

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

Appellees,

v.

Akron General Medical Center, et al.,

Appellants.

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Case No. 2008-1980

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

**REPLY BRIEF OF APPELLANTS
RICHARD D. PATTERSON, JR., M.D. AND
RADIOLOGY & IMAGING SERVICES, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. Appellants' Propositions Of Law Are Identical To Those That Appeared In Their Memorandum In Support Of Jurisdiction	1
III. PROPOSITION OF LAW NO. 1:	2
A. This Court Properly Accepted Jurisdiction Over Appellants' First Proposition Of Law Which Specifically Addressed The Legally Flawed Decision From The Ninth District Court Of Appeals	2
B. Appellee Is Misdirected As To What Constitutes "Direct Evidence" That Makes <i>Res Ipsa Loquitur</i> Inapplicable In This Case	3
C. The Authorities Relied Upon By Appellee Are Either Distinguishable Or Inapplicable To This Case	5
IV. PROPOSITION OF LAW NO. 2:	6
A. Appellee Fails To Adequately Refute Appellants' Correct Statement Of The Law That <i>Res Ipsa Loquitur</i> Is Not Applicable Where There Is Evidence Adduced Of Two Equally Efficient Causes Of Injury, One Of Which Is Not Attributable To Negligence.....	6
CONCLUSION.....	7
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Page

CASES

<i>Belvedere Condominium Unit Owners' Assoc. v. R.E. Roark Companies, Inc.</i> , 67 Ohio St. 3d 274, 1993-Ohio-119.....	2
<i>Hungler v. Cincinnati</i> (1986), 25 Ohio St. 3d 338.....	3
<i>Jennings v. Buick, Inc. v. City of Cincinnati</i> (1980), 63 Ohio St. 2d 167.....	7
<i>Morgan v. Children's Hosp.</i> (1985), 18 Ohio St. 3d 185	5
<i>Getch v. Bel-Park Anesthesia, Assn.</i> , Seventh District App. No. 96 C.A. 84, 1998-WL-201452.....	6
<i>Wiley v. Gibson</i> (1990), 70 Ohio App. 3d 463.....	6

I. INTRODUCTION

Plaintiff-Appellee April Couch, Administratrix of the Estate of Lurene N. Hall, deceased (“Appellee”) raises essentially four meritless arguments in an attempt to convince this Court that the Ninth District’s legally flawed decision should not be disturbed. Appellee **improperly** argues that (i) Dr. Patterson’s Propositions of Law are different than those set forth in his Memorandum in Support of Jurisdiction; (ii) Proposition of Law No. 1 raises new issues upon appeal; (iii) her case was based entirely upon circumstantial evidence and warranted a *res ipsa loquitur* jury charge; and (iv) a *res ipsa loquitur* jury instruction is appropriate even if there exists evidence of two equally efficient causes of injury, one of which is not attributable to the negligence of Dr. Patterson. Each of Appellee’s arguments is without merit because Appellee misstates facts in the case and flatly misinterprets the law on *res ipsa loquitur*

As the Trial Court properly held, the evidence adduced at trial unequivocally established that Appellee was not entitled to a *res ipsa loquitur* jury instruction. The Ninth District had no legal or factual basis upon which to reverse the jury’s verdict. Similarly, Appellee’s Merit Brief presents this Court with no legally sound basis upon which the Ninth District’s decision should be allowed to stand. If the Ninth District’s decision is not reversed by this Court, Ohio’s longstanding law on *res ipsa loquitur* will be completely altered. A reversal of the Ninth District’s decision will promote the purpose of the *res ipsa loquitur* doctrine and preserve the premise upon which *res ipsa loquitur* is based.

II. Appellants’ Propositions Of Law Are Identical To Those That Appeared In Their Memorandum In Support Of Jurisdiction.

In an apparent attempt to avoid the substantive legal arguments for this Court’s review, Appellee flatly misstates that the “two Propositions of Law set forth in the Merit Brief of Appellant differ markedly from those which had originally appeared in the Memorandum in

Support of Jurisdiction.” (Appellee’s Merit Brief, p. 12). A simple review of Dr. Patterson’s Memorandum in Support of Jurisdiction and his Merit Brief undoubtedly confirms that not only are the stated Propositions of Law identical, the respective arguments raised therein pertain to the very issues this Court accepted for review.

This Court should simply disregard Appellee’s contention that Dr. Patterson has somehow presented this court with “new” Propositions of Law in his Merit Brief. Instead, this Court should proceed directly to the merits of both Propositions of Law and review them accordingly.

III. PROPOSITION OF LAW NO. 1

A. **This Court Properly Accepted Jurisdiction Over Appellants’ First Proposition Of Law Which Specifically Addressed The Legally Flawed Decision From The Ninth District Court Of Appeals.**

Appellee improperly argues that this Court should disregard the First Proposition of Law because Dr. Patterson somehow waived the issues raised therein. Nothing could be further from the truth. Dr. Patterson has always maintained, briefed and orally argued that the Trial Court did not err in refusing to provide the jury with a *res ipsa loquitur* instruction. Just as Dr. Patterson argued before the Ninth District, Dr. Patterson is before this Court similarly establishing that the evidence in this case did not warrant a *res ipsa loquitur* jury charge.

Even if this Court was to consider Appellee’s waiver argument, this Court has consistently held that the waiver doctrine is not absolute. *Belvedere Condominium Unit Owners’ Assoc. v. R.E. Roark Companies, Inc.*, 67 Ohio St. 3d 274, 1993-Ohio-119, ¶ 2 of the Syllabus. When an issue of law not specifically argued below is implicit in an issue that was argued, this Court may consider and resolve the implicit issue. *Id.* at ¶ 3 of the Syllabus. This Court has the

discretion to consider an error where there is a sufficient basis “on the record” upon which this Court can consider the error. *Hungler v. Cincinnati* (1986), 25 Ohio St. 3d 338.

In this case, the issue raised in the First Proposition of Law is indisputably contained “within the record” before this Court. Dr. Patterson’s First Proposition of Law addresses the Ninth District’s erroneous decision that allows a trial court to instruct a jury on *res ipsa loquitur* in the face of “direct evidence” of negligence. Nothing herein presents this Court from considering and resolving the legal issue regarding the doctrine of *res ipsa loquitur*.

Therefore, this Court should proceed to the merits of Dr. Patterson’s First Proposition of Law.

B. Appellee Is Misdirected As To What Constitutes “Direct Evidence” That Makes *Res Ipsa Loquitur* Inapplicable In This Case.

Of critical import to Dr. Patterson’s First Proposition of Law, the doctrine of *res ipsa loquitur* is founded upon an absence of specific proof concerning acts or omissions which would constitute “negligence.” As this Court is well aware, this is a medical malpractice action in which negligence is established by expert opinions. 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.

Appellee's Merit Brief seemingly confuses what constitutes "direct evidence" in the context of what must be proven in a medical malpractice. Appellee apparently believes that since her experts were not eyewitnesses to the catheter implant procedure, their expert opinions constituted circumstantial evidence and not direct evidence, thus entitling her to a jury charge on *res ipsa loquitur*. (Appellee's Merit Brief, p. 15). This position taken by Appellee is misplaced and not in accordance with the law on *res ipsa loquitur* in a medical malpractice action.

Admittedly, non-party experts in a medical malpractice action cannot be eyewitnesses to the events at hand. However, expert witnesses base their opinions regarding negligence and proximate cause on the medical records, deposition testimony or other information derived during discovery. Experts generally do not infer negligence when they testify; they state what specific acts constituted medical negligence. In this case, Appellee's expert's opinions were not based upon inference of negligence or circumstantial evidence; Appellee's experts provided explicit testimony as to the **specific acts of negligence** that they claimed occurred in this case.

Interestingly, Appellee readily admits in her Merit Brief that her experts were able to testify as to what specific acts of negligence occurred in this case. Appellee states in her Merit Brief that her experts knew "exactly" what occurred and were "certain" about their conclusions. (Appellee's Merit Brief, p. 15). By Appellee's own admission, she offered "direct" evidence from her two medical experts as to what specific acts of medical negligence proximately caused the injury. Appellee's expert **did not** infer negligence when they testified. Accordingly, a *res ipsa loquitur* jury instruction was not given by the Trial Court.

By allowing a *res ipsa loquitur* jury charge in the face of this “direct” evidence of medical negligence and proximate cause, the Ninth District effectively abolished the 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.

C. The Authorities Relied Upon By Appellee Are Either Distinguishable Or Inapplicable To This Case.

Dr. Patterson’s First Proposition of Law is premised upon the argument that *res ipsa loquitur* does not apply when there exists “direct” evidence of negligence because *res ipsa loquitur* is an evidentiary rule which permits a jury to draw an “inference” of negligence by the use of circumstantial evidence. Appellee’s Brief relies upon three cases in opposition to Dr. Patterson’s First Proposition of Law. (Appellee’s Merit Brief, pp. 20-22). However, none of these cases address the specific issue at hand, *i.e.*, a jury charge on *res ipsa loquitur* is not warranted where a plaintiff in a medical malpractice action offers “direct” evidence from a medical expert as to what specific acts of medical negligence proximately caused the injury.

Appellee relies upon this court’s case of *Morgan v. Children’s Hosp.* (1985), 18 Ohio St. 3d 185. There is no dispute that the *Morgan* decision is a landmark case involving a *res ipsa loquitur* jury charge in a medical malpractice action and Appellee properly references the correct statement of law rendered by this Court. However, this Court’s decision in *Morgan* never addressed the application of *res ipsa loquitur* where an expert testifies about the specific act or omission that constitutes negligence. Therefore, Appellee’s reliance on the *Morgan* decision is misplaced in this case.

Similarly, Appellee improperly relies upon the Seventh District Court of Appeals decision in *Getch v. Bel-Park Anesthesia, Assn.*, Seventh District App. No. 96 C.A. 84, 1998-WL-201452. The **only** issue in the *Getch* case involved the appropriateness of the “language” of a jury charge on *res ipsa loquitur* that was given by the trial court where there were multiple defendants. The Seventh District in *Getch* did not address any issues involved “direct” evidence versus “circumstantial” evidence and the appropriateness of a *res ipsa loquitur* jury charge. Consequently, the *Getch* case is inapplicable to the issue raised herein.

Additionally, Appellee’s reliance upon the First District’s decision in *Wiley v. Gibson* (1990), 70 Ohio App. 3d 463 is undoubtedly misplaced. The *Wiley* case did not even involve a trial or whether a jury instruction on *res ipsa loquitur* should have been given. In *Wiley*, the First District addressed the issue of whether the trial court erred in granting summary judgment in favor of the defendant by refusing to consider the application of *res ipsa loquitur*. The *Wiley* case came down to whether there existed factual issues in the context of summary judgment proceedings; it had nothing to do with a jury charge on *res ipsa loquitur*.

Clearly, the legal authorities upon which Appellee relies to respond to Dr. Patterson’s First Proposition of Law are either distinguishable or inapplicable to this case.

IV. PROPOSITION OF LAW NO. 2

A. Appellee Fails To Adequately Refute Appellants’ Correct Statement Of The Law That *Res Ipsa Loquitur* Is Not Applicable Where There Is Evidence Adduced Of Two Equally Efficient Causes of Injury, One Of Which Is Not Attributable To Negligence.

Contrary to Appellee’s response to Dr. Patterson’s Second Proposition of Law, 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. This Court and several Appellate

Districts throughout Ohio have consistently 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 Dr. Patterson's Merit Brief, pp. 13-14).

Appellee's misguided position on this issue is that when a trial court instructs a jury with respect to *res ipsa loquitur*, the trial court can completely ignore the defendant's evidence/testimony regarding causation. In other words, a jury charge on *res ipsa loquitur* can be based solely upon evidence/testimony adduced during the plaintiff's case-in-chief without any consideration, whatsoever, of the evidence/testimony presented throughout the entire trial. Appellee's argument is without merit and should be disregarded accordingly.

As this Court correctly held in *Jennings v. Buick, Inc. v. City of Cincinnati* (1980), 63 Ohio St. 2d 167, *res ipsa loquitur* is inapplicable where there is evidence in the "entire" 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. In this case, the Trial Court properly determined that a *res ipsa loquitur* jury charge was not warranted because there was "conflicting" expert testimony regarding the cause of injury. Unfortunately, the Ninth District failed to recognize the conflicting expert testimony regarding the cause of injury and that this conflicting testimony clearly precluded the *res ipsa loquitur* jury instruction. As a result, the Ninth District leaves Ohio with a conflicting and inconsistent decision with this Court's precedent and other Appellate Districts.

V. CONCLUSION

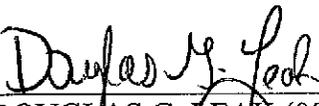
The Ninth District's decision is fundamentally wrong in its application of the *res ipsa loquitur* doctrine for two reasons. First, the decision redefines the *res ipsa loquitur* doctrine by

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. 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*.

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.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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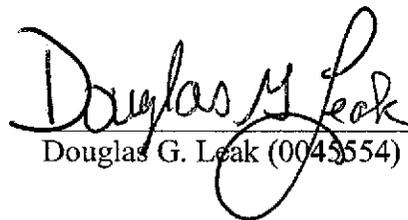
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