 28 U.S.C. § 1346(b)(1). Huntoon's claim is based on the negligence of VA employees involved in his surgery. Because Huntoon had no direct evidence of who or what caused his injury, he sought to establish negligence through the doctrine of *res ipsa loquitur*.

In Florida, the common-law doctrine of *res ipsa loquitur* "provides an injured plaintiff with a common-sense inference of negligence where direct proof of

negligence is wanting, provided certain elements consistent with negligent behavior are present." *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339, 1341 (Fla. 1978). "An injury standing alone, of course, ordinarily does not indicate negligence." *Id.* at 1342. But a plaintiff can still prove negligence if he can establish that his injury would not, in the ordinary course of events, have occurred without negligence by the defendants. *McDougald v. Perry*, 716 So. 2d 783, 785 (Fla. 1998).

Under this doctrine, "[t]he initial burden is on the plaintiff to establish that the circumstances attendant to the injury are such that, in the light of past experience, negligence is the probable cause and the defendant is the probable actor." *Goodyear Tire*, 358 So. 2d at 1342. The injured plaintiff must establish two things: (1) "the instrumentality causing his or her injury was under the exclusive control of the defendant"; and (2) "the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control." *Id.*

If the plaintiff meets his initial burden, the factfinder may infer negligence. *Marrero*, 486 So. 2d at 531 ("[T]he doctrine of *res ipsa loquitur* is merely a rule of evidence. Under it an inference may arise in aid of the proof." (quotation marks omitted)). But the doctrine does not compel an inference of negligence. *Id.* ("[*Res ipsa loquitur*] is a rule of evidence that permits, but does not compel, an inference of negligence under certain circumstances."). And the inference may be overcome if the factfinder, "taking into consideration all of the evidence in the case, . . . find[s]

that the [injury] was not due to any negligence on the part of [the defendant]." *Fla. Std. Jury Instr. (Civ.)* 402.4(e)[1]; *see Dockswell v. Bethesda Mem'l Hosp., Inc.*, 210 So. 3d 1201, 1212 (Fla. 2017) (stating that *res ipsa loquitur* "shift[s] the burden to the defendant").

II.

The district court concluded that Huntoon had met his initial burden to establish that *res ipsa loquitur* applied, despite the case being "on the margins" of that doctrine, and we do not revisit that decision because the United States does not challenge it appeal. The district court therefore applied a "presumption" of negligence in Huntoon's favor and then shifted the burden to the United States to rebut the presumption. After holding a three-day bench trial, and after reviewing the evidence and evaluating the role of the VA employees during and after the surgery, the court determined that the presumption had been rebutted and that there was no negligence attributable to any employee of the United States. Before going into the

[1] In full, standard civil jury instruction 402.4(e), concerning *res ipsa loquitur* in cases of medical negligence, reads,

> If you find that ordinarily the [incident] [injury] would not have happened without negligence, and that the (describe the item) causing the injury was in the exclusive control of (defendant) at the time it caused the injury, you may infer that (defendant) was negligent unless, taking into consideration all of the evidence in the case, you find that the (describe the event) was not due to any negligence on the part of (defendant).

court's findings in more depth, we pause to explain some necessary context about the surgery itself.

A.

For the surgery, Huntoon was positioned supine on a padded operating table. A tube for delivering intravenous fluids ("IV") was placed in the area of his right hand and wrist. His arms were positioned by his sides, palms facing inward, and padding was placed between his arms and his body, under his arms, and around the outside of his arms. After being padded, Huntoon's arms were supported by a draw sheet wrapped around his upper body from underneath, with the ends of the sheet clipped together over his chest and abdomen. The goal of these measures was to keep Huntoon in a "neutral comfortable position" for the lengthy surgery and to diffuse any pressure.

The surgery lasted approximately five and one-half hours. Dr. Robert Adelson, an independent contractor, performed the surgery along with his resident, Dr. Aaron Jaworek, also an independent contractor. During the surgery, Dr. Adelson operated from Huntoon's right side from where he reached to access Huntoon's nasal area. The resident was across from Dr. Adelson, on Huntoon's left side. The VA anesthesiologist, Dr. Richard Rogers, and his resident were located at the foot of the bed, monitoring Huntoon during the lengthy surgery. A VA nurse and a surgical technician were in the room as well. Following the surgery, Huntoon was transferred

from the operating table to a portable gurney using a plastic slider. He was then taken to the post-surgery recovery floor.

Huntoon testified that, when he awoke, he noticed that his right arm was swollen and extremely painful. He spoke with Dr. Jaworek, who said that the pain and swelling were "due to the fact that they had tucked [his] arms up underneath [his] body for the length of the surgery." Dr. Jaworek told Huntoon that, due to the length of the surgery, the tucking "had probably stretched the muscles around the rotator cuff." Huntoon was given pain medication and discharged the following day. He continued to experience severe pain, along with numbness, tingling, and burning, for at least a month after the surgery. And he still suffered some pain nearly seven years later.

B.

Based on this and other evidence, much of which was presented by the United States, the district court carefully evaluated a number of possible causes of Huntoon's CRPS injury, along with the role VA staff played in those possible causes. Specifically, the court examined the positioning and support of Huntoon's arms during the lengthy surgery; how Huntoon was wrapped during the surgery; whether Huntoon was dropped; whether his arm was jerked or pulled; whether the IV infiltrated or otherwise could have caused the injury; Huntoon's prior shoulder and back problems; and the positioning of various personnel during the surgery. The

court emphasized that, due to *res ipsa loquitur*, the United States had the burden to rebut the presumption of negligence against VA employees. Ultimately, the district court ruled out nearly all of these possible causes and found that the United States had established that Huntoon's injury was not due to any negligence on the part of VA employees.

The district court explained its findings in detail at the conclusion of the bench trial. We summarize these findings only in broad terms because Huntoon does not raise any specific issue with regard to most of the court's findings. Relying on testimony from Dr. Rogers, the anesthesiologist for the surgery, and contemporaneous notes from his resident and the nurses, the district court found that Huntoon's arms were not tucked underneath him and were appropriately positioned, padded, and supported; he "was not swaddled in such a way that it could cause a compression injury leaving the CRPS [(complex regional pain syndrome)] of the arms"; he was not dropped; his right arm was not pulled or jerked; and the IV did not infiltrate or otherwise cause the CRPS. The court also ruled out prior shoulder problems alone as the cause, finding that Huntoon had in fact suffered a shoulder injury during the surgery.

While the district ruled out as a cause Huntoon's prior shoulder problems alone, the court found that "inadvertent compression of the shoulder by the surgical personnel" during the surgery could, combined with the prior shoulder problems,

have caused Huntoon's injury. Specifically, the court found that the weight of the human body, leaning against Huntoon for the lengthy surgery and pressuring his shoulder, could have caused a compression injury of the type that Huntoon suffered. And the only two people who reasonably could have caused such an injury, the court explained, were the surgeon and his resident, both of whom were independent contractors. Accordingly, the court found that the United States had established by a preponderance of the evidence that Huntoon's injury was a compression injury caused by the surgical personnel. So to the extent negligence occurred, the court explained, it was not negligence attributable to the United States.

III.

Huntoon maintains that the district court's finding that the surgeons caused the injury to his arm is clearly erroneous because it was based solely on speculation from Dr. Rogers. He suggests that, without evidence that the surgeons caused the injury, the United States failed to rebut *res ipsa loquitur*'s presumption of negligence on the part of VA employees. We disagree.

Although the district court did make a factual finding that the surgeons caused Huntoon's injury, we need not directly address whether that finding is clearly erroneous.[2] The district court also found that there was no negligence attributable

[2] To be clear, that does not mean that we believe the finding was, in fact, clearly erroneous. The record shows that the district court carefully considered the evidence respecting the possible causes of Huntoon's shoulder injury and came to a reasonable conclusion based on that evidence.

to any VA employee, and that general finding was based on specific subsidiary findings supported by the record as a whole. Because the district court did not clearly err in determining that VA employees were not negligent, we affirm the district court's judgment on that basis.

We disagree with Huntoon's apparent contention that, due to the application of *res ipsa loquitur*, he wins if doubt remains as to the cause of his injury. In applying *res ipsa loquitur*, the district court found that Huntoon had met his initial burden "to establish that the circumstances attendant to the injury are such that, in the light of past experience, negligence is the probable cause and the defendant is the probable actor." *Goodyear Tire*, 358 So .2d at 1342. But, as the court recognized, Huntoon was under the control of both government and non-government employees when he received his injury. So there were, essentially, two categories of "probable actor[s]"—VA employees and the independent contractor surgeons—whose negligence could have caused the injury.

But the United States is liable for the negligence of only its employees. *See* 28 U.S.C. § 1346(b)(1). So it could evade liability under the FTCA by showing "that the [injury] was not due to any negligence on the part of [a VA employee]." *Fla.*

Moreover, contrary to Huntoon's assertions on appeal, the court expressly disclaimed that it was adopting Dr. Rogers's opinion, and it explained its reasons for independently arriving at that conclusion. Given the court's comprehensive and thoughtful consideration of the record, we are not left with a definite and firm conclusion that the court made a mistake.

Std. Jury Instr. (Civ.) 402.4(e). In other words, it could show that VA employees were not the "probable actor[s]." Therefore, the "crux of this appeal" is not, as Huntoon asserts, whether the United States proved that the independent-contractor surgeons caused the injury. Instead, it is whether, "taking into consideration all of the evidence in the case," the record supports the district court's finding that the injury was not due to any negligence on the part of a VA employee. *Id.* It does.

The record amply supports the district court's finding that Huntoon's injury did not result from any negligence on the part of a VA employee. The United States presented substantial evidence showing that VA employees did not perform negligently with respect to the various possible causes of Huntoon's injury. Based on that evidence and the evidence offered by Huntoon, the district court carefully evaluated the nature of Huntoon's injury, the possibilities that could have led to that injury, and what role the VA staff played in each of those possibilities. As explained above, the court found that Huntoon's arms were not tucked underneath him and were appropriately positioned, padded, and supported; he "was not swaddled in such a way that it could cause a compression injury leaving the CRPS of the arms"; he was not dropped; his right arm was not pulled or jerked; and the IV did not infiltrate or otherwise cause the CRPS. These findings essentially ruled out the possible causes in which the VA employees played a discernible role. That left other possible

causes—Huntoon's prior shoulder problems and a compression injury caused by the surgeons—that did not clearly implicate the actions of VA employees.

Huntoon does not raise any specific issue with regard to these factual findings, and we are not left with a definite and firm conviction that any of these findings are incorrect. *See Fla. Int'l Univ. Bd. of Trustees*, 830 F.3d at 1255. Certainly these carefully considered findings are based on a "permissible view[] of the evidence," and therefore are not clearly erroneous. *Id.* Under the circumstances, the United States did not need to go further and prove that the independent-contractor surgeons caused the injury. Because the United States presented substantial evidence that "the circumstances attendant to the injury [were] such that" VA employees were not the "probable actor[s]," *Goodyear Tire*, 358 So. 2d at 1342, the district court did not clearly err in finding that the United States had rebutted any presumption of negligence against it and had established that Huntoon's injury was not due to any negligence on the part of a VA employee.

IV.

For these reasons, we affirm the district court's judgment against Huntoon.

AFFIRMED.