Received 7/20/2021 10:25:34 AM Supreme Court Middle District
Filed 07/21/2021 Supreme Court Middle District
21 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

21 MAP 2021

ELIZABETH H. LAGEMAN, by and through her Power of Attorney and Daughter, ADRIENNE LAGEMAN,
Plaintiffs/Appellees

vs.

JOHN ZEPP, IV, D.O.., ANESTHESIA ASSOCIATES OF YORK, PA., INC., YORK HOSPITAL and WELLSPAN HEALTH d/b/a YORK HOSPITAL,
Defendants/Appellants

BRIEF *AMICUS CURIAE* OF NORTH CENTRAL PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

Appeal from the Opinion and Order of the Superior Court dated July 20, 2020, Reconsideration denied September 22, 2020, at No. 756 MDA 2018, vacating/remanding the May 10, 2018 Judgment of the Court of Common Pleas of York County at Docket No. 2014-SU-000846-82

CLIFFORD A. RIEDERS, ESQUIRE
North Central Pennsylvania Trial Lawyers Association
RIEDERS, TRAVIS, HUMPHREY, WATERS & DOHRMANN
161 West Third Street
Williamsport, PA 17701
(570) 323-8711

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

1. STATEMENT OF INTEREST OF *AMICI CURIAE*

The North Central Pennsylvania Trial Lawyers Association is a non-profit organization with a membership of approximately 100 men and women of the trial bar of North Central Pennsylvania. For nearly 40 years, the Association has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The North Central Pennsylvania Trial Lawyers Association strives to promote, through advocacy, the rights of individuals and the goals of its membership in both the Commonwealth and federal courts. The organization is involved in continuing legal education, meetings of its members, interface with legislators, and development of important legal issues with the courts. No one other than the undersigned has paid in whole or in part for the preparation of the *amicus curiae* brief.

2. COUNTER-STATEMENT OF THE QUESTION INVOLVED

Whether a trial court in Pennsylvania may charge on the evidentiary inference of *res ipsa loquitur* along with permitting proof under the conventional approach to presenting evidence in a medical malpractice claim.

Answered in the positive by the lower court.

3. COUNTER-STATEMENT OF THE CASE

Amicus curiae hereby adopts the Counter-Statement of the Case in the Brief of Appellee.

4. FACTS

Amicus curiae hereby adopts the Facts of Amicus Curiae Pennsylvania Association for Justice.

5. SUMMARY OF ARGUMENT

There is no reason why a trial court in Pennsylvania cannot charge upon both *res ipsa loquitur* and permit proof under conventional rules of evidence. In this case, the question before the jury concerned proper placement of a catheter. There was evidence both of an event that does not occur except in the presence of negligence, as well as evidence as to how the misplaced catheter actually reached its destination. The jury should not be made to choose between one or the other. It would be counterproductive to have motions practice and additional complex proceedings to determine whether *res ipsa loquitur* should be presented or whether the plaintiff should be put to the burden of conventional proof. Rather, this is the function of the jury, utilizing special interrogatories.

As stated by Pennsylvania Association for Justice Amicus Curiae, it is well established that a plaintiff may proceed on alternate theories of liability, so long as there is evidence to support them. Further, law from other states supports this argument.

6. ARGUMENT

Plaintiff should be permitted to rely upon *res ipsa loquitur*, when conventional criteria are met, together with presenting proof of specific acts of negligence.

North Central Pennsylvania Trial Lawyers Association is filing this Brief due to the error that *Amicus Curiae* of the American Medical Association and the Pennsylvania Medical Society has made with respect to their argument that *Res Ipsa Loquitur* should not be "expanded to allow a plaintiff to invoke the doctrine while also presenting direct evidence of liability."

This is not an expansion, but rather is consistent with most other jurisdictions and Pennsylvania law.

Most jurisdictions allow Plaintiff to plead and prove her case in the alternative. The N.C. and Texas cases cited by the American Medical Association and the Pennsylvania Medical Society merely hold that a *res ipsa* charge is improper where all the facts are indeed known. That is not the situation in the case at bar.

Plaintiff was under anesthesia and could not observe what occurred. The evidence as to what Dr. Zepp actually performed in terms of his medical care is circumstantial.

Plaintiff's expert testified that although Dr. Zepp claimed to have placed the catheter in the vein and confirmed its presence there, and he was the only one who handled the lines, the surgeon who was called in after Ms. Lageman suffered a stroke performed an ultrasound and found it in the artery. Therefore, it is virtually impossible to credit Dr. Zepp's testimony in terms of what he claims he did. The clear inference is that the doctor actually put the catheter in the artery and either did not test to be sure that he had done this or performed the testing improperly.

Our Supreme Court has adopted California's approach to products liability (*Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014)) and California allows the jury to be charged on **both** direct negligence and *res ipsa loquitur* in product liability and medical malpractice cases. The plaintiff in *Jiminez v. Sears*, 4 Cal.3d 379, 482 P.2d 681 (Ca. 1971) was injured when the ladder he purchased from the Defendant broke. The jury was instructed on strict liability, but the trial court refused to also instruct on negligence and *res ipsa*. The jury found in favor of Defendant. The California Supreme Court granted a new trial because Plaintiff was entitled to have **both** the issue of negligence and *res ipsa* go to the jury. The court found that a jury instructed on negligence might have concluded that a ladder weakened after Plaintiff's minimal use involved an unreasonable risk of bodily harm. In that case, a *res ipsa* instruction would have allowed the jury to infer that a new ladder which was not mistreated and broke in normal usage was negligently constructed. The

Court found that application of *res ipsa* was appropriate where there was evidence of specific defects and would have aided the Plaintiff. The reasoning of the Court, similar to the Pennsylvania Supreme Court in Jones v. Montefiore Hosp., 494 Pa. 410 (1981), 431 A.2d 920 was that the jury might reasonably have concluded there was insufficient evidence of direct evidence but found that, regardless how the incident occurred, its happening alone at least supported an inference of negligence. Therefore, charging on both would **not** have been inconsistent or confusing to the jury. The California Court cited a **medical malpractice** case in support of that conclusion:

> The instruction on the doctrine cannot be said to be merely superfluous. A claim that a res ipsa loquitur instruction was merely superfluous was ably answered by Chief Justice Traynor in *Tomei* v. *Henning, supra*, 67 Cal.2d 319, 323-324. Although the case did not involve products liability but rather a defendant doctor who concededly unintentionally sutured plaintiff's ureter during a hysterectomy, the case is closely analogous, and its reasoning is directly in point. The doctor had claimed that the misplacing of the sutures and the failure to discover it was an unavoidable accident. Chief Justice Traynor for a unanimous court stated:
>
> > We do not believe . . . that a res ipsa loquitur instruction would have been superfluous in this case. It would have focused consideration on the inferences that could be drawn from the happening of the accident itself as distinct from the inferences that could be drawn from the evidence of the specific procedures available to a surgeon to avoid suturing a ureter or to discover such suturing in time to correct it before closing the wound. . . . [The] question was whether the exercise of reasonable care would have prevented [the suturing]. Properly instructed, the jury could pursue the answer to that

question along two distinct routes. It could ask what did defendant do or fail to do that might have caused the accident. Under a **res ipsa** loquitur instruction it could ask whether it is more likely than not that when such an accident occurs, the surgeon was negligent. Since the verdict was reached without the benefit of a res ipsa instruction, it establishes only that the jury could not find negligence along the first route; it could not identify any specific negligent conduct. Had the instruction been given, however, the jury might reasonably have concluded that regardless of how the accident happened or how it could have been avoided, its happening alone supported an inference of negligence.

Similarly, here a res ipsa loquitur instruction would have focused consideration on the inferences that could be drawn from the accident itself as distinct from the inferences to be drawn, if any, from the expert testimony. **In light of the conflicting evidence, the jury may have rejected plaintiff's expert's testimony and thus concluded that plaintiff failed to prove a specific defect in the design or manufacture of the ladder. Had the jury accepted plaintiff's own testimony as to his minimal use of the ladder and as to the accident and had the jury been instructed on the doctrine of res ipsa loquitur, it could reasonably find that it is more likely than not that when such an accident occurs, the manufacturer or seller of the ladder is negligent. Under the instruction, the jury could properly have concluded that the happening of the accident itself warranted an inference of negligence and that the inference had not been balanced.**

* * *

Prior cases of this court have assumed without discussing the point that a plaintiff in a products liability case could seek recovery at the same time on theories of strict liability in tort and in negligence. (*Pike* v. *Frank G. Hough Co., supra,* 2 Cal.3d 465, 474,

> 476; *Vandermark* v. *Ford Motor Co., supra*, 61 Cal.2d 256, 261; *Greenman* v. *Yuba Power Products, Inc., supra*, 59 Cal.2d 57, 60; cf. *Gherna* v. *Ford Motor Co., supra*, 246 Cal.App.2d 639, 649-651.) No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. **It is apparent that in this products liability case instructions on negligence in addition to those on strict liability might have been of great aid to the plaintiff, and we cannot agree with defendants' contention to the contrary.**
>
> *** * ***

The California Court interposed a "see" cite to Prosser, *Strict Liability to the Consumer in California*, 18 Hastings L.J. 9, 50-58. The California Court also pointed out that if the plaintiff is denied an instruction on *res ipsa loquitur,* "[t]he plaintiff is penalized for going forward and making as specific a case of negligence as possible. If he endeavors to make such a case, he runs the risk of losing the benefits of the doctrine to which the circumstances entitle him. The end result is not injurious to the defendant. He is not injured by the fact that the inference of negligence arose. The circumstances established a foundation therefore based upon probability. Indeed, he is in a better position as he has specific evidence to meet before the trier of fact that may be helpful to him." *Leet v. Union Pac. R.R. Co.*, 25 Cal.2d 605, 621, 155 P.2d 42 (Ca. 1944).

The medical malpractice decision cited above, *Tomei v. Henning*, 67 Cal. 2d 319, 431 P.2d 633, 62 Cal. Rptr. 9 (Ca. 1967) arose out of a hysterectomy during which the doctor accidentally sutured the patient's ureter, causing the patient to

have a kidney removed. All the experts agreed that damage to the ureters is a hazard of a hysterectomy that should always be present in the mind of the surgeon and that such damage can occur no matter how carefully the operation is conducted.

The California Supreme Court held that reversible error had been committed: "Since it is undisputed that defendant's conduct was responsible for the accident and that plaintiff did not contribute thereto, it was error to refuse the conditional res ipsa loquitur instruction." The Court also rejected the defendant's contention that such an instruction would have been redundant. The Court did not believe that a *res ipsa* instruction would have been superfluous. Properly instructed, the Court opined, the jury could pursue the answer to the questions presented along two distinct routes. It could ask what the defendant did or failed to do that might have caused the incident. Had the instruction been given, the jury might reasonably have concluded that regardless of how the incident occurred, or how it could have been avoided, its happening alone supported an inference of negligence. The error was prejudicial. Cal. Const., art. VI, § 13; *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]. *See also*, Tomei, 67 Cal. 2d at pp. 323-324, 431 P.2d pp. 635-636, 62 Cal. Rptr. pp. 11-12.

The Court held there was sufficient **direct evidence of the doctors' negligence** and **evidence to support a finding of negligence under the rule of**

res ipsa loquitur to support instructing the jury on **both** in *Clark v. Gibbons*, 66 Cal.2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (Ca. 1967). The evidence, independent of the doctrine of *res ipsa loquitur*, was sufficient to support the verdict against both doctors. That is the key to the case. A *res ipsa* charge was appropriate because of outstanding issues about the exact mechanism of an injury, but likewise a jury could have found that specific evidence of the injury was also, or in the alternative, sufficient.

The California Court, in weighing the probabilities concerning negligence with regard to a particular occurrence, have relied on both common knowledge and on expert testimony. *Davis* v. *Memorial Hospital*, 58 Cal.2d 815, 817 [26 Cal.Rptr. 633 376 P.2d 561]; *Siverson* v. *Weber*, 57 Cal.2d 834, 836 [22 Cal.Rptr. 337, 372 P.2d 97].

As in Pennsylvania, the doctrine of *res ipsa loquitur* is fundamentally predicated upon inferences deducible from circumstantial evidence and the weight to be given to them. *Quintal* v. *Laurel Grove Hospital*, *supra*, 62 Cal.2d 154, 163. As stated in *Fowler* v. *Seaton*, 61 Cal.2d 681, 686-687 [39 Cal.Rptr. 881, 394 P.2d 697]:

> One of the frequently quoted statements of the applicable rules is to be found in the opinion of Chief Justice Erle in *Scott* v. *London & St. Katherine Docks Co*. (1865) 3 H. & C. 596, quoted in Prosser on Torts (2d ed. 1955) section 42, at page 201, as follows:
>
> * * *

> Of course, negligence and connecting defendant with it, like other facts, can be proved by circumstantial evidence. There does not have to be an eyewitness, nor need there be direct evidence of defendant's conduct. There is no absolute requirement that the plaintiff explain how the accident happened. Res ipsa loquitur may apply where the cause of the injury is a mystery, if there is a reasonable and logical inference that defendant was negligent, and that such negligence caused the injury. (Prosser on Torts, *supra*, at p. 204.) (See also *Quintal* v. *Laurel Grove Hospital*, *supra*, 62 Cal.2d 154, 164-165.)

In the case of *Ybarra* v. *Spangard*, 25 Cal.2d 486, 489 et seq. [154 P.2d 687, 162 A.L.R. 1258], the California Court considered the application of the doctrine of *res ipsa loquitur* to cases where the injury was received by a medical patient while unconscious under the influence of anesthesia. Because of the uncertainty and difficulty of proving negligence, the court had no problem applying the doctrine of *res ipsa loquitur*. Without the aid of the doctrine, a patient who receiving permanent injuries of a serious character would be foreclosed from proof. *See*, *Maki* v. *Murray Hospital*, 91 Mont. 251 [7 P.2d 228]. *Ybarra* simply could not accept the proposition that because a patient was under anesthesia, they may not be able to prove their case and therefore *res ipsa loquitur* was applicable. *Ybarra* v. *Spangard*, *supra*, 25 Cal.2d 486, 489-491.

Ybarra noted the difficulties that the modern hospital setting of a patient, who comes under the care of many different people, to appreciate the precise

nature concerning what agencies may have coalesced to cause harm. 25 Cal.2d at pp. 491-492.

Ybarra involved an injury which may not have been received during the operation, but *Leonard* v. *Watsonville Community Hospital,* 47 Cal.2d 509, 514 et seq. [305 P.2d 36], involved an injury during the operation. This case followed *Ybarra* in holding that where the conditions of the doctrine are satisfied and the medical personnel had any control over the patient's body and instrumentalities, the inference of *res ipsa loquitur* may be applicable.

> *Ybarra* and *Leonard* established that if the conditions giving rise to the doctrine are present when the medical personnel are treated as a group acting in concert and they collectively have access to the chief evidence as to the cause of the injury but the plaintiff does not, a single doctor may not escape the inference as a matter of law merely by showing that as to him alone it is more probable than not that he was free from fault. The basis of the application of the doctrine to all defendants in the cases is that the medical personnel acted as a group and that collectively, without regard to what any one may individually know, or did, they are in a position to explain the cause and produce the chief evidence bearing on the question whereas the plaintiff is not. To avoid the inference *as a matter of law* an individual doctor must go beyond showing that it was unlikely or not probable he was negligent and must establish that he is free from negligence by evidence which cannot be rationally disbelieved. Falling short of such a showing, it remains for the jury to determine whether the inference arising from the doctrine has been rebutted as to any particular doctor.
>
> * * *
>
> The conditions giving rise to the doctrine here existed. This problem was recently discussed in *Quintal* v. *Laurel Grove Hospital, supra*, 62 Cal.2d 154, a case involving injuries during an operation. There the plaintiff suffered a cardiac arrest during the administration

> of a general anesthetic, and it was held that an instruction on conditional res ipsa loquitur was proper even though the medical experts testified that a cardiac arrest, although a rare occurrence, is a known and calculated risk in the giving of a general anesthetic and though there was no expert testimony that when cardiac arrests do occur, they are more likely than not the result of negligence. There was evidence that a method of meeting the unusual risk existed. Experts testified that when due care is used, cardiac arrests do not ordinarily occur, and, in addition, evidence was presented of fever and apprehension of the patient before administration of the anesthetic which tended to show that the cardiac arrest in that case was caused by negligence of the doctors.
>
> Thus, we recognized in *Quintal* that proof that when due care is exercised an injury rarely occurs, accompanied by other evidence indicating negligence, may be sufficient to warrant an instruction on conditional res ipsa loquitur. (See also *Ragusano* v. *Civic Center Hospital Foundation*, 199 Cal.App.2d 586, 593-594 [19 Cal.Rptr. 118].) This is particularly true where, as in *Quintal* and in the present case, the injury occurred as the result of a normal procedure such as the administration of an anesthetic, rather than from a complex operation.

Evidence that an incident rarely occurs when due care is used does not without more indicate that a particular occurrence is more likely than not the result of someone's negligence. *Siverson* v. *Weber*, *supra*, 57 Cal.2d 834, 839. In *Siverson* it was stated:

> To permit an inference of negligence under the doctrine of res ipsa loquitur solely because an uncommon complication develops would place too great a burden upon the medical profession and might result in an undesirable limitation on the use of operations or new procedures involving an inherent risk of injury even when due care is used. Where risks are inherent in an operation and an injury of a type which is rare does occur, the doctrine should not be applicable unless it can be said that, in the light of past experience, such an occurrence

> is more likely the result of negligence than some cause for which the defendant is not responsible.

57 Cal.2d at p. 839. In *Siverson*, there was no evidence of a negligent act of a type that could have caused the accident, and none of the witnesses "testified that anything was done during the operation which was contrary to good medical practice." (57 Cal.2d at pp. 838-839.) The court refused to permit an instruction on the doctrine where the only basis for it was evidence that the injury suffered by the patient rarely occurs as a result of the surgical procedure.

The Illinois Supreme Court agreed with California's approach and held it was error to only instruct a jury on direct negligence and refuse a *res ipsa* charge where there was also evidence to support a charge on *res ipsa*. The Court also rejected the arguments that such an instruction cannot be given where the medical conduct at issue was a complex matter which required expert testimony and that defendant's introduction of evidence controverting plaintiff's evidence required a denial of a *res ipsa* instruction. As the Court stated:

> We reverse as to *res ipsa loquitur* and affirm as to the jury instruction.
>
> The *res ipsa loquitur* doctrine is a species of circumstantial evidence permitting the trier of fact to draw an inference of negligence if plaintiff demonstrates that he or she was injured "(1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control, and (3) under circumstances indicating that the injury was not due to any voluntary act or neglect on the part of the plaintiff * * *." (3 J. Dooley, Modern [*6] Tort Law sec. 48.02

(1977). See also W. Prosser, Torts sec. 39 (4th ed. 1971)). Illinois recognizes this doctrine (*Metz v. Central Illinois Electric & Gas Co.* (1965), 32 Ill. 2d 446) **and its applicability to medical malpractice actions** (*Edgar County Bank & Trust Co. v. Paris Hospital, Inc.* (1974), 57 Ill. 2d 298; *Walker v. Rumer* (1978), 72 Ill. 2d 495).

Before our opinion in *Walker*, there was a misconception that *res ipsa loquitur* only applied in medical malpractice actions when the medical activity at issue was within the common knowledge of laymen. (See, *e.g., Slater v. Missionary Sisters of the Sacred Heart*, (1974), 20 Ill. App. 3d 464; *Estell v. Barringer* (1972), 3 Ill. App. 3d 455.) **The court recognized in *Walker*, however, that expert testimony could establish a negligence probability where jurors were unfamiliar with the issue.** (72 Ill. 2d 495, 499-500.) Our opinion in *Edgar County Bank & Trust Co. v. Paris Hospital, Inc.* (1974), 57 Ill. 2d 298, noted that one purpose of *res ipsa loquitur* was to ensure that relevant evidence was produced at trial. In addition, the doctrine is useful in combatting the reluctance of medical personnel to testify against one another. (*Sanders v. Frost* (1969), 112 Ill. App. 2d 234, 241; Prosser, Torts sec. 39, at 227 (4th ed. 1971).) [***5] Doctors, for example, "may be more willing to testify that the injury was of a kind which would not ordinarily occur in the exercise of due care than they would be to specify those acts which constituted negligence." Note, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, 60 Nw. U.L. Rev. 852, 865 (1966).

In accordance with the foregoing principles, **we decided in *Walker* that *res ipsa loquitur* could be an appropriate theory of liability in medical malpractice cases**. Since that issue was decided on the pleadings, we did not consider the quantity of evidence required to prove the elements of *res ipsa loquitur*. Nor did we discuss the standard by which the trial court determines, as a matter of law, the amount of evidence necessary to present a *res ipsa loquitur* theory to the jury. These issues are presented now.

The trial court must in the first instance decide whether, as a matter of law, the *res ipsa loquitur* doctrine applies at all. (*Drewick v. Interstate Terminals, Inc.* (1969), 42 Ill. 2d 345, 349.) It will not apply

unless a duty of care is owed by the defendant to the plaintiff. (See, *e.g., Hunter v. Alfina* (1969), 112 Ill. App. 2d 432.) Assuming that a duty of care exists, and in this case the issue is beyond doubt, the trial court must also determine, as a matter of law, (1) whether plaintiff's pleaded facts would ever establish the three elements of control, lack of contributory negligence and the improbability of injury without negligence, and (2) whether those elements, as pleaded, gave sufficient notice to the defendant of the *res ipsa loquitur* cause of action. See, *e.g., Kruger v. Newkirk* (1976), 40 Ill. App. 3d 581.

On a motion for directed verdict, the role of the trial judge is to view all of the evidence in a light most favorable to the nonmovant and decide whether a verdict for the nonmovant could ever stand. (*Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 510.) In *Cox v. Yellow Cab Co.* (1975), 61 Ill. 2d 416, 421, for example, this court held the doctrine inapplicable as a matter of law because the evidence introduced by the plaintiff clearly established that the defendant did not have control over the instrumentality causing the injury. (See also *Krotke v. Chicago, Rock Island & Pacific R.R. Co.* (1974), 26 Ill. App. 3d 493, 501-02; *Wimberley v. Material Service Corp.* (1973), 12 Ill. App. 3d 1051; *Collgood, Inc. v. Sands Drug Co.* (1972), 5 Ill. App. 3d 910; 3 J. Dooley, Modern Tort Law sec. 48.21 (1977).) In the instant case, since the parties agree that Mrs. Spidle was injured while under control of the defendant and was without contributory negligence, the only issue presented is whether the plaintiffs have introduced enough evidence that the injury would not have happened, ordinarily, without negligence.

* * *

Plaintiffs' counsel asked, in his first question, whether the fistula would, in the absence of negligence, ordinarily result. If the expert had answered that question "no," he would have established directly plaintiffs' initial burden with respect to the probability component of *res ipsa loquitur*. With such an answer, he would have testified, in effect, that supracervical hysterectomies resulting in fistulas more probably than not have negligent antecedents. Such a direct answer, contrary to the conclusions of the appellate court in *Grubb v. Jurgens* (1978), 58 Ill. App. 3d 163, would be sufficient

initially even though it would not have constituted proof that fistulas never happen without negligence. To hold otherwise, to require a plaintiff to conclusively prove negligence, would "obviate the purposes and policy behind shifting the burden of coming forward with the evidence to the defendant" (*Spidle v. Steward* (1979), 68 Ill. App. 3d 134, 140 (Craven, J., dissenting)), a policy this court endorsed in *Edgar County Bank & Trust Co. v. Paris Hospital, Inc.* (1974), 57 Ill. 2d 298. Most courts have agreed with this view and have required plaintiff to show only that the result "ordinarily," not always, had negligent antecedents. *Walker v. Rumer* (1978), 72 Ill. 2d 495; *Edgar County Bank & Trust Co. v. Paris Hospital, Inc.* (1974), 57 Ill. 2d 298; *Metz v. Central Illinois Electric & Gas Co.* (1965), 32 Ill. 2d 446; *People v. Morris* (1978), 60 Ill. App. 3d 1003; *Jirik v. General Mills, Inc.* (1969), 112 Ill. App. 2d 111; *Summers v. Northern Illinois Gas Co.* (1969), 117 Ill. App. 2d 125, 138; 2 Restatement (Second) of Torts sec. 328D and comments (1965).

* * *

[F]actual disputes presenting credibility questions or requiring evidence to be weighed should not be decided by the trial judge as a matter of law. As was stated in *Pedrick*: "Clearly, the constitution does, and judges should, carefully preserve the right of the parties to have a substantial factual dispute resolved by the jury, for it is here that assessment of the credibility of witnesses may well prove decisive." (*Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 504; see also *Lovejoy v. National Food Stores, Inc.* (1973), 12 Ill. App. 3d 982; *Wolfe v. Whipple* (1969), 112 Ill. App. 2d 255; *Summers v. Northern Illinois Gas Co.* (1969), 117 Ill. App. 2d 125, 138; *Traylor v. The Fair* (1968), 101 Ill. App. 2d 268, 275.) This right was not preserved in the instant case.

Drewick v. Interstate Terminals, Inc. (1969), 42 Ill. 2d 345, illustrates the preferred approach. There a steel ventilator-window sash fell from a building owned by defendants and struck the plaintiff. It was agreed that plaintiff was not contributorily negligent and that this type of accident would not ordinarily happen without negligence. But whether defendant exercised control over the window was disputed. The court examined the record as a whole and held "it

> was not error for the trial court to send the case to the jury on a *res ipsa* instruction, particularly where the jury was expressly instructed that control on defendant's part was a prerequisite to its liability." (42 Ill. 2d 345, 351.) We see no reason to treat the probability component of *res ipsa loquitur* differently from the control component. Plaintiffs have the burden of proof on each element of *res ipsa loquitur*. And we think that from this record, read as a whole, a jury could have decided that each of these elements was proved. Therefore, the *res ipsa loquitur* negligence counts should have been submitted to the jury for a decision.

The Court also relied upon the Illinois Pattern Jury Instructions, IPI Civil No. 22.01 (2d ed. 1971).

The Court also relied upon the California Supreme Court in ***Clark v. Gibbons, supra.*** In that case, **an expert testified to a low incidence of injuries when due care was used. Other evidence tended to establish specific acts of negligence. The court reasoned that this evidence, combined, presented a jury question under *res ipsa loquitur*.**

> Subsequent cases have struck *res ipsa loquitur* counts where expert testimony of a rare and unusual result was not accompanied by further evidence of negligent acts that could have caused the injury at issue. (See, *e.g., Contreras v. St. Luke's Hospital* (1978), 78 Cal. App. 3d 919, 933, 144 Cal. Rptr. 647, 656.) When the trial judge in the instant case permitted the ordinary negligence counts to go to the jury, he ruled that a verdict finding the defendant liable could stand. **The evidence sufficient to hold defendant liable under negligence specifically does not eliminate the *res ipsa loquitur* doctrine; rather, the foundation for it and the inference of negligence permitted under it were strengthened (Prosser, Torts sec. 40, at 231-32 (4th ed. 1971)), at least to the extent of presenting a jury question.** Spidle v. Steward, 79 Ill. 2d 1, 5-12, 402 N.E.2d 216, 218-221 (Ill. 1980).

(Emphases added.)

Florida's Supreme Court agreed that the presentation of evidence of direct negligence does not preclude a charge on *res ipsa* where the evidence supports the latter:

> **If a case is a proper res ipsa case in other respects, the presence of some direct evidence of negligence should not deprive the plaintiff of the res ipsa inference.** There comes a point, however, when a plaintiff can introduce enough direct evidence of negligence to dispel the need for the inference.

The Florida Supreme Court relied upon Prosser to say that while the plaintiff is bound by his "own evidence", the "proof of some specific facts does not necessarily exclude inference of others". Prosser gave an extensive example of a railroad switch. When a plaintiff goes further than showing that there was a derailment but attempts to demonstrate that the derailment was caused by an open switch, the plaintiff "destroys any inference of other causes". Prosser is relied upon for the proposition that only when there is no "inference" does *res ipsa loquitur* vanish from the case. The switch on the railroad track may have been left open by a drunken switchman, or the switch may have been thrown by an escaped convict with a grudge against the railroad. Under one set of facts, plaintiff has proven himself out of court, and in another *res ipsa* is not necessary. Where a party cannot furnish a full and complete explanation of an occurrence, plaintiff is

not deprived of the benefit of *res ipsa loquitur*. Prosser and Keaton § 40 (footnotes omitted).

As the Florida Supreme Court further stated:

> Since *Goodyear* we had occasion to decide *City of New Smyrna Beach Utilities Commission v. McWhorter*, 418 So.2d 261 (Fla. 1982). In *McWhorter* an accumulation of paper of unknown origin caused an obstruction in the city's sewer line, which in turn caused a blockage in the system and flooding of the plaintiff's house. We cited *Goodyear* and stated that the McWhorters could benefit from the doctrine of res ipsa loquitur only if they could show that: 1) direct evidence of the city's negligence was unavailable; 2) the line ordinarily would not have become obstructed and the sewage ordinarily would not have flooded their home absent negligence by the city; and 3) the main sewer line and all that entered it was under the exclusive control of the city. We found that the McWhorters failed to allege or prove any of these elements, thus precluding the giving of a res ipsa instruction. Neither *Goodyear* nor *McWhorter* stand for the proposition that by introducing "any direct evidence of negligence" the plaintiff thereby forfeits a res ipsa instruction if it is otherwise applicable. use of the term "where direct proof of negligence is wanting" should be interpreted in light of Professor Prosser's vanishing inference. This interpretation does not require that there be a complete absence of direct proof.
>
> * * *
>
> It is quite clear that under traditional res ipsa loquitur analysis the defendant doctors in this case cannot be said to have each possessed exclusive control at all times when plaintiff's injury may have occurred. Yet the patient is in no position to prove which defendant or combination of defendants caused her injury to an area of her body remote from the site of surgery, because she was unconscious when it occurred. We are persuaded that the fairest course to take under these particular circumstances is to allow the plaintiff to go to the jury with the benefit of a res ipsa loquitur instruction. We agree with the reasoning of the

> California Supreme Court in the landmark case of *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944):
>
> * * *

Id. at 689, 690 (citations omitted). The Court was convinced that the California result was more fair in the unconscious patient situation. The Court also noted that there might be other instances when the customary control requirement should be similarly relaxed. *Marrero v. Goldsmith*, 486 So. 2d 530, 532-533, 1986 Fla. LEXIS 1624, *4-10, 11 Fla. L. Weekly 35. (Emphases added.)

The Supreme Court of Washington also agreed that a Plaintiff may pursue both theories so long as the evidence is not:

> So completely explanatory of how the accident occurred that no inference is left that the accident may have happened in any other way, there is nothing left upon which the doctrine need or can operate:
>
> > Applicability of **res ipsa loquitur** also does **not** prevent the plaintiff from pleading or proving specific acts of **negligence** by the defendant. *Covey*, 36 Wn.2d at 391. *Pacheco v. Ames*, 149 Wn.2d 431, 441, 69 P.3d 324, 329 (Wash. 2003).
> >
> > The doctrine of *res ipsa loquitur* is a rule of evidence which, when applied in a proper case, warrants the court or jury in inferring negligence, thereby casting upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the inference. *Morner v. Union Pac. R. Co.*, 31 Wn. (2d) 282, 196 P. (2d) 744. The inference which the doctrine permits is grounded upon the fact that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured person. *Lynch v. Ninemire*

> *Packing Co.,* 63 Wash. 423, 115 Pac. 838, L. R. A. 1917E, 178; 38 Am. Jur. 995, Negligence, § 299. Accordingly, the doctrine has no application where there is direct evidence as to the precise cause of the injury and all the attending facts and circumstances appear. 38 Am. Jur., *supra*.
>
> The problem has frequently arisen whether, in a particular case, the pleading and proof as to particular acts of negligence preclude the application of the doctrine of *res ipsa loquitur* under the principle stated above. We have held that, even though a party should base his action upon the doctrine of *res ipsa loquitur,* he may plead and prove specific acts of negligence on the part of defendant and may rely upon the presumption of negligence and, also, upon his proof of specific acts of negligence. *Case v. Peterson,* 17 Wn. (2d) 523, 136 P. (2d) 192; *Mahlum v. Seattle School Dist. No. 1,* 21 Wn. (2d) 89, 149 P. (2d) 918. However, if the evidence submitted by either or both parties is so completely explanatory of how the accident occurred that no inference is left that the accident may have happened in any other way, there is nothing left upon which the doctrine need or can operate. *Anderson v. Harrison,* 4 Wn. (2d) 265, 103 P. (2d) 320; *Morner v. Union Pac. R. Co., supra*.

Covey v. W. Tank Lines, 36 Wn.2d 381, 390-391, 218 P.2d 322, 327 (Wash. 1950). (Emphasis added.)

In adopting Section 328D of the Restatement (Second) of Torts, the Michigan Supreme Court agreed that where a Plaintiff has presented expert evidence the result suffered by Plaintiff does not ordinarily occur, the mere fact the Defendant disputes the Plaintiff's evidence is not sufficient to deny Plaintiff a *res ipsa* charge:

> In a case where there is no expert evidence that "but for" negligence this result does not ordinarily occur, and in which the

> judge finds that such a determination could not be made by the jury as a matter of common understanding, a prima facie case has not been made, and a directed verdict is appropriate. **However, if there is such evidence, even if it is disputed**, or if such a determination could be made as a matter of common understanding, **the jury is to determine whether plaintiff has proven whether it is more likely than not that [*155] defendant's negligence caused plaintiff's injury.** The court may grant a motion for a directed verdict only if it is determined that reasonable minds could not differ that this result could ordinarily happen without negligence.

Jones v. Porretta, 428 Mich. 132, 154-155, 405 N.W.2d 863, 874 (Mich. 1987) (emphases added).

Michigan has also upheld instructing the jury on both direct negligence & *res ipsa* where the evidence warrants:

> Further, we reject defendants' assertion that an instruction on res ipsa loquitur is improper where evidence in support of a specific theory of negligence is offered. While it is true that Smith posed specific theories of negligence to the jury, there was conflicting testimony regarding exactly how his injury occurred, and res ipsa loquitur was designed to address situations where the cause of injury is not necessarily clear. We agree with the trial court that it is perfectly legitimate for a plaintiff to proceed with a specific theory of negligence and, recognizing that the jury may not find sufficient evidence to sustain that particular theory, argue in the alternative that the jury may find the defendant liable based on res ipsa loquitur. It is axiomatic in Michigan that parties are able to plead and go forward on alternate theories of liability.

Smith v. Khouri, 2006 Mich. App. LEXIS 3393, *13, 2006 WL 3333669.

Thus, the Court upheld a verdict for Plaintiff where she proceeded on both grounds:

> In this case, one of plaintiff's theories of liability was premised on the res ipsa loquitur doctrine. See, e.g., *Wischmeyer v Schanz*, 449 Mich 469, 483-484; 536 NW2d 760 (1995). Plaintiff argued that the removal of sections of rectum and bowel does not ordinarily occur during a surgical procedure to remove fetal remains from the uterus unless the surgeon is negligent in the performance of the surgery. That is, analogous to cases in which an inappropriate part of the anatomy is removed during surgery, like the wrong limb, the fact that sections of a patient's rectum and bowel are not ordinarily "ripped out" during a procedure to remove fetal remains from a uterus [*26] is so blatant that it is within the common knowledge of the jury, i.e., expert testimony is not even necessary. See ***Jones*, 428 Mich at 152 n 7**; see also *Sullivan v Russell*, 417 Mich 398, 407; 338 NW2d 181 (1983); *Lince v Monson*, 363 Mich 135, 141; 108 NW2d 845 (1961). However, plaintiff also presented expert testimony to prove that her injuries were not "just a bad result" or an "unsuccessful" surgery. See ***Jones*, 428 Mich at 152**. Plaintiff's experts testified that sections of a patient's rectum and bowel are not ordinarily removed during a surgical procedure to remove fetal remains from the uterus in the absence of negligence.
>
> * * *

Garcia v. Gove, 2013 Mich. App. LEXIS 1797, *25-27, 2013 WL 5989710.

It is therefore clear that *res ipsa loquitur* does not stand exclusive of other theories. For a jury only to be able to hear *res ipsa loquitur* or other evidence of negligence would be confusing and would result in an attempt to box in one party or another in a way that is not productive. It would lead to motions practice and potential trial confusion.

If the circumstances are sufficient to invoke *res ipsa loquitur*, a jury should have that option and should also have the option, thanks to special verdict questions, of considering specific acts of negligence. *Res ipsa loquitur* is an

evidentiary inference. It would engender confusion and potentially erroneous results to restrict a jury unless the evidence clearly does not support the inferential charge.

7. CONCLUSION

WHEREFORE, it is respectfully requested that Your Honorable Court sustain the Order of the Superior Court, which was eminently reasonable and by no stretch of the imagination was a situation calling for reversal. This case is consistent with the law of jurisdictions that recognize the necessity of the jury to choose between *res ipsa loquitur* criteria versus direct evidence. The jury should have that option, directed as it will be, by carefully drafted special interrogatories.

Respectfully submitted,

/s/ Clifford A. Rieders
CLIFFORD A. RIEDERS ID 20962
Attorney for Amicus Curiae
North Central Pennsylvania Trial Lawyers Association
RIEDERS, TRAVIS, HUMPHREY, WATERS & DOHRMANN
161 West Third Street
Williamsport, PA 17701
(570) 323-8711

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Signature: /s/ Clifford A. Rieders
CLIFFORD A. RIEDERS
Attorney I.D. No.: 20962

CERTIFICATE OF WORD COUNT COMPLIANCE

I, Clifford A. Rieders, certify that the foregoing Brief does not exceed the word limitation of Pa.R.A.P. 531(a)(3), as it contains 6,993 words, exclusive of the supplementary matter in Pa.R.A.P. 1115(g).

Dated: July 20, 2021

/S/ Clifford A. Rieders
CLIFFORD A. RIEDERS

CERTIFICATION REGARDING ELECTRONIC COPIES

It is hereby certified by the undersigned member of the Bar of this Court that the electronic copy (in .pdf format) of the foregoing Brief for Amicus Curiae North Central Pennsylvania Trial Lawyers Association included on the accompanying compact disc is an accurate and complete version of the paper version.

Dated: July 20, 2021

/S/ Clifford A. Rieders
CLIFFORD A. RIEDERS

CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I, Clifford A. Rieders, hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that requires filing confidential information and documents differently than non-confidential information and documents.

Dated: July 20, 2021

/s/ Clifford A. Rieders
CLIFFORD A. RIEDERS

CERTIFICATE OF SERVICE

I, Clifford A. Rieders, hereby certify that this 20th day of July, 2021, I caused the foregoing Brief for *Amicus Curiae* North Central Pennsylvania Trial Lawyers Association to be served on the following persons in the manner stated below, which service satisfies the requirements of Pa.R.A.P. 121:

electronically and by serving two true and correct copies by first class United States mail, postage prepaid, addressed as follows:

Joseph M. Melilo, Esquire
Navisky, Olson & Wisneski LLP
2040 Linglestown Rd., Ste. 303
Harrisburg, PA 17110
jmelilo@nowllp.com
Counsel for appellee

Matthew Walker Rappleye, Esquire
Robert A. Graci, Esquire
Ashley Nichols Weber, Esquire
Lawrence Stengel, Esquire
Jennifer Susan Snyder, Esquire
Saxton & Stump, LLC
280 Granite Run Rd., Ste. 300
Lancaster, PA 17601
Saxton & Stump, LLC
280 Granite Run Rd., Ste. 300
Lancaster, PA 17601
mwr@saxtonstump.com
rag@saxtonstump.com
anw@saxtonstump.com
Counsel for Appellants

Maureen M. McBride, Esquire
James C. Sargent, Jr., Esquire
Lamb McErlane, PC
24 E. Market Street
P.O. Box 565
West Chester, PA 19381-0565
mmcbride@lambmcerlane.com
jsargent@lambmcerlane.com
Amicus Curiae Counsel for American Medical Association
And Pennsylvania Medical Society

Dated: July 20, 2021

/s/ Clifford A. Rieders
CLIFFORD A. RIEDERS