IN THE SUPREME COURT OF OHIO

CASE NO. 08-1980

APRIL E. COUCH, ADMINISTRATRIX OF THE ESTATE OF LURENE N. HALL
Plaintiff-Appellee

-vs-

AKRON GENERAL MEDICAL CENTER, et al.
Defendant –Appellants

ON APPEAL FROM THE NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 24066

MEMORANDUM OPPOSING JURISDICTION OF PLAINTIFF-APPELLEE, APRIL E. COUCH, ADMINISTRATRIX

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EXPLANATION OF WHY THIS CASE PRESENTS NO ISSUES OF PUBLIC OR GREAT GENERAL IMPORTANCE

Defendant-Appellants, Richard D. Patterson, Jr., M.D. and Radiology & Imaging Service, Inc., are seeking further review of a Ninth District decision which is both straightforward and unassailable. The unanimous panel simply held that a *res ipsa loquitur* instruction must be furnished upon request when conflicting expert testimony exists upon the question of whether the injury sustained ordinarily does not occur without negligence. *Estate of Hall v. Akron Gen. Med. Ctr.*, 9th Dist. No. 24066, 2008-Ohio-4332, 2008 W.L. 3918068 ¶ 30. The ruling was firmly rooted in the precedent which had been established by this Court, most notably *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 406 N.E.2d 1385.

Contrary to Defendants' dire prognostications, the holding certainly has not "effectively guaranteed that jurors will be able to infer negligence in all medical malpractice cases." *Defendant-Appellants' Memorandum in Support of Jurisdiction, p. 1.* The logic of the opinion applies only when the plaintiff's experts have testified that the harm sustained would not have occurred if the standard of care would have been followed and the remaining requirements for a *res ipsa loquitur* instruction have been satisfied. It should come as no surprise to anyone that, under such circumstances, the charge must be furnished when a valid request has been made in accordance with Civ.R. 51.

In an effort to create an intriguing legal question where none exists, Defendants' Memorandum is founded upon the notion that the *res ipsa loquitur* instruction is never appropriate "when there exists 'direct' evidence of negligence." *Defendant-Appellants' Memorandum in Support of Jurisdiction, p. 1.* Not once was this peculiar argument raised in the appellate proceedings below. The trial judge had denied the requested instruction with the

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following explanation:

> My understanding of Ohio law is, is that if there are multiple potential causative factors, then the instruction is not given.

Tr. Vol. V, p. 548. During the post-trial proceedings, Defendants proceeded to champion this erroneous view of the law and maintained that:

> Consequently, it is clear that the Court properly refused to instruct the jury on the doctrine of *res ipsa loquitor* because there was conflicting expert testimony regarding the cause of the laceration in the decedent's superior vena cava. Plaintiff's experts testified that the laceration could not occur absent negligence. Defendants' experts, on the other hand, testified that the perforation of major blood vessels is a known risk of any catheter placement procedure. *** [emphasis added]

Defendants' Brief in Opposition to Plaintiffs' Motion for New Trial, p. 12. Precisely the same arguments were advanced in the Brief which was submitted to the Ninth District. *Brief of Defendant-Appellees served June 9, 2008, pp. 16-18.* At no time did they depart from the nonsensical view that the instruction is only warranted when the experts are in full agreement as to its applicability. The appellate court was thus never afforded an opportunity to consider, and never commented upon, whether Plaintiff's case was predicated entirely upon "direct evidence" so that a *res ipsa loquitur* charge would be unwarranted as a matter of law.

As Defendants undoubtedly appreciated at the time, Plaintiff's medical malpractice claim was hardly founded upon "direct evidence" of negligence. Dr. Patterson had candidly admitted that he had no explanation for the 4-cm laceration which had been discovered by the County Coroner during the autopsy. *Tr. Vol. I, p. 152.* None of the surgical assistants and nurses who were in a position to observe the routine out-patient procedure testified against Dr. Patterson. By necessity, Plaintiff's entire theory of liability was based purely upon circumstantial evidence.

Indeed, the absence of direct evidence of negligence was hardly lost upon defense

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counsel during closing argument. The following passage was typical of her remarks to the jury.

> And, in fact, the evidence has shown that Dr. Patterson met the standard of care. There has been no evidence that he carelessly performed this procedure or that for some reason on this particular day he forgot how to perform the procedure, forgot what was important about the procedure. There is no evidence that he withdrew or allowed the guide wire to be withdrawn, which he clearly would have seen on these images as would [technician] Willie [Seith]. There is no evidence that he advanced the third dilator without the guide wire.
>
> There is simply no evidence to support the plaintiff's claim.

Tr. Vol. V, pp. 603-604. As defense counsel openly acknowledged, Plaintiff's claim was indeed based entirely upon a circumstantial *res ipsa loquitur* theory.

> Now, [Plaintiff's experts] told us that the only way that this injury, these injuries could occur is if Dr. Patterson did something wrong.
> ***

Id., p. 587. It had been conceded that Defendants had been in exclusive control of the dilator and guidewire which, Plaintiff's experts maintained, must have torn the superior vena cava. *Tr. Vol. I, p. 153.*

This particular malpractice case was thus tailor made for the *res ipsa loquitor* instruction, which the trial judge inexplicably refused to furnish because of his mistaken belief that the charge was unwarranted whenever the medical evidence was conflicting as to the existence of multiple causes. While Defendants' recent abandonment of this nonsensical position is understandable, the imaginative legal theory they have offered in its place does not have, and has never had, any significance to this particular medical malpractice action. No issues of public or great general importance are therefore raised which would merit this Court's time and attention.

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STATEMENT OF CASE AND FACTS

Plaintiff-Appellee, April E. Couch, Administratrix, commenced this medical malpractice action in the Summit County Court of Common Pleas on February 10, 2006. She alleged that Lurene N. Hall, Deceased (hereinafter the "Decedent"), had died during the course of a routine catheter implant procedure which had been negligently mismanaged by Defendant-Appellant, Richard Patterson, Jr., M.D. Defendant was employed by Defendant-Appellant, Radiology & Imaging, Inc., at the time. Defendants submitted an Answer denying liability and interposing various affirmative defenses on August 22, 2006. Several other Defendants had also been named in the Complaint, all of which were voluntarily dismissed during the course of the proceedings.

The jury trial commenced on December 3, 2007. During their case-in-chief, Plaintiff's experts established that Defendant must have violated the standard of care by lacerating the inside wall of the Decedent's superior vena cava while surgically implanting a hemodialysis catheter in the left side of her neck. *Tr. Vol. II, pp. 267-270, 281-283; Vol. III, pp. 336-340.* Although he claimed that he had performed the procedure strictly "by the book," Defendant had no explanation for how the fatal wound had occurred. *Id., Vol. I, p. 152.*

The first defense expert, Matthew Leavitt, M.D. (hereinafter "Dr. Leavitt"), attributed the laceration to either a "dilator" or "guide wire" which had been surgically inserted in the Decedent's left jugular vein during the procedure. *Tr. Vol. IV, p. 451.* The interventional nephrologist claimed merely that, if Defendant was being truthful about performing the procedure properly, then no violation of the standard of care occurred. *Id., pp. 431 & 458-459.* Except for one purely technical error, he could not quarrel with the autopsy report.[1] *Id., Vol. IV,*

[1] As Dr. Leavitt observed, and everyone agrees, the coroner had written that the laceration had occurred "during hemodialysis" instead of "during hemodialysis catheter insertion." *Tr. Vol. IV, p. 463.* Only the latter is correct. *Id.*

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pp. 462-463. Defendant's second expert, L. Mark Dean, M.D. (hereinafter "Dr. Dean"), proceeded to assert that the coroner's reference to "bluish discoloration" in the autopsy report meant that there was an infection "eating away the lining of the blood vessel" which "unraveled" once the catheter was implanted. *Id., Vol. IV, pp. 495-498 & 512.*

Because her experts had forcefully testified that veins are not supposed to be lacerated during catheter implant procedures by the medical devices in the surgeon's exclusive control, Plaintiff requested a *res ipsa loquitur* charge from the court. *Tr. Vol. V, pp. 546-547.* The Judge proceeded to instruct the jury without advising them of this fundamental principle of Ohio tort law. *Id., pp. 624-647.* Plaintiff renewed her request for the *res ipsa loquitur* instruction, to no avail. *Id., p. 647.* The jury thereafter returned a verdict in favor of Defendants. *Tr. Vol. V, pp. 649-651.* In an interrogatory which was signed by only six (6) of them, they indicated that Defendants had been found not to be negligent. A judgment was entered accordingly on December 7, 2007.

Plaintiff commenced her appeal to the Ninth District and argued that the trial judge had impermissibly refused to (1) permit her to call the County Coroner on rebuttal, (2) furnish the *res ipsa loquitur* instruction, and (3) grant a new trial. The panel unanimously agreed with the second argument and vacated the defense verdict. *Hall*, 2008-Ohio-4332. Defendants are now seeking further review in the Supreme Court of Ohio.

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ARGUMENT

PROPOSITION OF LAW NO. 1: THE NINTH DISTRICT'S INTERPRETATION OF *RES IPSA LOQUITUR* IS NOT CONSISTENT WITH OHIO'S LEGAL AUTHORITIES AND THE END RESULT WILL BE THAT JURORS WILL BE ABLE TO INFER NEGLIGENCE IN ALL MEDICAL MALPRACTICE CASES.

PROPOSITION OF LAW NO. 2: THE NINTH DISTRICT'S DECISION REGARDING *RES IPSA LOQUITUR* IS INCONSISTENT AND CONTRADICTORY TO DECISIONS RENDERED BY THIS COURT AND OTHER COURTS OF APPEAL THROUGHOUT OHIO.

Perhaps the undersigned counsel is being obtuse, but it is difficult to understand the difference between the two Propositions of Law which have been fashioned. In both instances, Defendants are arguing that the Ninth District's decision is contrary to the opinions which have been issued by other courts. The only "error" which has been identified is the appellate court's supposed belief that a *res ipsa loquitur* charge is warranted even where the malpractice case is premised upon direct evidence of negligence. *Defendant-Appellants' Memorandum in Support of Jurisdiction, pp. 8-13*. As can be readily observed, the panel never once advocated such a view of Ohio law. *Hall*, 2008-Ohio-4332 ¶ 17-30. Plaintiff's case was indeed purely circumstantial, which had never been disputed by Defendants until the instant Memorandum in Support of Jurisdiction was devised.

The Plaintiff's Proposed Jury Instructions which had been filed on November 27, 2007 had sought the following charge:

> One way a Plaintiff may prove negligence is through circumstantial evidence. Circumstantial evidence will be defined for you. You may, but are not required to, find that the Defendant was negligent if you decide by the greater weight of the evidence that:

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> 1. The Ash Dialysis Catheter insertion procedure alleged to have resulted in injury to Lurene Hall was in the exclusive control of the Defendants at the time of the injury; and
>
> 2. The injury to Lurene Hall occurred under circumstances where in the ordinary course of events the injury would not have happened if the Defendants had exercised reasonable care.
>
> Exclusive control by Defendants. The Ash Dialysis Catheter insertion procedure must have been in the exclusive control of the Defendants and not in the control, even partially, of any other persons.
>
> Claims of Defendants. The Defendants claim that:
>
> 1. The Defendants was not in exclusive control of the Ash Dialysis Catheter insertion procedure.
>
> 2. The Defendants exercised reasonable care while in control of the Ash Dialysis Catheter insertion procedure.
>
> 3. The injury would have occurred whether or not the Defendants exercised reasonable care;
>
> 4. The injury was not caused by the Ash Dialysis Catheter insertion procedure.

Id., p. 15. This charge closely tracks that which has been furnished in 3 O.J.I. §331.03. The parties were never in disagreement over the contours of *res ipsa loquitur*. According to Defendants:

> To warrant application of the rule, a plaintiff <u>must adduce evidence</u> in support of two conclusions (1) that the instrumentality causing the injury was under the exclusive management and control of the defendant; and (2) that the injury would not have occurred in the ordinary course of events absent negligence [emphasis added].

Brief of Defendant-Appellees served June 9, 2008, p. 16.

Defendants never disputed that the first requirement was satisfied the moment that the interventional radiologist admitted that he had been in exclusive management and control of the dilator and other instruments throughout the surgical procedure. *Tr. Vol. I, p. 153.* The only remaining issue therefore was whether Plaintiff had "adduce[d] evidence in support" of the second element. She plainly did so, since both of her experts forcefully testified that 4-cm.

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lacerations of the superior vena cava do not occur when the standard of care has been followed. *Tr. Vol. II, pp. 267-290, 289-290, 298-300 & 314; Vol. III, pp. 327-328, 335-336, 340 & 374.* Defendants have yet to cite any authorities holding that a *res ipsa loquitor* charge must be denied whenever conflicting medical opinions are submitted by the defense.

Little disagreement actually existed over whether mishandling the guidewire and dilator could seriously injure the patient. Even Dr. Patterson conceded that:

> Q. So when the dilator is being inserted in the patient, you always insert it over a guidewire, correct?
>
> A. Absolutely, yes.
>
> Q. And the guidewire has to be in advance of the dilator or the dilator could cause damage to the vessel wall, correct?
>
> A. Yes. ***
>
> Q. And you would agree that it would be a violation of the standard of care to advance a dilator without the benefit of the guidewire being in front of it so it had something to track on, correct?
>
> A. <u>I definitely believe that would be a violation of the standard of care.</u> [emphasis added].

Id., Vol. I, p. 117. Not surprisingly, his experts were in agreement with him in this regard. *Id., Vol. IV, pp. 452-453 & 511.* The following exchange took place during cross-examination of Dr. Leavitt:

> Q. *** [I]f you have a guide – or a dilator that's being advanced without the benefit of sliding over guide wire, it could cause the type of injury that occurred in [the Decedent], four-centimeters laceration on the medial wall of the superior vena cava?
>
> A. Absolutely.

Id., p. 456. Dr. Dean concurred.

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> Q. *** [Y]ou referred to this entire kit as being a very safe tool, correct?
>
> A. It is a very safe tool.
>
> Q. If used properly.
>
> A. Yes.
>
> Q. You would agree, though, that if it was – a dilator was advanced without the benefit of a guide wire that it is tracking over, that it could cause damage to the inside of a blood vessel?
>
> A. It is possible.

Id., p. 511.

There is no truth to Defendants' representation that Plaintiff "offered 'direct' evidence from her two medical experts as to what specific acts of medical negligence proximately caused the injury, thus negating the need for the jury to make an inference of negligence based upon circumstantial evidence." *Defendant-Appellants' Memorandum in Support of Jurisdiction, p. 1.* None of Plaintiff's medical experts had been present during the procedure and thus could not offer any "direct" evidence about anything. As is traditionally the practice, they expressed findings and opinions based upon the testimony and records which were available to them in accordance with Evid.R. 703. No objections were raised by anyone when the jury was instructed that they were free to base their verdict upon evidence which was "direct or circumstantial or both". *Tr. Vol. V, p. 626.*

Defendants' recently announced belief that the malpractice claim was based upon "direct" evidence of negligence is premised upon assertions such as:

> Appellee's experts, Dr. Foley and Dr. Kremen, <u>explicitly</u> testified that Dr. Patterson deviated from the standard of care when he inadvertently pulled the guidewire back and advanced the dilator. Dr. Foley and Dr. Kremen further opined, with certainty, that the

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> negligent advancement of the dilator caused the perforation of the superior vena cava which ultimately caused Ms. Hall's death. ***

Defendant-Appellants' Memorandum in Support of Jurisdiction, p. 10 (emphasis original). Rather obviously, the fact that the experts testified with reasonable "medical certainty", as they were required to do, and were "explicit" in their view that a fatality will not occur when the routine out-patient catheter placement is performed correctly hardly equates to "direct" testimony. They never claimed to be eyewitnesses to the mismanaged procedure. There is no dancing around the fact that the odd direct/circumstantial argument was never raised in the proceedings below, which was perfectly understandable given the true nature of the case.

Since there was (1) no dispute that Dr. Patterson was in exclusive control of the dilator and other instruments which were being inserted into the Decedent during the surgery and (2) competent expert testimony that lacerations will not occur when the procedure is performed in accordance with the standard of care, then the *res ipsa loquitur* instruction was warranted. The very purpose of this venerable doctrine is to avoid the unfairness caused when the plaintiff is precluded from demonstrating precisely how the injury occurred because such could only be known by the defendant. *See Becker v. Lake Cty. Mem. Hosp. West (1990).* 53 Ohio St.3d 202, 206-207, 560 N.E.2d 165, 169-170; *Shields v. King* (1st Dist. 1973), 40 Ohio App.2d 77, 83, 317 N.E.2d 922, 927. Because the jurors were never informed that Ohio law permits such inferences to be drawn under these circumstances, Plaintiff was effectively precluded from properly establishing her entitlement to relief through valid circumstantial evidence.

The Ninth District's concise decision is just one more in a long line of unbrokern authorities recognizing that a *res ipsa loquitur* charge must be furnished when justified by the evidence presented at trial. The court in *Morgan v. Children's Hosp.* (1985), 18 Ohio St.3d 185,

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480 N.E.2d 464, reversed a jury verdict in favor of a doctor defendant who administered anesthesia during surgery in a medical malpractice action. The trial court concluded that since expert testimony was required to establish the requisite standard of care, a *res ipsa loquitur* instruction was not appropriate. The *Morgan* court concluded that:

> The reasoning of the lower court concerning *res ipsa loquitur* in medical malpractice cases is not compelling. Numerous other jurisdictions when faced with this same question have found that expert testimony can be used in medical malpractice cases to establish that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed, thereby allowing an instruction on *res ipsa loquitur* to be given to the jury. (footnote omitted).

Id, 18 Ohio St.3d at 189.

In *Getch v. Bel-Park Anesthesia, Assn.* (Apr. 15, 1998), 7th Dist. No. 96 C.A. 84, 1998 W.L. 201452, the court upheld application in the *res ipsa loquitur* doctrine in a medical malpractice case involving multiple defendants. The court opined:

> It is well established that the doctrine of *res ipsa loquitur* is an evidentiary rule which allows a trier-of-fact to draw an inference of negligence from facts presented, such that a trier-of-fact is permitted, but not compelled, to find negligence. *** Res ipsa loquitur is applicable in cases involving medical malpractice . *** To warrant such application, a plaintiff must produce evidence to show that the instrumentality causing injury was, at the time of said injury, under the exclusive control of the defendant and that the injury occurred under such circumstances which in the ordinary course of events would not have occurred if ordinary care had been observed. (citations omitted).

Id. at p. *2.

Similarly, in *Wiley v. Gibson* (1st Dist. 1990), 70 Ohio App.3d 463, 591 N.E.2d 382, a dental malpractice case, the plaintiff patient claimed that the defendant dentist negligently administered local anesthetic, resulting in permanent paralysis to her face. The trial court

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declined to provide the *res ipsa loquitur* instruction requested by plaintiff. The appellate court reversed. The *Wiley* court opined:

> The evidence demonstrates that the instrumentality causing the injury to the plaintiff was the final injection of the local anesthetic and that the injection was solely under the control of the defendant. The trial court's finding that there existed variables which were outside the defendant's exclusive control, namely the plaintiff's physical frailties and natural reactions, is not supported by any evidence in the record before the court on the motion for summary judgment. In fact, the evidence would indicate otherwise since the plaintiff had received injections of local anesthetic from the defendant on previous occasions with no ill effect. Therefore, the first requirement for the application of *res ipsa loquitur,* that the instrumentality be under the defendant's exclusive control, is met.
>
> With respect to the remaining aspect of the doctrine, the plaintiff offered the deposition of an expert who explained the proper procedure for administering an injection of anesthetic along the mandible. The expert further testified that the only way to create permanent damage to the trigeminal nerve, resulting in paresthesia of the face and tongue, is by improper technique in the injection of the nerve with a needle. . . . It is true that the expert did not explicitly state that he believed the defendant was negligent in his administration of the anesthetic to the plaintiff. Nevertheless, his testimony is sufficient to establish that paresthesia of the face and tongue does not ordinarily occur if an injection of an anesthetic along the mandible is properly administered with ordinary care. The plaintiff has, therefore, met both prerequisites for the application of the doctrine of *res ipsa loquitur* to these facts.

Id., 70 Ohio App.3d at 465-466.

Defendants' authorities are wholly distinguishable. In *Roberts v. Crow* (Dec. 21, 2005), 9th Dist. No. 22535, 2005-Ohio-6744, 2005 W.L. 3481490, for example, the patient plaintiff's expert recanted his testimony during trial. The defendant moved for a directed verdict, which the court granted. As a result of the plaintiff expert recanting his testimony, the court concluded that the plaintiff failed to establish the elements of a prima facie medical malpractice claim. The appellate court concluded that the plaintiff's expert had not recanted his testimony, and thus, the

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plaintiff established his prima facie case. With respect to the argument that the trial court erred in concluding that the *res ipsa loquitur* doctrine did not apply, the appellate court held that there was evidence that something other than negligence caused the injury.

Similarly, in *Brokaw v. Mercy Hosp. Anderson* (1st Dist. 1999), 132 Ohio App.3d 850, 726 N.E.2d 594, competing experts offered differing testimony concerning whether injection actually caused patient's nerve damage. In *Hager v. Fairview Gen. Hosp.* (July 29, 2004), 8th Dist. No. 83266, 2004-Ohio-3959, 2004 W.L. 1688537, the expert's testimony regarding the cause of decedent's injuries was merely speculative and insufficient to establish that defendant "probably, rather than merely possibly" caused decedent's injuries. Finally, in *Bowden v. Annenberg* (Dec. 9, 2005), 1st Dist. No. C-040499, 2005-Ohio-6515, 2005 W.L. 3338935, there was evidence that the injury could have occurred in the absence of negligence. As the *Bowden* court recognized, "applicability of *res ipsa loquitur* must be determined by the trial court on a case-by-case basis." *Id.* at p. *6. The unanimous opinion which was issued by the Ninth District below correctly states and applies these well-recognized principles of Ohio law and should be left intact.

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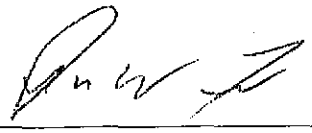
CONCLUSION

For the foregoing reasons, this Court should decline further review of the Ninth District's sound decision ordering a new trial on the basis of the trial judge's refusal to furnish the *res ipsa loquitur* charge.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Memorandum** was served via regular U.S. Mail on this 6th day of November, 2008 upon:

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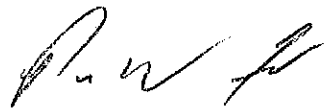

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