

IN THE SUPREME COURT OF OHIO

Estate of Lurene N. Hall, By
April E. Couch, Admx., et al.,

Appellees,

v.

Akron General Medical Center, et al.,

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Case No. 2008-1980

On Appeal from the Summit
County Court of Appeals, Ninth
Appellate District

MERIT BRIEF OF APPELLANTS
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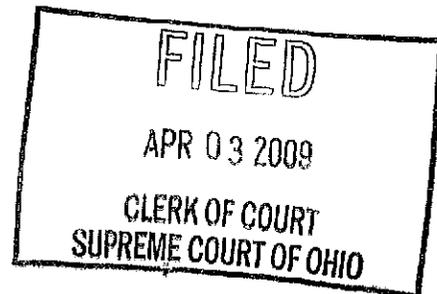


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STATEMENT OF FACTS

This case arises from the Ninth District Court of Appeals' erroneous decision that vacated a jury verdict on the basis that the jury should have been charged on *res ipsa loquitur*. In doing so, the Ninth District completely redefined the *res ipsa loquitur* doctrine and has effectively guaranteed that jurors will be able to infer negligence in all medical malpractice cases. By allowing a *res ipsa loquitur* jury charge in the face of "direct" evidence of medical negligence and proximate cause presented by a plaintiff, the Ninth District completely ignored the premise that *res ipsa loquitur* is a rule of "circumstantial" evidence limited to cases that allow for an inference of negligence.

On February 10, 2006, Plaintiff-Appellee April E. Couch, Administratrix of the Estate of Lurene N. Hall, deceased ("Appellee"), refiled this medical malpractice action against several medical care providers, but eventually dismissed all defendants except Richard Patterson, M.D. and his professional corporation ("Dr. Patterson"). Appellee alleged that Dr. Patterson negligently performed a catheter placement procedure on September 10, 2003 which proximately caused the death of Ms. Hall.

Ms. Hall began regular kidney dialysis treatments in June, 2003 due to rapidly decreasing kidney function. Three months later, the indwelling tunnel catheter used to perform the dialysis became infected. (Tr. 83.) Ms. Hall's kidney specialist referred her to Dr. Patterson, an interventional radiologist, for removal of the infected catheter and placement of a new catheter. (Tr. 84.) Dr. Patterson removed the infected catheter from Ms. Hall's right internal jugular vein on September 8, 2003. (Tr. 86-87.) The removal procedure was uneventful. (Tr. 91.)

Dr. Patterson subsequently inserted a new dialysis catheter in Ms. Hall's left jugular vein on September 10, 2003 at Akron General Medical Center. (Tr. 92.) Dr. Patterson selected the left vein due to the previous infection in the right vein. (Tr. 92.) Before proceeding, Dr.

Patterson explained the procedure to Ms. Hall, informed her of the potential risks, and answered her questions. (Tr. 94.) After Ms. Hall consented to the procedure, Dr. Patterson took an ultrasound image to visualize the internal jugular vein and identify an ideal access point. (Tr. 99.) Dr. Patterson then utilized ultrasound to visualize his insertion of a needle into Ms. Hall's jugular vein. (Tr. 107-108.)

Once the needle was introduced into the jugular vein, Dr. Patterson switched from ultrasound visualization to fluoroscopic visualization. (Tr. 109.) Fluoroscopy is essentially a real time x-ray. (Tr. 103.) Dr. Patterson used fluoroscopy to visualize his insertion of a small microwire through the needle, down the jugular vein, and into to the innominate vein. (Tr. 109.) He then fitted a coaxial introducer over the microwire and removed the microwire. (Tr. 110.) The next step was to slide a "J-tipped" guidewire through the introducer, into the jugular vein, down into the superior vena cava, through the right atrium of the heart, and into the inferior vena cava. (Tr. 110-111.) The placement of the guidewire was visualized under fluoroscopy. (Tr. 111-112.) Once the guidewire was placed, Dr. Patterson successively inserted three progressively larger dilators over the guidewire in order to increase the size of the access site. (Tr. 114-117.) The advancement of the dilators was also visualized under fluoroscopy. (Tr. 116.)

Dr. Patterson then removed the guidewire and inserted the tunnel catheter. (Tr. 126.) The catheter was inserted into the access site and guided into Ms. Hall's right atrium. (Tr. 126-130.) The external portion of the catheter was then sewn under the patient's skin. (Tr. 130-131.) Dr. Patterson confirmed that the catheter had been properly placed in Ms. Hall's right atrium by withdrawing blood through the catheter into a syringe. (Tr. 133-134.)

Soon after the procedure was completed, Ms. Hall complained of pain at the incision site. (Tr. 139.) Dr. Patterson prescribed Vicodin to reduce the pain. (Tr. 139.) Approximately fifteen minutes later, Ms. Hall was somewhat cool and clammy. (Tr. 140.) Dr. Patterson and the nurses hooked Ms. Hall to monitoring and contacted the physicians who had been directing her care in the hospital. (Tr. 143-144.) He and the nurses then transported Ms. Hall from the procedure room to her regular room so that she could be seen by her treating physicians. (Tr. 144-145.) Ms. Hall maintained stable vital signs while being transported to her room, but she subsequently lost consciousness and became pulseless. (Tr. 145-146.) An emergency code was called, but resuscitative efforts were unsuccessful.

The Summit County Medical Examiner's Office performed an autopsy, which revealed a laceration in Ms. Hall's superior vena cava. (Tr. 118.) The medical examiner concluded that the laceration led to a pericardial tamponade, which occurs when blood gathers within the sac that encases the heart. (Tr. 260-261.) The blood that gathered in the pericardial sac prevented the heart from beating properly, which led to cardiac arrest. (Tr. 260-261.)

On December 3, 2007, a jury trial commenced. During her case-in-chief, Appellee presented two expert witnesses who explicitly testified as to the specific negligent acts of Dr. Patterson that proximately caused Ms. Hall's death. Appellee's interventional radiology expert, Dr. Michael Foley, testified that Dr. Patterson deviated from the standard of care when he inadvertently pulled the guidewire back and advanced the dilator without it. (Tr. 266-284.) Dr. Foley further opined that this caused the dilator to be pushed through the superior vena cava. (*Id.*) Dr. Foley concluded that the perforation of the superior vena cava caused Ms. Hall's terminal pericardial tamponade. (*Id.*) Of importance, Dr. Foley testified that he knew "exactly"

what happened during Ms. Hall's catheter placement that amounted to a negligent act on the part of Dr. Patterson:

What I have seen happen is a laceration or a tear of the superior vena cava occur when a guide wire is pulled back and one of the dilators, especially the last one that I showed you, that gray dilator, which is the longest of the three, is advanced without the guide wire continuing in front of that sharper tip of the dilator. And when that occurs, you are leading with the sharp tip of the dilator, and you have the ability to lacerate or tear or puncture or perforate the vessel that you are moving the catheter around in. And I believe that that is exactly what happened in this case.

(Tr. 290.) (Emphasis added.)

Appellee also called Dr. Jeffrey Kremen, a vascular surgeon, to similarly testify about Dr. Patterson's specific acts of negligence that led to Ms. Hall's death. Dr. Kremen opined that Dr. Patterson negligently allowed the dilator to get off course which then produced the laceration of the superior vena cava. This laceration resulted in bleeding into the sac surrounding Ms. Hall's heart. Dr. Kremen testified that Dr. Patterson breached the standard of care in causing the laceration of the superior vena cava during the catheter placement procedure and this proximately caused Ms. Hall's death. (Tr. 336.) Just like Dr. Foley, Dr. Kremen opined with "certainty" that the dilator was negligently placed and caused the perforation. (Tr. 343-344.)

During Dr. Patterson's case-in-chief, Dr. Matthew Leavitt, an interventional nephrologist, testified that Dr. Patterson performed the catheter placement procedure "by the book" and in compliance with the standard of care. (Tr. 449.) The mere fact that an injury occurred did not automatically mean Dr. Patterson was negligent. (Tr. 447-448, 460-61.) Injury to vessels is a recognized complication of the procedure. (Tr. 445, 447-448.) Dr. Leavitt did not observe anything in the records or the deposition testimony to suggest the procedure was performed improperly. (Tr. 448-449, 461.) Instead, the laceration most likely resulted from an inherent

weakness in Ms. Hall's vessel wall. (Tr. 445-446.) In Dr. Leavitt's opinion, Appellee's experts' theories were "just short of impossible." (Tr. 450.)

Similarly, Dr. Patterson's interventional radiologist, Dr. Mark Dean, concurred that Dr. Patterson performed the procedure in accordance with the standard of care. (Tr. 494, 510.) Injury to vessels is a recognized complication that is listed on the catheter kit's packaging. (Tr. 508-509.) He also opined that the laceration most likely resulted from an inherent weakness or staph aureus bacteria in Ms. Hall's vessel wall. (Tr. 497, 512.) Dr. Dean did not believe any of the dilators were long enough to cause the injury. (Tr. 498, 504.)

After the close of all evidence, Appellee asked the trial court to instruct the jury on the doctrine of *res ipsa loquitur*. (Tr. 547.) The Trial Court properly withheld the instruction. Thereafter, the jury ultimately concluded that Dr. Patterson complied with the standard of care in performing the September 10, 2003 procedure. Appellee subsequently filed two Motions for New Trial which requested a new trial based upon the omission of Appellee's proposed *res ipsa loquitur* jury instruction, amongst other arguments. The Trial Court properly overruled the Motions. Appellee timely appealed to the Ninth District Court of Appeals.

In Appellee's appeal, the Ninth District erroneously vacated the jury verdict on the sole basis that the jury should have been charged on *res ipsa loquitur*. (Appx. 2). In doing so, the Ninth District expanded *res ipsa loquitur* beyond the boundaries within which it was originally intended. Specifically, the Ninth District improperly allowed for a *res ipsa loquitur* inference jury charge in conjunction with Appellee's direct evidence of specific acts of negligence on the part of Dr. Patterson. However, the use of direct evidence of specific acts of negligence and reliance upon *res ipsa loquitur* is logically inconsistent and, thus, the Ninth District's decision constitutes an unfounded statement of law.

Additionally, the Ninth District created a conflict with this Court's precedent and other Ohio Appellate Districts on the application of *res ipsa loquitur* where it has been shown by the evidence adduced that there are two equally efficient and probable causes of the injury, one of which is not attributable to negligence. The Ninth District's decision failed to follow the well established law in Ohio that holds that *res ipsa loquitur* is not applicable where the expert medical testimony regarding causation is in dispute.

Dr. Patterson filed his Notice of Appeal to the Supreme Court of Ohio on October 17, 2008. (Appx. 1). On February 4, 2009, this Court granted jurisdiction to hear the case and allowed the appeal.

ARGUMENT

Proposition of Law No. I:

***Res Ipsa Loquitur* Is An Evidentiary Principle Premised Upon The Use Of Circumstantial Evidence Whereby Negligence May Be Inferred In Situations Only Where There Is No Affirmative Proof of Negligence; *Res Ipsa Loquitur* Is Not Applicable Where There Is Direct Evidence of Specific Acts That Allegedly Constitute The Negligence At Issue In The Case.**

A. Introduction And Overview.

The Ninth District Court's decision in this case completely redefines the *res ipsa loquitur* doctrine and has effectively guaranteed that jurors will be able to infer negligence in all medical malpractice cases. The Ninth District's decision has automatically shifted the burden of proof to doctors and hospitals to establish that they were not negligent. By improperly applying *res ipsa loquitur* to this case, the Ninth District has altered Ohio's longstanding medical malpractice law and has practically created absolute liability in medical malpractice actions.

The doctrine of *res ipsa loquitur* is an evidentiary rule which permits a jury to draw an "inference" of negligence by the use of circumstantial evidence. *Res ipsa loquitur* is founded

upon an absence of specific proof of acts or omissions constituting negligence. In other words, *res ipsa loquitur* does not apply when there exists “direct” evidence of negligence. Instead, *res ipsa loquitur* is only applicable when a plaintiff presents circumstantial evidence of negligence upon which jurors are entitled to make an inference of negligence.

In this case, the Ninth District completely ignored the premise that *res ipsa loquitur* is a rule of circumstantial evidence that allows for an inference of negligence. Appellee herein 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. By allowing a *res ipsa loquitur* jury charge in the face of “direct” evidence of medical negligence and proximate cause, the Ninth District has abolished the particular justice and foundation of the *res ipsa loquitur* doctrine that rests upon circumstantial evidence. The prejudicial effect of the Ninth District’s decision is that defendants in medical malpractice actions will be required to defend themselves against inferences of negligence stacked on top of “direct” evidence of negligence.

With the Ninth District’s illogical decision, as it stands now, in all medical malpractice cases throughout Ohio, trial courts can automatically instruct jurors on both medical negligence and *res ipsa loquitur* when a plaintiff’s case is based upon direct evidence of negligence and not circumstantial evidence. The prejudice of this misapplication of *res ipsa loquitur* cannot be doubted. Jurors will be able to consider the direct evidence of negligence in conjunction with a presumption of negligence. This would drastically alter Ohio law in medical malpractice cases by shifting the burden of proof to defendants and opening a Pandora’s box of absolute liability for medical care providers.

B. Standard of Review.

A trial court is required to charge the jury with instructions that are an accurate and complete statement of the applicable law. *Marshall v. Gibson* (1985), 19 Ohio St. 3d 10, 12, 482 N.E. 2d 583. When jury instructions are reviewed upon appeal, the jury instructions must be considered as a whole in order to determine whether the jury charge probably misled the jury in a matter materially affected the complaining party's substantial rights. *Becker v. Lake Cty. Mem. Hosp. West* (1990), 53 Ohio St. 3d 202, 560 N.E. 2d 165.

Although an abuse of discretion standard to review a trial court's decision to give or not give a jury instruction may be applied, the abuse of discretion standard of review is not applied where the inquiry does not go to the sufficiency of the evidence to support the specific instruction. *State v. Lessin*, 1993-Ohio-52, 620 N.E.2d 42. Instead, where the evidence is uncontroverted, the issue of whether a jury instruction is required presents a question of law. *Id.* Whether a *res ipsa loquitur* jury charge is warranted is a question of law to be determined initially by the Trial Court and then reviewed *de novo* upon appeal. *Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St. 2d 65, 67, 262 N.E.2d 703. Here, it is undisputed that Appellee presented direct evidence of negligence. Therefore, the Trial Court properly determined as a matter of law not to give a *res ipsa loquitur* jury instruction because such a rule of circumstantial evidence is inapplicable when direct evidence of negligence is presented.

The Trial Court properly determined that a *res ipsa loquitur* jury instruction was not warranted in this case. However, the Ninth District erroneously held that a *res ipsa loquitur* jury instruction should have been given despite the presentation of direct evidence of negligence by Appellee. Had the Trial Court charged the jury on *res ipsa loquitur*, per the Ninth District's reasoning, the instructions as a whole would have confused the jury because the jurors would

have been asked to infer negligence notwithstanding direct evidence of negligence. The Trial Court properly recognized that it would have been confusing and misleading to the jury if it gave a jury instruction on *res ipsa loquitur* in the face of direct evidence of negligence presented by Appellee. Unfortunately, the Ninth District usurped the Trial Court's power to make its decision as a matter of law on the appropriate jury instructions.

C. Law And Argument.

Res ipsa loquitur literally means "the thing speaks for itself." The doctrine was created on the premise that a plaintiff lacked direct evidence to prove negligence on the part of a defendant. *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App. 3d 220. In this case, the Ninth District's decision goes beyond the parameters and the purpose of *res ipsa loquitur* and has effectively opened the door for *res ipsa loquitur* to now extend to situations where the injury no longer speaks for itself but rather speaks through expert testimony on specific acts of negligence. The Ninth District now allows *res ipsa loquitur* to be used as a sword whereby plaintiffs in medical malpractice cases are entitled to an inference of negligence on top of direct evidence of negligence. Consequently, the Ninth District has altered Ohio's longstanding law in medical malpractice cases and has effectively shifted the burden of proof to defendants to prove a lack of negligence to the point in which there is a great risk of absolute liability in medical malpractice actions.

Res ipsa loquitur is an evidentiary principle premised on the use of circumstantial evidence. *Morgan v. Children's Hospital* (1985), 18 Ohio St. 2d 185. A plaintiff is entitled to a jury charge on *res ipsa loquitur* when either little or no direct evidence of negligence is presented. Where a plaintiff is unable to show a specific act of negligence, *res ipsa loquitur* applies where a plaintiff is able to show that the potential causes of an injury are within the

control of a defendant and such injury does not occur in the absence of negligence. *Shields v. King* (1973), 40 Ohio App. 2d 77.

The doctrine of *res ipsa loquitur* is founded upon an absence of specific proof concerning acts or omissions which would constitute negligence. Under the *res ipsa loquitur* doctrine, negligence may be inferred in situations only where there is no affirmative proof of negligence offered by the Plaintiff. *Id.* at 83; *DiMarco v. Bernstein* (Oct. 13, 1998), Cuyahoga App. No. 54406, 1988 WL 112972. *Res ipsa loquitur* gives an injured person an opportunity to rely upon circumstantial evidence in proving a case of negligence where there is insufficient direct evidence. Where the plaintiffs' claim for negligence is not based upon circumstantial evidence but, instead, is based on direct proof of negligence, an instruction on the doctrine of *res ipsa loquitur* is not warranted. *DiMarco, supra.*, at 4.

In this case, *res ipsa loquitur* was inapplicable because Appellee presented direct evidence/testimony from two medical experts regarding the specific acts of Dr. Patterson that constituted medical negligence. Appellee's case-in-chief was not based upon circumstantial evidence or an absence of proof and, therefore, a jury instruction on *res ipsa loquitur* was not warranted. Appellee's experts, Dr. Foley and Dr. Kremen, explicitly testified that Dr. Patterson deviated from the standard of care when he inadvertently pulled the guidewire back and advanced the dilator. (Tr. 266-284; 343-344.) Dr. Foley and Dr. Kremen further opined, with certainty, that the negligent advancement of the dilator caused the perforation of the superior vena cava which ultimately caused Ms. Hall's death. (*Id.*) Appellee did not rely upon circumstantial evidence to prove her claim of medical negligence; Appellee relied upon a specific act of negligence. In short, Appellee offered direct proof of negligent conduct and did not rely on indirect proof to establish negligence.

Since Appellee in this case presented direct evidence of negligence on the part of Dr. Patterson, the Ninth District erroneously held that the jury should have been charged on *res ipsa loquitur*. The specific acts of negligence and the cause of injury were set forth in very specific terms by Appellee's two medical experts. The Ninth District's allowance of a *res ipsa loquitur* charge coupled with the testimony of Appellee's experts on direct proof of negligence creates an unfair advantage for all plaintiffs against defendant-physicians. The *res ipsa loquitur* inference can now be prejudicially stacked on top of expert testimony enabling jurors to infer negligence when the jurors should be weighing the evidence and credibility of the expert witnesses presented at trial. Allowing jurors to bypass the direct evidence and expert testimony to simply infer negligence through *res ipsa loquitur* creates substantial risks of a wrong result.

At the trial below, the Trial Court properly allowed the jurors to weigh the expert testimony provided by Appellee against the expert testimony provided by Dr. Patterson and then decide which group of experts was correct. Now, pursuant to the Ninth District's decision reversing the jury's defense verdict, Appellee will be permitted to assert *res ipsa loquitur* inferences even where she puts on evidence of specific negligence. In other words, the jurors will be permitted to substitute an inference of negligence in place of Appellee actually proving negligence. Allowing *res ipsa loquitur* in conjunction with specific acts of negligence equips plaintiffs with an extra weapon for proving negligence in all medical malpractice actions bordering on strict liability. Now, the Ninth District's new definition for *res ipsa loquitur* automatically shifts the burden of proof to medical care providers to prove that they were not negligent.

The Ninth District should not be permitted to alter Ohio's medical malpractice law by misapplying the doctrine of *res ipsa loquitur*. This Court should reverse the Ninth District's decision and reinstate the jury's verdict that was based upon a properly charged jury.

Proposition Of Law No. II:

***Res Ipsa Loquitur* Is Not Applicable Where There Is Evidence Adduced At Trial By Either The Plaintiff Or The Defendant Of Two Equally Efficient Causes Of Injury, One Of Which Is Not Attributable To The Negligence Of The Defendant.**

A. Introduction And Overview.

While the Ninth District completely disregarded the very foundation for *res ipsa loquitur*, its decision is also inconsistent and contradictory to decisions rendered by this Court and other Appellate Districts in Ohio. There have been several decisions issued by this Court and other Appellate Districts which have held under similar circumstances to this case that a jury charge on *res ipsa loquitur* is not appropriate when there is conflicting expert testimony regarding the cause of injury. These decisions hold that where it has been shown by evidence adduced by either a plaintiff or a defendant that there are two equally efficient and probable causes of injury, one of which is not attributable to the negligence of the defendant, the rule of *res ipsa loquitur* does not apply.

In rendering a decision that conflicts with this Court's precedent and other Appellate Districts, the Ninth District failed to take into consideration that conflicting expert testimony presented by a defendant regarding the cause of injury, not attributable to the negligence of the defendant, negates the application of *res ipsa loquitur*. As a result of the Ninth District's inconsistent and contradictory decision, a plaintiff can be guaranteed a jury charge on *res ipsa loquitur* regardless of what evidence/testimony is adduced in a defendant's case-in-chief. In other words, a jury can be provided a *res ipsa loquitur* jury instruction based solely upon what

evidence/testimony is presented on causation during the plaintiff's case-in-chief without any consideration of all of the evidence/testimony presented throughout the entire trial.

B. Law And Argument.

The Ninth District's decision regarding the application of *res ipsa loquitur* is inconsistent with opinions from this Court and contradictory to other Appellate Districts and, consequently, warrants this Court's resolution of this conflict. The Ninth District's decision causes uncertainty in the use of *res ipsa loquitur* when there is evidence in the record of more than one equally efficient and probable cause of the injury and one of them is not attributable to the negligence of the defendant. Trial courts are now left with no clear guidance on how to apply *res ipsa loquitur* in medical malpractice actions.

This Court and several Appellate Districts throughout Ohio have held that when there is evidence adduced at trial by either the plaintiff or the defendant of two equally efficient and probable causes of injury, one of which is not attributable to the negligence of the defendant, the rule of *res ipsa loquitur* does not apply. See *Jennings Buick, Inc. v. City of Cincinnati* (1980), 63 Ohio St. 2d 167; *Roberts v. Crow*, Summit App. No. 22535, 2005-Ohio-6744; *Brokamp v. Mercy Hospital* (1999), 132 Ohio App. 3d 850; *Hager v. Fairview General Hospital*, Cuyahoga App. No. 83266, 2004-Ohio-3959; *Bowden v. Annenberg*, Hamilton App. No. C-040499, 2005-Ohio-6515; *D'Amore v. Cardwell*, Lucas App. No. L-06-1342, 2008-Ohio-1559. In other words, the doctrine does not apply when the expert medical testimony regarding the cause of the injury is in dispute. See *Roberts*, 2005-Ohio-6744, ¶ 26 ("However, there is evidence of two equally efficient and probable causes of injury, one of which is not attributable to the negligence of the defendant."); *Brokamp*, 132 Ohio App. 3d at 25 ("Because the cause of Daniel's injury was in dispute, the court's decision not to give the *res ipsa loquitur* instruction was proper."); *Hager*,

2004-Ohio-3959, ¶ 61 (“In the case at bar, because Sikora testified that there were many possible causes of decedent’s dental problems, plaintiff is not entitled to an inference of defendant’s negligence.”); *Bowden*, 2005-Ohio-6515, ¶ 47 (“As the record contains evidence of more than one equally efficient and probable cause of Dorothy Bowden’s vascular injuries, at least one of which would not have been attributable to the negligence of Dr. Annenberg and Smith, an instruction on *res ipsa loquitur* was not appropriate.”); *D’Amore*, 2004-Ohio-1559 (Jury was presented with evidence supporting alternative verdicts depending upon which cause the jury chose to believe, one not involving negligence).

In the instant case, the Trial Court properly refused to instruct the jury on the doctrine of *res ipsa loquitur* because there was conflicting expert testimony regarding the cause of the laceration in Ms. Hall’s superior vena cava. Appellee’s experts testified that the injury could not occur without physician negligence. (Tr. 267, 269, 335-336, 340.) However, Dr. Patterson’s experts testified that a vessel injury is a known complication of a catheter placement procedure that can occur even if the physician performs the procedure perfectly. (Tr. 445, 447, 448, 509, 527.) They opined that the laceration may have been caused by a vessel wall abnormality or staph aureus infection, as opposed to negligence. (Tr. 446-447, 497.)

The conflicting expert testimony regarding the cause of the laceration precluded the *res ipsa loquitur* instruction. Ohio law leaves no doubt that the doctrine of *res ipsa loquitur* was not applicable in this case with competing theories of causation. However, the Ninth District’s decision failed to follow the law set forth in the above-cited cases by erroneously holding that a *res ipsa loquitur* charge can be provided even where a defendant presents conflicting evidence/testimony regarding the cause of injury not attributable to the defendant. Consequently, the Ninth District has issued conflicting law that now allows a jury charge on *res*

ipsa loquitur based solely upon evidence/testimony adduced during Plaintiff's case-in-chief without any consideration, whatsoever, of the evidence/testimony presented throughout the entire trial.

The conflicting and inconsistent decision issued by the Ninth District has created confusion as to when the rule of *res ipsa loquitur* is applicable where the record reflects conflicting testimony presented on the cause of injury. Consequently, the Ninth District's conflicting decision incorrectly vacated a jury verdict that was justifiably based upon the evidence and correct jury instructions.

Conclusion

The Ninth District's decision is fundamentally wrong in its application of the *res ipsa loquitur* doctrine for two reasons. First, the decision redefines the *res ipsa loquitur* doctrine by completely ignoring the premise that *res ipsa loquitur* is a rule of circumstantial evidence and does not apply when direct evidence of negligence is offered at trial. As the Ninth District's decision now stands, jurors in medical malpractice actions will be able to stack inferences of negligence on top of direct proof of negligence and defendants will have to affirmatively prove that they were not negligent. The prejudicial effect of the Ninth District's decision is that Ohio's longstanding medical malpractice law has been altered and, now, there is the very real risk of imposing absolute liability in such cases.

Second, the Ninth District's decision is inconsistent and contradictory to decisions rendered by this Court and other Appellate Districts in Ohio. The Ninth District failed to recognize that conflicting expert testimony presented by a defendant regarding the cause of injury, not attributable to the negligence of the defendant, negates the application of *res ipsa loquitur*. Under the erroneous reasoning of the Ninth District, a jury can always be provided a

res ipsa loquitur jury instruction based solely upon what evidence/testimony is presented on causation during the plaintiff's case-in-chief without any consideration of all of the evidence/testimony presented throughout the entire trial.

Without guidance from this Court, *res ipsa loquitur* will be invoked beyond the boundaries within which it was originally intended and Ohio's longstanding law in medical malpractice will be completely altered. Plaintiffs in medical malpractice cases will essentially be guaranteed a jury instruction on *res ipsa loquitur* even though plaintiffs present direct evidence of negligence and also where the cause of injury may not be attributable to the negligence of the defendant.

The decision below must be reversed. A reversal will promote the purpose of the *res ipsa loquitur* doctrine and preserve the premise upon which *res ipsa loquitur* is based. Additionally, a reversal of the Ninth District's decision will correct the injustice caused as a result of a completely justifiable jury verdict being improperly vacated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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Douglas G. Leak (0045554)

IN THE SUPREME COURT OF OHIO

ESTATE OF LURENE N. HALL, by
April E. Couch, Admx, et al.,

Appellees,

v.

AKRON GENERAL MEDICAL CENTER,
et al.,

Appellants.

08-1980

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No. 24066

NOTICE OF APPEAL OF APPELLANTS
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AND RADIOLOGY & IMAGING SERVICES, INC.

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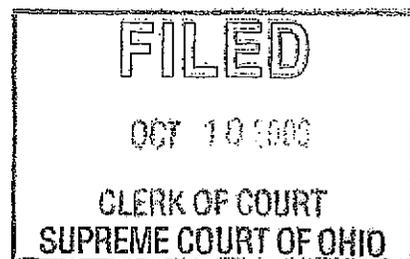
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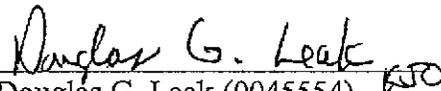


Notice of Appeal of Appellants
Richard D. Patterson, Jr., M.D. and Radiology & Imaging Services, Inc.

Appellants Richard D. Patterson, Jr., M.D. and Radiology & Imaging Services, Inc. hereby give notice of appeal to the Supreme Court of Ohio from the decision rendered by the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 24066 on August 27, 2008.

This case is one of public and great general interest that warrants a review by the Ohio Supreme Court. A Memorandum in Support of Jurisdiction is being filed contemporaneously with this Notice of Appeal.

Respectfully submitted,


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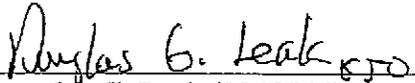
This is to certify that a true copy of the foregoing was mailed by regular U.S. Mail this
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COURT OF APPEALS
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STATE OF OHIO

COUNTY OF SUMMIT

ESTATE OF LURENE N. HALL
BY APRIL E. COUCH, ADMRX., et al.

2008 AUG 27 AM 7:59
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY
CLERK OF COURTS

C. A. No. 24066

Appellants

v.

AKRON GENERAL MEDICAL CENTER,
et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006-02-0983

DECISION AND JOURNAL ENTRY

Dated: August 27, 2008

DICKINSON, J.

INTRODUCTION

{¶1} April Couch, in her capacity as the Administratrix of the Estate of her mother, Lurene Hall, sued various medical providers she believes negligently caused Ms. Hall's death during a surgical procedure. The case went to trial, and the jury rendered a defense verdict. Ms. Couch has appealed, arguing that the trial court: (1) incorrectly refused to allow Ms. Couch to call the county coroner as a rebuttal witness; (2) incorrectly refused to give the jury an instruction regarding res ipsa loquitur; and (3) incorrectly denied her motion for a new trial. This Court reverses and remands this case for a new trial because the trial court incorrectly refused to instruct the jury regarding res ipsa loquitur.

FACTS

{¶2} In order to accommodate Ms. Hall's frequent kidney dialysis treatments, Dr. Richard Patterson, an interventional radiologist, surgically implanted a catheter that ran from Ms. Hall's neck to the top of her heart. The procedure involved piercing the skin on the left side of her neck with a needle, inserting an introducer into the skin, and inserting a guide wire through the introducer down through the jugular vein into the superior vena cava and beyond. The next step is for progressively larger dilators to be slid along the guide wire. Dilators are small tapered instruments that are pushed through to open the passageway wider to accommodate larger items. Dr. Patterson testified it is critical that the dilators are slid along the guide wire because an unguided dilator advancing into the vein can cause damage to the vessel walls. This can occur if the guide wire is inadvertently pulled back while the doctor is advancing the dilators. Dr. Patterson was able to monitor the progression of the dilators during the procedure using fluoroscopy, a type of x-ray video camera equipment that projects a real-time image onto a monitor.

{¶3} Soon after the procedure, Ms. Hall reported pain at the insertion site and was given pain medication. Dr. Patterson reported that, fifteen minutes later, Ms. Hall appeared "unresponsive," "lethargic," "cool," and "a little bit clammy." Dr. Patterson ordered her to be taken back to her hospital room and had her admitting doctor paged. Shortly thereafter, Ms. Hall died.

{¶4} Her autopsy revealed a four-centimeter laceration of the wall of the superior vena cava, one of the major vessels that carries blood to the heart. All of the experts agreed that the cause of death was pericardial tamponade. This was described as a stopping of the heart caused by pressure due to blood leaking into the sac that surrounds the heart. At trial, everyone agreed

that the internal bleeding that killed Ms. Hall started during the catheter placement procedure performed by Dr. Patterson. The experts disagreed, however, on what caused that bleeding.

{¶5} Ms. Couch's expert interventional radiologist, Dr. Michael Foley, testified that Dr. Patterson must have inadvertently pulled the guide wire back and advanced the dilator without it, causing the dilator to be pushed through the vessel wall. He based his opinion on the location of the injury and the rapid pace of Ms. Hall's decline and death following the procedure.

{¶6} He further testified, that this type of injury does not occur in the ordinary course of events if the standard of care is followed. He first testified to that point on direct examination. On cross-examination, he testified that, if Dr. Patterson had actually followed the procedure Dr. Patterson claimed he had, "the perforation of the superior vena cava would not have occurred." He continued, "However, that couldn't have been what really happened in real life, because you would not have lacerated the superior vena cava if you did everything according to the way you said you did it. It wouldn't happen." He testified the laceration was evidence of trauma that he believed came from the unguided advancement of a dilator during this procedure.

{¶7} Ms. Couch's lawyer asked Dr. Foley for his opinion regarding various defense theories of causation. Dr. Foley strongly disagreed with Dr. Patterson's experts. He testified that none of the alternative theories suggested by the defense experts described events that were likely to have caused Ms. Hall's injury. This included a defense theory that a flesh-eating staph infection had weakened the vessel.

{¶8} Ms. Couch also called a vascular surgeon, Dr. Jeffrey Kremen, who offered his opinion, to a reasonable degree of medical certainty, "[t]hat the dilator that was used in some way got off course and produced the laceration that led to [the bleeding into the sac around Ms. Hall's heart] that led to [her death]." Dr. Kremen concluded that the laceration in Ms. Hall's

superior vena cava happened during the catheter placement procedure. He was asked about various defense theories regarding how the injury could have occurred in the absence of negligence. Dr. Kremen stated that he did not believe that any of the alternative theories, including an infection weakening the vessel, explained Ms. Hall's injury. He specifically testified that "there is probably no other conclusion you can draw than [that] the dilator, . . . probably caused the rather large injury, [that is] the rent in the wall . . ."

{¶9} Dr. Kremen testified that, in his opinion, based upon a reasonable degree of medical certainty, Ms. Hall's injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed. He testified that, "if this procedure . . . goes according to protocol, this shouldn't happen. . . . [T]his is really something, if you are following . . . the rules, you shouldn't end up with a tear in the vena cava."

{¶10} Dr. Patterson and his employer called an interventional nephrologist, Dr. Matt Leavitt, who testified that the laceration in the superior vena cava was the cause of Ms. Hall's death and that it occurred during the catheter placement procedure. He testified, however, that the laceration was likely the result of some unknown abnormality in the vessel. He was not able to point to anything in Ms. Hall's medical history indicating that she had any weakness in her blood vessels, but he testified that friction from the wire was the most likely cause of the injury. Dr. Leavitt further testified that friction does not normally cause this type of injury, so, according to him, Ms. Hall's injury was evidence that she was predisposed to such an injury.

{¶11} Dr. Leavitt acknowledged that the guide wire can inadvertently come out during these procedures and that a dilator tip could cut the wall of a blood vessel. He also acknowledged that it would violate the standard of care to advance a dilator without the benefit

of a guide wire. He felt, however, that the possibility of the dilator advancing through the vessel wall to cause this injury was “just short of impossible.”

{¶12} Dr. Leavitt testified that Dr. Patterson “definitely met the standard of care.” He testified that his opinion was based on the fact that Dr. Patterson’s description of the procedure was “by the book,” indicating that he was not negligent. He did admit on cross-examination, however, that had the procedure gone other than the way Dr. Patterson described, his opinion would have been different. He further testified that Ms. Couch’s experts’ opinions that Dr. Patterson advanced the dilator without the benefit of a guide wire is “unlikely as can be” because “[i]t is not something that an experienced operator would do” and because no other witness to the procedure testified that it had occurred.

{¶13} Dr. Leavitt testified that bleeding, both internal and external, is a known risk of this procedure. Although, “not common complications, [] they do happen.” He further testified that these complications can happen even when the procedure is done perfectly. He testified that the laceration of the superior vena cava is not in and of itself evidence of incompetence.

{¶14} Dr. Patterson also called Dr. Mark Dean, an expert in interventional radiology. Dr. Dean testified that Dr. Patterson met the standard of care by performing a standard procedure in this case. He also admitted that his opinion was based on Dr. Patterson’s description of his procedure and that his opinion would be different if Dr. Patterson’s description had been otherwise. He testified, however, that a deviation from the standard of care is not the only way a superior vena cava laceration of this nature could occur.

{¶15} Dr. Dean testified that Ms. Hall’s injury was not the result of any instrument perforating the wall of the vein. He testified that the vein was weak because “the flesh-eating form of staph aureus” “was eating away . . . the lining of her blood vessel.” He opined that the

mere stretching of the blood vessels, which was a necessary part of the procedure, caused the vessel to “unravel[].” When asked about his opinion of Ms. Couch’s experts’ theory that negligence caused this injury, Dr. Dean testified that he did not believe the dilator was long enough to reach the area of injury. He also testified that he warns his patients of several potential risks of the procedure including bleeding, infection, and death.

{¶16} The trial court refused to give Ms. Couch’s proffered jury instruction regarding *res ipsa loquitur*. The trial court ruled that the instruction was not appropriate because “there are multiple potential causative factors.”

RES IPSA LOQUITUR

{¶17} Ms. Couch has argued that the trial court incorrectly refused to instruct the jury regarding the doctrine of *res ipsa loquitur*. “[R]es ipsa loquitur is a rule of evidence which permits the trier of fact to infer negligence on the part of the defendant from the circumstances surrounding the injury to plaintiff.” *Hake v. George Wiedemann Brewing Co.*, 23 Ohio St. 2d 65, 66 (1970). “The trier of fact is permitted, but not compelled, to find negligence.” *Morgan v. Children’s Hosp.*, 18 Ohio St. 3d 185, 187 (1985). The doctrine does not shift the burden of proof from the plaintiff on any element. *Id.* (citing *Prosser & Keeton, Law of Torts* § 40 (5th ed. 1985)). It simply provides a “method of proving the defendant’s negligence through the use of circumstantial evidence.” *Id.* (quoting *Jennings Buick Inc. v. Cincinnati*, 63 Ohio St. 2d 167, 169-170 (1980)). “The weight of the inference of negligence which the jury is permitted to draw . . . as well as the weight of the explanation offered to meet such inference, is for the determination of the jury.” *Fink v. New York Cent. R.R. Co.*, 144 Ohio St. 1, at 12 (1944).

{¶18} The doctrine “had its origin in the law of necessity.” *Fink*, 144 Ohio St. at 5. “The particular justice of the doctrine rests upon the foundation that the true cause of the

occurrence whether innocent or culpable is within the knowledge or access of the defendant and not within the knowledge or access of the plaintiff.” *Id.* Res ipsa loquitur, therefore, is often applied when someone “receives unusual injuries while unconscious and in the course of medical treatment” because in such cases the “cause [of the injury is] within the exclusive knowledge of the defendants.” *Becker v. Lake County Mem’l Hosp. W.*, 53 Ohio St. 3d 202, 205 (1990) (quoting *Ybarra v. Spangard*, 154 P.2d 687, 690-691 (1944) and *Kolakowski v. Voris*, 415 N.E. 2d 397, 410 (1981)).

{¶19} Res ipsa loquitur applies if the plaintiff produces evidence “(1) [t]hat the instrumentality causing the injury was, at the time of the injury, or at the time of creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) 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.” *Hake*, 23 Ohio St. 2d at 66-67. “Whether sufficient evidence has been adduced at trial to warrant application of the rule is a question of law to be determined initially by the trial court, subject to review upon appeal.” *Id.* at 67. Therefore, this Court must conduct a de novo review of a trial court’s decision whether to instruct the jury about res ipsa loquitur. *Akron-Canton Waste Oil Inc. v. Safety-Kleen Oil Serv. Inc.*, 81 Ohio App. 3d 591, 602 (1992).

THE ORDINARY COURSE OF EVENTS

{¶20} Dr. Patterson and his employer have not disputed that they had exclusive control of whichever instrumentalities caused the injury during the catheter placement procedure. They have argued, however, that the evidence before the trial court did not satisfy the second requirement for a res ipsa instruction: “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.”

Hake, 23 Ohio St. 2d at 66-67. Dr. Patterson has argued that *res ipsa loquitur* should not be applied in this case because, according to him, the doctrine does not apply when there is expert medical testimony before the trial court suggesting an alternative theory explaining the injury. In this case, two expert witnesses for the defense testified that internal bleeding is a known risk of the procedure and, although uncommon, this type of injury can occur without negligence.

{¶21} In effect, Dr. Patterson has argued that, even if Ms. Couch presented evidence that, if unrebutted, would have entitled her to an instruction on *res ipsa loquitur*, he successfully rebutted that evidence with the testimony of his experts and the trial court correctly concluded that she was not entitled to that instruction. As support for his argument, he has cited *Jennings Buick v. Cincinnati*, 63 Ohio St. 2d 167 (1980), and this Court's opinion in *Roberts v. Crow*, 9th Dist. No. 22535, 2005-Ohio-6744.

{¶22} Admittedly, the Supreme Court's opinion in *Jennings* includes language that seems to support Dr. Patterson's argument, language this Court quoted and relied on in *Roberts*: "Where it has been shown by the evidence adduced that there are two equally efficient and probable causes of the injury, one of which is not attributable to the negligence of the defendant, the rule of *res ipsa loquitur* does not apply." *Jennings*, 63 Ohio St. 2d at 171, quoted in *Roberts*, 2005-Ohio-6744, at ¶24. Unfortunately, the quoted language is broader than the facts in *Jennings* support.

{¶23} *Jennings* involved property damage caused by a bursting water main. The plaintiff theorized that the city had negligently backfilled the area after completing a repair, thus causing the pipe to burst. The plaintiff's own expert testified on cross-examination that the city's litany of other possible, non-negligent causes were "equally as probable" as that proposed by the plaintiff. *Id.* at 168. The reason the plaintiff in *Jennings* was not entitled to an instruction on *res*

ipsa loquitur was not that there was evidence that tended to show “two equally efficient and probable causes of the injury,” it was because the only evidence before the trial court showed more than one “equally efficient and probable cause[] of the injury.” *Id.* at 171. The plaintiff in *Jennings* failed to introduce evidence that satisfied the second requirement for a res ipsa loquitur instruction.

{¶24} Five years after *Jennings*, the Ohio Supreme Court considered the application of res ipsa loquitur in the medical malpractice case of *Morgan v. Children’s Hosp.*, 18 Ohio St. 3d 185, 187 (1985). In *Morgan*, a twelve-year-old boy never awoke following a surgical procedure and, at the time of trial, was in a persistent vegetative state. All experts agreed the boy had suffered brain damage caused by oxygen deprivation during surgery. The experts disagreed, however, regarding the cause of the deprivation. The plaintiffs’ experts testified that it was caused by the defendant’s failure to provide adequate ventilation during surgery. *Id.* at 186. The defendants’ experts testified that the boy suffered from air emboli, that is, air bubbles that blocked the blood vessels carrying oxygen to the brain. *Id.*

{¶25} The defendants in *Morgan* argued that, because they had presented an alternative, non-negligent explanation for the injury, the plaintiff was not entitled to an instruction on res ipsa loquitur. *Id.* at 189. The Supreme Court disagreed, pointing to the “well-established principle that a court may not refuse as a matter of law to instruct on the doctrine of res ipsa loquitur merely upon the basis that the defendant’s evidence sufficiently rebuts the making of such an inference.” *Id.* (citing *Fink v. New York Cent. R.R. Co.*, 144 Ohio St. 1, paragraph three of the syllabus (1944) (“[A] trial court . . . is without authority to declare, as a matter of law, that the inference of negligence which the jury is permitted to draw, has been rebutted or destroyed by an explanation of the circumstances offered by the defendant, and such action . . . is an

invasion of the province of the jury.”). The Supreme Court reversed in *Morgan* and remanded for a new trial.

{¶26} The question in this case is not, as Dr. Patterson has argued, whether he produced evidence that there are reasonable, non-negligent potential causes of Ms. Hall’s injury. The question is whether Ms. Couch produced evidence that the injury occurred under such circumstances that, in the ordinary course of events, it would not have occurred if Dr. Patterson had observed ordinary care. See *Hake*, 23 Ohio St. 2d at 66-67.

{¶27} In *Jennings*, the plaintiffs failed to present sufficient evidence for the application of the doctrine because their only expert agreed with the defense. On cross-examination, the plaintiff’s expert testified that each of the defendants’ proposed causes was “equally as probable” as the plaintiff’s theory of negligence. See *Jennings*, 63 Ohio St. 2d at 168. Thus, the plaintiff had failed to present evidence from which a jury could reasonably conclude that the negligence of the defendant was any more probable a cause of the injury than the non-negligent theories offered by the defendant. See *id.* at 171. In the same opinion, the Ohio Supreme Court wrote that, in order to apply *res ipsa loquitur*, a plaintiff is not required to disprove all non-negligent possible explanations for the injury. “[A] plaintiff . . . need not eliminate all reasonable non-negligent causes of [her] injury. It is sufficient if there is evidence from which reasonable men can believe that it is more probable than not that the injury was the proximate result of a negligent act or omission.” *Jennings*, 63 Ohio St. 2d at 172; see also *Gayheart v. Dayton Power & Light Co.*, 98 Ohio App. 3d 220, 232 (1994). To the extent this Court held otherwise in *Roberts v. Crow*, 9th Dist. No. 22535, 2005-Ohio-6744, that holding is overruled.

{¶28} In this case, Ms. Couch’s experts testified to the standard of care for this procedure and further testified that, in the ordinary course of events, this type of injury does not

occur without negligence. They both testified that, in order to tear the wall of the superior vena cava, Dr. Patterson's guide wire must have been retracted when the third dilator was pushed into the vein. Despite the lack of direct evidence of the guide wire being retracted or the dilator actually piercing the wall of the blood vessel, Ms. Couch's experts unequivocally testified that the laceration to Ms. Hall's superior vena cava, more likely than not, resulted from Dr. Patterson's negligence during the procedure. Both experts further testified that it was unlikely that the laceration had been caused by any of the non-negligent explanations offered by Dr. Patterson's experts.

{¶29} The defense experts testified that the laceration came from either a pre-existing flesh-eating bacteria or an unknown abnormality in the blood vessel. They also admitted, however, that their opinions were based on Dr. Patterson's testimony that the procedure went as planned.

{¶30} Based on the evidence presented at trial, reasonable jurors could believe that it is more probable than not that Ms. Hall's injury was the proximate result of a negligent act or omission during the course of the catheter placement procedure. See *Jennings*, 63 Ohio St. 2d at 172. Ms. Couch produced sufficient evidence, in the form of expert witness testimony, to show that, in the ordinary course of events, this type of injury does not occur without negligence. Dr. Foley, Ms. Couch's interventional radiology expert, unequivocally stated, several times and in various ways, that if the doctor is carefully advancing the dilators using a properly positioned guide wire, he will not tear the superior vena cava. Counter-evidence, including expert opinions regarding alternative, non-negligent causes, does not affect the trial court's determination of whether Ms. Couch has met the threshold requirements for an instruction on *res ipsa loquitur*. Ms. Couch was not required to "eliminate all reasonable non-negligent causes of [her] injury."

See *Id.* Requiring her to do so would invade the province of the jury. The trier of fact must weigh the evidence and decide which experts to believe.

{¶31} As Ms. Couch's evidence met the requirements for her to be entitled to an instruction on *res ipsa loquitur*, the trial court should have instructed the jury that an inference of negligence was permissible. Ms. Couch's second assignment of error is sustained.

REBUTTAL WITNESS

{¶32} Ms. Couch's first assignment of error is that the trial court incorrectly refused to allow her to call the county coroner as a rebuttal witness. This Court's ruling on Ms. Couch's second assignment of error, however, requires the case to be reversed and remanded for a new trial. Therefore, this assignment of error is moot, and is overruled on that basis. See App. R. 12(A)(1)(c).

MOTION FOR NEW TRIAL

{¶33} Ms. Couch has argued that the trial court should have granted her motion for a new trial based on the cumulative effect of the errors alleged in her other arguments. Based on this Court's disposition of Ms. Couch's second assignment of error, this assignment of error is moot and is, therefore, overruled. See App. R. 12(A)(1)(c).

CONCLUSION

{¶34} The trial court should have instructed the jury on *res ipsa loquitur* because Ms. Couch's evidence met the requirements for application of the doctrine in this case. The judgment of the Summit County Court of Common Pleas is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

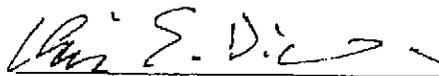
Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellees.


CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

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