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IN THE COURT OF APPEALS OF INDIANA

WILLIAM DELK and SANDRA DELK,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 89A04-1003-CT-208
	)	
REID HOSPITAL & HEALTH CARE SERVICES, INC., INDIANA UNIVERSITY SCHOOL OF NURSING, and THE TRUSTEES OF INDIANA UNIVERSITY,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Charles K. Todd, Jr., Judge
Cause No. 89D01-0904-CT-8

November 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

William and Sandra Delk (the "Delks") appeal the trial court's grant of summary judgment in favor of Reid Hospital & Health Care Services Inc. (the "Hospital"), the Indiana University School of Nursing, and the Trustees of Indiana University (collectively, "I.U.," and collectively with the Hospital, the "Appellees").[1] The Delks raise one issue which we revise and restate as whether the trial court erred in granting the Appellees' motion for summary judgment based upon a finding of contributory negligence. We affirm.

The relevant facts most favorable to the Delks and as designated by the parties follow. On April 10, 2005, William was admitted to the Hospital for treatment of a "[h]eadache and numbness [on the] left side of the body," a condition associated with a past stroke and which had worsened. Appellants' Appendix at 89.60, 89.69.[2] William "was noted to have 'complete' hemiplegia on his left side," and this condition rendered him to be at "high risk for falls." Id. at 144. An MRI revealed that William had not had another stroke but was experiencing a migraine headache.

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[1] On September 22, 2009, I.U. filed a motion to join the Hospital's motion for summary judgment which stated:

> Comes now the Defendants, the Indiana University School of Nursing, and the Trustees of Indiana University ("IU"), by counsel, and moves the Court for leave for IU to join in the Motion for Summary Judgment ("Motion") based upon contributory negligence filed herein by [the Hospital] and, further, IU hereby joins in and adopts as its own the brief filed by [the Hospital] in support of its Motion and, further, IU hereby adopts as its own the Designation of Evidence in Support of Its Motion for Summary Judgment . . . .

Appellees' Appendix at 1. On October 23, 2009, the trial court granted the motion.

[2] Page 89 of the appellants' appendix consists of a packet of William's health records which are paginated. The number after the decimal point refers to the page number of the packet.

On the morning of April 15, 2005, while William was still admitted to the Hospital, William had to use the restroom, and Student Nurse Rita Crider and another nurse helped William into a rolling commode chair. Because of William's size and disability, the nursing staff usually deployed "two to three people" and a "gait belt" to "pivot transfer" him safely from place to place. Id. at 131. After placing William in the chair, the other nurse whom William knew as Janette left, and Nurse Crider wheeled him over to the toilet. After positioning the commode over the toilet, Crider left William in the bathroom and closed the door to the hallway.[3]

After about ten minutes and without summoning a nurse to assist, William "leaned forward" in an attempt to reposition himself on the commode to "take a little pressure off one area and move it to another and try[] to find an area of comfort to some degree." Id. at 120. In the process, William fell from the commode chair and to the floor, sustaining injuries including a fractured hip. William did not ask for help beforehand or try to reach the "pull cord," which he knew was located over his right shoulder and could be used to request help because he "just figured there's somebody going to be right back . . . ." Id. at 122. After hearing William scream out in pain, a nurse came to his assistance. William said that "it just happened," that "it wasn't anybody's fault," and that "I fell." Id. at 54.

[3] The designated evidence, including photographs of the bathroom area, reveals that there was a single door that functioned as the door to two separate doorways. The door may be used to close the bathroom within the patient's room itself or to close the patient's room to the hospital hallway.

On April 20, 2006, the Delks filed a proposed complaint for damages against the Hospital with the Indiana Department of Insurance alleging negligence which caused William to sustain "a fractured left hip requiring a left hip replacement." Id. at 41. On October 17, 2007, the Hospital deposed William. At the deposition, William at one point stated:

> I've had this fear when – you know, of when I've been – even in my wheelchair, you have this fear of falling if you lean too far.
>
> I remember when I'm in my room at the nursing home that I – an older gentleman was going down the hall, and he fell forward out of his chair and went sprawling across the floor. And who rushes to help him? Helpless me. I pushed my way out there and started hollering for help, and as loud as I could holler. But I – I just remember seeing that man and hearing him wince when he hit the floor and hearing the thud. And I thought, boy, I don't want that to happen to me. . . . [T]hat picture, even today, I can think of this man who was in the room down – right down from me that – him going – getting himself, trying to hurry, whether he was going back to go to the bathroom, but trying to hurry and getting himself too far forward and, zoom, there he went.

Id. at 51-52.

On January 27, 2009, the finding of the Medical Review Panel was filed, unanimously finding that "[t]he evidence does not support the conclusion that the Defendants failed to meet the applicable standard of care as charged in the complaint." Id. at 43. On April 3, 2009, the Delks filed a complaint with jury demand in the Wayne County Superior Court against the Appellees alleging medical malpractice. On May 1, 2009, the Appellees filed a motion for summary judgment, brief in support of the motion, and designation of evidence in support of the motion alleging that "[a]s a matter of law,

[the Delks'] action is barred by the common law defense of contributory negligence." Id. at 24. On May 20, 2009, the Delks filed their brief in opposition to Appellees' motion for summary judgment. On August 27, 2009, the Delks timely filed their designation of evidence. On September 18, 2009, the Appellees filed their reply brief in support of their motion for summary judgment. On October 23, 2009, the court held a hearing on the Appellees' motion.[4]

On February 26, 2010, the court issued its order granting the Appellees' motion. The court's ten-page order stated in part:

> The Court agrees with [the Delks'] position that there are facts in dispute for which doubt must be resolved against the movant, and also that there may indeed be facts establishing negligence on the part of [Appellees], especially when reasonable inferences drawn from those facts are construed most favorably to the [Delks] as nonmovant. However, finding that there are facts in dispute, or that there are facts which establish negligence on the part of [Appellees] does not end the examination regarding summary judgment in a case involving contributory negligence. . . .
>
> The Court finds that there is no factual dispute that Mr. Delk leaned forward and shifted his weight of his own accord. In doing so, there is no factual dispute that he did not call out for help at any time before he shifted on the seat, and he did not try to reach the pull cord. Additionally, it is undisputed that Mr. Delk was aware that by shifting his weight, it posed a risk of him falling. . . . There are no facts from which one could infer that any emergency was the basis or premise for Mr. Delk shifting his weight on his own without attempting to request assistance, despite his clearly being aware of the risk of his falling in the event that he did so. . . . Mr. Delk's condition and understanding would support that a reasonable man under the same disabilities or infirmities of Mr. Delk would clearly exercise precautions other than were supported by his actions and inactions.

[4] A copy of the transcript of this hearing is not included in the record on appeal.

Also, we again note that on this date the trial court granted I.U.'s motion to join Hospital.

Id. at 13-14 (citations omitted).

The sole issue is whether the trial court erred in granting the Appellees' motion for summary judgment based upon a finding of contributory negligence.

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. "Although the non-moving party has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we 'carefully assess the trial court's decision to ensure that he was not improperly denied his day in court.'" McSwane v. Bloomington Hosp. and Healthcare Sys., 916 N.E.2d 906, 909-910 (Ind. 2009) (quoting Blake v. Calumet Const. Corp., 674 N.E.2d 167, 169 (Ind. 1996); Wisniewski v. Bennett, 716 N.E.2d 892, 894 (Ind. 1999)).

Where a trial court enters findings of fact and conclusions thereon in granting a motion for summary judgment, as the trial court did in this case, the entry of specific findings and conclusions does not alter the nature of our review. Rice v. Strunk, 670 N.E.2d 1280, 1283 (Ind. 1996). In the summary judgment context, we are not bound by the trial court's specific findings of fact and conclusions thereon. Id. They merely aid our review by providing us with a statement of reasons for the trial court's actions. Id.

The Delks argue that "[o]nly in the rarest of circumstances should summary judgment be entered on the issue of contributory negligence," and that "[a]ctions subsequent to a health care provider's negligence do not constitute contributory negligence." Appellants' Brief at 4-5 (citing Sawlani, M.D. v. Mills, 830 N.E.2d 932, 943 (Ind. Ct. App. 2005), trans. denied). The Delks argue that "[t]he hospital staff failed to implement a proper plan of management for this risk [for falls] and knew that the bathroom was unsafe because it was not designed or configured to provide safety bars-grab bars for someone with left sided paralysis," and "[w]hat happened in this case is the very thing which the [Appellees] had a duty to prevent which cannot constitute contributory negligence." Id. at 6 (citing Saunders v. County of Steuben, 693 N.E.2d 16 (Ind. 1998)). Finally, the Delks argue that "[t]he trial court's ruling is based on an incorrect assessment of one answer in Mr. Delk's deposition." Id. at 7.

The Appellees argue that it is undisputed that William "attempted to shift his weight on the bathroom commode without first calling for help" and that he was "aware of the risk of falling if he leaned forward while sitting," and therefore that "[t]here is only one inference that can reasonably be drawn from these facts: Mr. Delk was contributorily negligent, at least to some extent." Hospital's Brief at 5. The Appellees argue that "[a]bsent from the [Delks'] Brief is any reference to the two Indiana Supreme Court decisions," Funston v. School Town of Munster, 849 N.E.2d 595 (Ind. 2006), and McSwane, 916 N.E.2d 906, relied upon in the summary judgment motion and cited to extensively by the trial court in its order. Id. at 7. The Appellees argue that Sawlani is

distinguishable because William's "decision to move without asking for help was not wholly subsequent to [Appellees'] alleged negligence but instead was simultaneous and cooperating with [Appellees'] actions to produce the fall and injury." Id. at 11. The Appellees also argue that "[a]s the trial court correctly concluded, Mr. Delk was clearly aware of the risk of falling as evident by his [deposition] testimony." Id. at 13.

In McSwane, Chief Justice Shepard observed that the legislature "specifically excluded . . . qualified healthcare providers for medical negligence" from the statute adopting comparative fault negligence. McSwane, 916 N.E.2d at 911 (citing Ind. Code § 34-51-2-1(b)(1) (2008)).[5] Rather, in medical malpractice actions common law contributory negligence applies. Id. "Under the common law defense of contributory negligence, a plaintiff may not recover if guilty of any negligence, no matter how slight, that proximately contributes to the claimed injury." Funston, 849 N.E.2d at 598 n.2 (citing Bain, Adm'x v. Mattmiller, 213 Ind. 549, 556, 13 N.E.2d 712, 715 (1938)). "A plaintiff's contributory negligence operates as a complete bar to recovery." McSwane, 916 N.E.2d at 911 (citing Foster v. Owens, 844 N.E.2d 216, 221 (Ind. Ct. App. 2006), reh'g denied, trans. denied). "Contributory negligence is generally a question of fact and is not an appropriate matter for summary judgment 'if there are conflicting factual inferences.'" Funston, 849 N.E.2d at 599 (quoting Butler v. City of Peru, 733 N.E.2d

[5] Chief Justice Shepard authored the opinion in McSwane. McSwane, 916 N.E.2d at 908. Justice Boehm concurred in the result. Id. at 912. Justice Sullivan concurred in part and concurred in the result, writing that "summary judgment was appropriate on grounds that the defendants did not breach their duty of care as a matter of law and, therefore, [because] it not being necessary to address the issue of contributory negligence, expresses no view on it." Id. Justice Rucker authored a dissent that was joined by Justice Dickson. Id.

912, 917 (Ind. 2000)). "However, where the facts are undisputed and only a single inference can reasonably be drawn therefrom, the question of contributory negligence becomes one of law." Id. (quoting Jones v. Gleim, 468 N.E.2d 205, 207 (Ind. 1984)); see also Pittsburgh, etc., R.R. Co. v. Spencer, 98 Ind. 186, 1884 WL 5741 (1884); Stallings v. Dick, 139 Ind. App. 118, 124-125, 210 N.E.2d 82, 86 (1965); Jenney Elec. Mfg. Co. v. Flannery, 53 Ind. App. 397, 98 N.E. 424 (1913)).

The test for contributory negligence is whether the plaintiff's conduct "falls below the standard to which he should conform for his own protection and safety. Lack of reasonable care that an ordinary person would exercise in like or similar circumstances is the factor upon which the presence or absence of negligence depends." Id. at 598 (quoting Jones, 468 N.E.2d at 207). Where a plaintiff suffers from a mental or physical infirmity, "[o]n the issue of contributory negligence, mental condition and/or physical incapacities are factors to be considered." Memorial Hosp. of South Bend, Inc. v. Scott, 261 Ind. 27, 36-37, 300 N.E.2d 50, 56 (1973). In such scenarios, "[t]he proper test to be applied . . . is the test of a reasonable man under the same disabilities and infirmities in like circumstances." Id. at 36, 300 N.E.2d at 56; see also id. at 37, 300 N.E.2d at 57 ("[T]he conduct of the handicapped individual must be reasonable in the light of his knowledge of his infirmity, which is treated merely as one of the circumstances under which he acts.") (quoting W. PROSSER, LAW OF TORTS, pp. 151-152 (4th ed., 1971)). In so holding, the Indiana Supreme Court in Scott quoted an opinion from the Florida District Court of Appeal examining a similar issue:

> In determining whether a particular individual has been guilty of contributory negligence at a particular time, it is necessary to consider (1) the characteristics of that individual – age, intelligence, experience, knowledge, physical condition, etc. – which would affect his ability to detect dangerous conditions or appreciate the degree of hazards involved in conditions actually observed; (2) the physical facts – the extent to which the particular hazard is noticeable and the degree of alertness to avoid such a hazard reasonably called for by surrounding circumstances; and (3) the action taking place – the incidents of movement, sound and physical activities of the individual charged with contributory negligence and other persons and objects, animate and inanimate.

Id. at 38, 300 N.E.2d at 57 (quoting Isenberg v. Ortona Park Recreational Ctr., Inc., 160 So.2d 132, 134 (Fla. Dist. Ct. App. 1964)).

Here, a review of the undisputed facts and reasonable inferences reveals that William was a man afflicted with complete hemiplegia on his left-side stemming from a stroke suffered in the past and which rendered him a high risk for falls. On April 15, 2005, without summoning a nurse to assist him, William attempted to "lean forward" and reposition himself while sitting in a commode chair in order to "take a little pressure off one area and move it to another and try[] to find an area of comfort to some degree." Appellants' Appendix at 120. William did not think to ask for assistance because he "just figured there's somebody going to be right back . . . ." Id. at 122. As a consequence, William fell from the commode and fractured his left hip. Immediately after William fell, he told the nurses who came to assist that "it just happened," that "it wasn't anybody's fault," and that "I fell." Id. at 54. Also, William stated during his deposition that he had witnessed someone at his nursing home fall from a chair once because that

person had leaned too far forward and that he has "thought, boy, I don't want that to happen to me. . . ." Id. at 52.

It is certainly understandable that William, after spending over ten minutes sitting on the commode chair, would want to reposition himself in an attempt to find some comfort by relieving pressure. However, "being understandable does not equate with being completely free of all negligence." Funston, 849 N.E.2d at 600. William, as a man with physical infirmities that rendered the left side of his body numb, was alert to the dangers posed by leaning forward while seated in a chair. That the Appellees may have also been negligent is of no matter.[6]

We also do not find the Delks' other arguments and authority to be persuasive. First, the Delks cite to Sawlani and argue that "[a]ctions subsequent to a health care provider's negligence do not constitute contributory negligence." Appellants' Brief at 5. In Sawlani, this court noted that "[t]he contributory negligence must unite in producing the injury and, thus, be 'simultaneous and co-operating with the fault of the defendant . . . (and) enter into the creation of the cause of action.'" Sawlani, 830 N.E.2d at 942. The court held that the doctor could not rely on the defense of contributory negligence because the doctor's "alleged negligence was complete in September 1997. [The

[6] The dissent posits "that this is not a case where there is only one possible inference, *i.e.*, that William was negligent . . . ." *Infra*, slip op. at 16 (Bradford, J., dissenting). However, we are unpersuaded that the inference can be drawn that William's conduct was free of all negligence. Again, and as William noted in his deposition, William was aware as a person suffering from physical infirmities of the risk for falling were he to lean forward, yet he made the decision to do so without first seeking help from the nursing staff by either calling out or using the pull cord which was located over his right shoulder. Just as in Funston, it is understandable under the circumstances that William leaned forward in the chair, "[b]ut being understandable does not equate with being completely free of all negligence." Funston, 849 N.E.2d at 600.

plaintiff's] alleged contributory negligence did not occur until September 1998, when she failed to have another mammogram as directed by [the doctor]." Id. at 943. Here, by contrast, the alleged negligence of the Appellees, that William was alone in the bathroom when he fell, was occurring simultaneously to his contributorily-negligent conduct leading to his fall and therefore united in producing William's injury. Thus, Sawlani is not applicable to the facts of this case.

Second, the Delks cite to Saunders for the proposition that "[w]hat happened in this case is the very thing which the [Appellees] had a duty to prevent which cannot constitute contributory negligence." Appellants' Brief at 6. The issue in Saunders concerned a suicide at a jail and the trial court's jury instruction that the suicide itself could be considered contributory negligence and a defense to negligence on the County's part in their duty to protect persons in custody from harm. Saunders, 693 N.E.2d at 18-19. The Indiana Supreme Court held that "because the instructions in this case permitted the suicide itself to constitute the defense, a new trial is required." Id. at 19. The reasoning in Saunders, however, was based upon the policy that, where there is a duty to prevent an affirmative and intentional act harmful to that person, that duty "cannot be defeated by the very action sought to be avoided." Id. (quoting Myers v. County of Lake, Ind., 30 F.3d 847, 853 (7th Cir. 1994), cert. denied 513 U.S. 1058, 115 S. Ct. 666 (1994)). Here, William did not intend to fall when he leaned forward to reposition himself. Moreover, the Court in Saunders included language limiting its holding to jail suicides. Id. ("[W]e do not exclude the possibility that contributory negligence or

incurred risk might constitute a defense if based on some act other than the suicide or attempted suicide."); see also (noting that Saunders "began by stating '[t]his case deals with the standard of liability of jailers for the suicide of a person in their custody,'" and that it "[c]learly . . . dealt with a particular type of plaintiff – an inmate who committed suicide – and a particular type of defendant – a jailer that has a specific custodial duty to its inmates").

Finally, we note that the Delks do not dispute that any negligence on William's part was a proximate cause of his injuries. "An act or omission is said to be a proximate cause of an injury if the resulting injury was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the act or omission." Funston, 849 N.E.2d at 600. We wish to highlight that "[t]here can be multiple proximate causes of a resulting event," and that a plaintiff's negligence must only be "a" proximate cause to satisfy the test for contributory negligence. Funston, 849 N.E.2d at 600. Here, as noted by I.U., "Mr. Delk leaned forward and fell from the bedside commode, causing his injuries." I.U.'s Brief at 15.

For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of the Hospital and I.U.

Affirmed.

DARDEN, J., concurs.

BRADFORD, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM DELK and SANDRA DELK,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 89A04-1003-CT-208
	)	
REID HOSPITAL & HEALTH CARE SERVICES, INC., INDIANA UNIVERSITY SCHOOL OF NURSING, and THE TRUSTEES OF INDIANA UNIVERSITY,	)	
	)	
Appellees-Defendants.	)	

BRADFORD, Judge, dissenting.

I respectfully dissent from the majority's conclusion that the trial court properly granted summary judgment in favor of the Appellees-Defendants Reid Hospital & Health Care Services, Inc., Indiana University School of Nursing, and the Trustees of Indiana University (collectively, the "Appellees") upon a finding of contributory negligence.

"Negligence consists in the failure to use due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances." *Tabor v. Continental Baking Co.*, 110 Ind.App. 633, 640, 38 N.E.2d 257, 259-60 (1941). The Indiana Supreme Court has held:

> The general rule on the issue of the plaintiff's contributory negligence is that the plaintiff must exercise that degree of care that an ordinary reasonable [person] would exercise in like or similar circumstances.... We hold that a departure from the general rule is required where the plaintiff is suffering from physical infirmities which impair [her] ability to function as an "ordinary reasonable [person]." The proper test to be applied in such cases is the test of a reasonable [person] *under the same disabilities and infirmities* in like circumstances. On the issue of contributory negligence, mental condition and/or physical incapacities are factors to be considered.

Mem'l Hosp. of South Bend, Inc. v. Scott, 261 Ind. 27, 36, 300 N.E.2d 50, 56 (1973) (omitted internal citations and emphasis in original).

It is undisputed that the Indiana Supreme Court has held that a hospital may assert an affirmative defense of contributory negligence when a plaintiff's negligence was even slightly causal. *McSwane v. Bloomington Hosp. and Healthcare Sys.*, 916 N.E.2d 906, 911 (Ind. 2009).

> A plaintiff's contributory negligence operates as a complete bar to recovery. *Foster v. Owens*, 844 N.E.2d 216, 221 (Ind. Ct. App. 2006). While a plaintiff whose own negligence may have contributed as much as 49 percent to her injury may recover under comparative fault from a defendant whose acts provided 51 percent, under contributory negligence a claimant whose own negligence was even slightly causal is barred from recovery. A court should find a plaintiff contributorily negligent if her conduct falls below the standard to which she is required to conform for her own protection. *Faulk v. Northwest Radiologists, P.C.*, 751 N.E.2d 233, 239 (Ind. Ct. App. 2001). A patient's failure to provide accurate diagnosing information or failure to seek recommended treatment are examples of such contributory negligence. *See King v. Clark*, 709 N.E.2d 1043, 1044-45 (Ind. Ct. App. 1999). *The question of contributory negligence is a question of law for the court when only one reasonable inference or conclusion can be drawn from the evidence*. *Leppert Bus Lines, Inc. v. Rayborn*, 133 Ind. App. 325, 331, 182 N.E.2d 260, 263.

McSwane, 916 N.E.2d at 911 (emphasis added). However, even where, as here, the facts at issue are undisputed, it is within the province of the jury to determine the particular inference that is to be accepted if conflicting inferences can be drawn therefrom by reasonable men or sensible impartial men. *Tabor*, 110 Ind.App. at 641, 38 N.E.2d at 260. Moreover, "[i]n negligence cases, summary judgment is 'rarely appropriate." *Rhodes v. Wright*, 805 N.E.2d 382, 387 (Ind. 2004). "This is because negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person-one best applied by a jury after hearing all of the evidence." *Id*.

Here, it is undisputed that William, who suffered from various physical ailments, sustained injuries from a fall as he leaned forward to try to adjust his position on a rolling commode chair after being left unattended in a bathroom by hospital staff for approximately ten minutes. Upon review, it is clear to me that this is not a case where there is only one possible inference, *i.e.*, that William was negligent, but rather that there are different factual inferences that could possibly be drawn from the facts presented before the trial court regarding William's condition and whether his act of leaning forward to try to adjust his position on the rolling commode chair was negligent. Thus, I believe that a fact-finder should determine whether William was negligent and that this is not a matter that can be disposed of by summary disposition.

For the foregoing reasons I respectfully dissent and would reverse the judgment of the trial court.