

2005

June W. Cox Pete v. Dr. Robert L. Youngblood, St.  
Marks Hospital, and John Does I-IV, XYZ  
Corporations I-IV : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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JUNE W. COX PETE,

Plaintiff-Appellant,

vs.

DR. ROBERT L. YOUNGBLOOD, ST.  
MARKS HOSPITAL, and JOHN DOES I-  
IV, XYZ CORPORATIONS I-IV,

Defendants-Appellee.

Court of Appeals No. 20050268-CA

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**BRIEF OF APPELLANT**

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Appeal from the Orders Entering Summary Judgment for Defendant and Denying  
Plaintiff's Motion for Jury Trial by the District Court of the Third Judicial District,  
the Honorable J. Dennis Fredrick, Presiding

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UTAH APPELLATE COURTS  
NOV 02 2005

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## **JURISDICTIONAL STATEMENT**

The Third Judicial District Court, Judge J. Dennis Fredrick, entered its final judgment in this matter on or about February 15, 2005. Plaintiff-Appellant timely filed her Notice of Appeal on or about March 15, 2005. The Utah Supreme Court transferred this matter to this Court on or about March 21, 2005. Therefore, the Utah Court of Appeals has jurisdiction over this Appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2004).

## **ISSUES PRESENTED FOR REVIEW**

### **FIRST ISSUE PRESENTED**

Under Utah law, is the plaintiff in a medical malpractice action required to present expert medical testimony when the malpractice arose from the defendant-physician's failure to remove a foreign object from the plaintiff's surgical site?

#### *Standard of Review*

This issue presents a question of law. The trial court's conclusions of law should be reviewed by this Court de novo. *State v. Pena*, 869 P.2d 932 (Utah 1994). Further, to insure that a court acted within its discretion, the facts and reasons for the court's decisions must fully set forth appropriate findings and conclusions. *Barnes v. Barnes*, 857 P.2d 257 (Utah Ct. App. 1993). Findings must be sufficiently detailed to ensure that the trial court's discretionary determination was rationally based. *Id.*

#### *Preservation of this Issue*

Plaintiff-Appellant preserved this issue below by filing her Memorandum in Opposition to Defendant's Motion for Summary Judgment. (R. 127–154).

## SECOND ISSUE PRESENTED

Under the Utah Rules of Civil Procedure, does Rule 26(a)(3) require the plaintiff to a medical malpractice action to identify and designate treating physicians as expert witnesses when such treating physicians were previously identified and designated in the plaintiff's Rule 26(a)(1) Initial Disclosures and when the treating physicians were not "retained or specially employed to provide expert testimony in the case"?

### *Standard of Review*

This issue presents a question of law. The trial court's conclusions of law should be reviewed by this Court de novo. *State v. Pena*, 869 P.2d 932 (Utah 1994). Further, to insure that a court acted within its discretion, the facts and reasons for the court's decisions must fully set forth appropriate findings and conclusions. *Barnes v. Barnes*, 857 P.2d 257 (Utah Ct. App. 1993). Findings must be sufficiently detailed to ensure that the trial court's discretionary determination was rationally based. *Id.*

### *Preservation of this Issue*

Plaintiff-Appellant preserved this issue below by filing her Memorandum in Opposition to Defendant's Motion for Summary Judgment. (R. 127–154).

## THIRD ISSUE PRESENTED

Under Utah law, does a district court abuse its discretion when it denies a plaintiff's motion for trial by jury, pursuant to Rule 39, when the plaintiff makes its motion before any discovery has commenced?

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### *Standard of Review*

A trial court's refusal to grant or to deny a jury trial pursuant to Rule 39(b) is reviewed for an abuse of discretion. *James Mfg. Co. v. Wilson*, 390 P.2d 127, 128 (Utah 1964); *Aspenwood, L.L.C. v. C.A.T., L.L.C.*, 2003 UT App 28, ¶ 33, 73 P.3d 947, 954.

### *Preservation of this Issue*

Plaintiff-Appellant preserved this issue below by filing her Motion for Jury Trial and her Memorandum of Points and Authorities in support thereof. (R. 36–41).

### **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES**

Rule 26(a)(3), Utah Rules of Civil Procedure, reads as follows:

(a)(3) *Disclosure of expert testimony.*

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by Subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by Subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

Rule 26 has been reproduced in its entirety as Exhibit A in the Addendum to Appellant's Brief, *infra*.

Rule 39(b), Utah Rules of Civil Procedure, reads as follows:

(b) *By the court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

Rule 39 has been reproduced in its entirety as Exhibit B in the Addendum to Appellant's Brief, *infra*.

## **STATEMENT OF THE CASE**

### *A. Nature of the Case*

Plaintiff-Appellant June W. Cox Pete ("Mrs. Pete") respectfully requests that this Court reverse the judgment granted in favor of Defendant Dr. Robert L. Youngblood ("Defendant") in her claim for Defendant's medical malpractice and negligence. (R. 6–7). Mrs. Pete's claims stem from Defendant's failure to remove surgical gauze from Mrs. Pete's body. *Id.* The gauze remained in her body for approximately thirty years, causing persistent infections and discomfort. (R. 5–6).

### *B. Course of Proceedings and Disposition of Court Below*

Mrs. Pete filed her Complaint on or about February 6, 2003, against Defendant and St. Mark's Hospital. (R. 3). Defendant answered the Complaint on or about April 7, 2003, and Mrs. Pete voluntarily dismissed St. Mark's Hospital from the litigation on or

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about July 14, 2003 after receiving sufficient statutory authority negating the liability of St. Mark's Hospital. (R. 10, 26–27).

Prior to the commencement of any discovery proceedings, but more than ten days after Defendant filed his answer, Mrs. Pete moved, pursuant to Utah R. Civ. P. 39(b), for a trial by jury. (R. 36–37). Although Mrs. Pete fully intended to demand a jury trial within ten days of the last responsive pleading to be filed, pursuant to Rule 38, she was unable to do so because St. Mark's Hospital was dismissed from the suit before it filed a responsive pleading. (R. 39). On or about October 28, 2003, the district court denied Mrs. Pete's motion for a trial by jury as follows:

[T]he [c]ourt concludes that the Plaintiff waived her right to a jury trial by failing to file a timely demand in compliance with the provisions of Rule 38, Utah Rules of Civil Procedure, and that Plaintiff failed to demonstrate sufficient justification to persuade the Court to exercise its discretion pursuant to Rule 39(b), Utah Rules of Civil Procedure, to relieve her of that waiver.

(R. 62–63). The district court did not, however, identify any way in which Defendant would be prejudiced, or any other strong or compelling reason to refuse to grant Mrs. Pete's motion for a trial by jury.

During the discovery process, Mrs. Pete submitted her Initial Disclosures to Defendant. (R. 60–61). Although Defendant never returned this favor, Mrs. Pete provided all of the information required by Rule 26(a). *See* Initial Disclosures, attached as Exhibit G and incorporated herein by this reference. In her initial disclosures to Defendant, Mrs. Pete identified at least three doctors—two medical doctors and one dentist—who provided her with treatment and could offer testimony in this case. *Id.* Mrs. Pete also

provided medical records and billing summaries from these medical providers with her initial disclosures to Defendant. Unlike Mrs. Pete, Defendant never identified, prior to his motion for summary judgment, to Mrs. Pete any individual—including himself—who would offer any expert testimony on his behalf.

After participating in discovery, and after the court-imposed deadline for filing dispositive motions, Defendant moved for summary judgment, alleging only that Mrs. Pete failed to designate an expert witness. (R. 103, 110–11). Mrs. Pete opposed Defendant’s motion, making the following four arguments: (1) Defendant failed to file his motion before the deadline set by the district court for filing dispositive motions in this case; (2) Mrs. Pete properly designated her expert witnesses and provided her expert witness’ reports in her Rule 26(a) Initial Disclosures; (3) expert testimony is not required in the case at hand because it is within the common knowledge and experience of laypeople that negligence and medical malpractice has occurred where physicians leave surgical instruments and paraphernalia inside surgical sites; and (4) a plaintiff is not required to designate her treating physicians as expert witnesses because they are not specifically retained or employed for the purpose of providing expert testimony. (R. 127, 131–35). However, the district court refused to strike the affidavit of Defendant, in which he offered expert testimony despite never identifying himself as an expert witness pursuant to Rule 26(a)(3); the district court struck the affidavit of Mrs. Pete’s treating physician, which was filed in opposition to Defendant’s motion, stating that the affidavit “was not submitted until after the Plaintiff certified this case for trial”; and the district court granted summary judgment in favor of Defendant as follows:

[B]ecause this case requires the presentation of expert testimony and none has been provided, summary judgment is appropriate. Finally, after reviewing the record in this matter, the Court is not persuaded the doctrine of *res ipsa loquitur* has any application.

Based upon the foregoing, Defendant's Motion for Summary Judgment and Motion to Strike are granted.

(R. 228–29).

Mrs. Pete timely filed her Notice of Appeal, and the Utah Supreme Court transferred the case to this Court, from which she seeks relief from the judgment of the district court below.

### *C. Statement of Facts*

Mrs. Pete respectfully requests that this Court reverse the judgment and order of the district court below in which that court held (1) that the firmly established doctrine of *res ipsa loquitur* has no application to this case, (2) that a plaintiff's treating physicians must be designated as expert witnesses, (3) that the identification of treating physicians as witnesses in a plaintiff's Initial Disclosures, and the provision of medical records and billing summaries from such treating physicians, does not adequately identify treating physicians as expert witnesses, and (4) that Mrs. Pete is not entitled to present her case to a jury of her peers. (R. 58–59, 62–63, 228–30, 238–40).

The medical malpractice case at hand began at a horse race in 1970. The horse on which Mrs. Pete was riding suffered a "stroke," causing the large animal to fall. *See* Deposition of June W. Cox Pete at 20, attached as Exhibit H and incorporated herein by this reference. The horse threw Mrs. Pete face first to the ground. *Id.* As she lay there helplessly, the horse fell on top of Mrs. Pete, the "saddle horn and candle" hitting her

shoulder and her head. *Id.* She lay unconscious on the track for nearly an hour while emergency medical attention was sought. *Id.* The small Nevada town in which the race occurred was ill equipped to handle injuries as severe as those suffered by Mrs. Pete, so the doctor arranged for Mrs. Pete to be flown to Salt Lake City for treatment. *Id.* at 21. Mrs. Pete needed expert medical attention.

At St. Mark's Hospital in Salt Lake City, Mrs. Pete was placed in the care of a young and inexperienced plastic surgeon—the Defendant. (R. 116). Defendant had only been admitted to practice medicine in Utah for six short months when he attempted to repair the shattered bones in Mrs. Pete's face. (R. 113, 116). Defendant wired together as many bones as he could and then placed gauze in the surgical site to "provide stability." (R. 113).

Approximately two weeks after the surgery, Mrs. Pete visited Defendant so that he could remove the gauze and sutures he had placed during the surgery. (R. 113); *see also* Exhibit H at 29–37. Mrs. Pete visited Defendant's office approximately three more times, where she was examined by the young surgeon. No additional gauze was removed from her facial tissue during these appointments. Exhibit H at 29–37; (R. 113).

Over the next thirty years, Mrs. Pete suffered from persistent and painful sinus infections, swelling, and headaches. *Id.* 38–39. Although she is a hardy rancher who dislikes taking medication because she would rather know what is happening to her body than mask the pain, Mrs. Pete visited her family physician and properly took prescribed medications, hoping her malady could be corrected. *Id.* at 35, 38–39, 45–54. However, in November 2001, after a particularly painful and severe infection caused the area below



her eye to swell to the size of an egg, Mrs. Pete saw a specialist in St. George, Utah, for additional treatment and diagnosis. *Id.* at 45–47, 65–66. Unfortunately the specialist could not determine the cause of Mrs. Pete’s chronic pain, swelling, and infections. *Id.* at 49–50.

Mrs. Pete’s dentist examined her to determine whether her problems stemmed from her teeth. After finding only normal and healthy teeth, he lanced the infected portion of her cheek. *Id.* at 67–70. A large amount of foul-smelling puss oozed from the puncture. *Id.* Then, the dentist found the source of Mrs. Pete’s chronic infections and swelling—thirty-year-old gauze buried under Mrs. Pete’s facial tissue. *Id.* An oral surgeon removed two five-inch pieces of gauze from Mrs. Pete’s facial tissue. *Id.* The gauze was located at the site of her original 1970 surgery, which was performed by Defendant. *Id.* at 55. Mrs. Pete had no other surgery around her face since Defendant placed gauze in her surgical site. *Id.* Following the removal of the purulent gauze, Mrs. Pete has had no recurring symptoms. *Id.* at 69–70.

### **SUMMARY OF ARGUMENTS**

This Court must decide whether a surgeon’s negligence in failing to remove surgical paraphernalia from a patient’s facial tissue “speaks for itself.” In finding in favor of Defendant, the court below erred in three ways: First, it is within the common knowledge and experience of laypeople that a surgeon who leaves gauze in a surgical site for thirty years has been negligent. Therefore, the court erred in refusing to apply the doctrine of *res ipsa loquitur* in the case at hand. Second, even though no expert testimony is required to prove negligence under *res ipsa loquitur*, the district court erred in striking

the affidavits of Mrs. Pete's treating doctors. Finally, the court below should have granted Mrs. Pete's motion for jury trial because it would not have resulted in any prejudice.

First, the doctrine of *res ipsa loquitur* applies to the case at hand. In medical malpractice cases, a plaintiff may prove her *prima facie* case of negligence against a physician without providing any expert testimony if the physician's conduct is an "affront" to the medical profession, or if the elements of *res ipsa loquitur* are shown. Courts in this state, and in other jurisdictions, have held that when a surgeon leaves behind surgical paraphernalia inside a patient, the doctrine of *res ipsa loquitur* should be applied because it is within the common knowledge and experience of laypeople that such a mistake would not happen but for negligence. In the case at hand, Defendant left surgical gauze in Mrs. Pete's facial tissue, causing thirty years' worth of pain, discomfort, and infection. Therefore, Defendant was entitled to proceed under a *res ipsa loquitur* theory, and the judgment and order of the district court must be reversed.

Second, Mrs. Pete submitted expert testimony, even though not required under the doctrine of *res ipsa loquitur*, to oppose Defendant's motion for summary judgment. The court erred in ruling that Mrs. Pete failed to properly designate her experts. Pursuant to Rule 26(a)(3), a party must identify the witnesses she intends to elicit expert opinions from and produce a report outlining the bases of the opinions. However, by its terms, the rule only applies to "a witness who is retained or specially employed to provide expert testimony in the case," not to treating physicians. Utah R. Civ. P. 26(a)(3)(B).

In the case at hand, the affidavits submitted by Mrs. Pete satisfied the requirements of Rule 26(a)(3) for two reasons: First, the affidavits were from treating

physicians, who are not subject to the strictures of Rule 26(a)(3). And second, Mrs. Pete properly identified her witnesses and provided their notes and records in her initial disclosures to Defendant. Therefore, the district court erred in striking the affidavits submitted by Mrs. Pete, and the judgment and order of that court must be reversed.

Finally, the district court abused its discretion in refusing to grant Mrs. Pete's motion for a jury trial. Although granting such motions lies with the discretion of the court, a motion for jury trial should be granted liberally, unless the opposing party shows prejudice or some other "strong and compelling" reason.

In the case at hand, Defendant would have suffered no prejudice, and no other strong or compelling reason existed for denying Mrs. Pete's motion. At the time of her motion, no discovery had commenced as the litigation was still in its infancy. Further, Mrs. Pete's failure to demand a jury trial earlier did not result from inadvertence. Therefore, the court below erred by refusing to grant Mrs. Pete the opportunity to present her evidence of Defendant's negligence to a jury.

For these reasons, this Court should hold that the doctrine of *res ipsa loquitur* applies when a surgeon fails to remove surgical gauze from a patient's facial tissue, that Mrs. Pete properly submitted expert affidavits in opposition to Defendant's motion for summary judgment, and that Mrs. Pete is entitled to a trial by jury. Therefore, the judgment and order of the district court should be reversed, and this case should be remanded for trial.

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## ARGUMENT

### **I. THE DISTRICT COURT ERRED BY REQUIRING MRS. PETE TO PRESENT EXPERT MEDICAL TESTIMONY BECAUSE IT IS WITHIN THE COMMON KNOWLEDGE AND EXPERIENCE OF LAYPEOPLE THAT A SURGEON HAS BEEN NEGLIGENT IF HE LEAVES A FOREIGN OBJECT IN A PATIENT.**

First, Mrs. Pete was improperly required to present expert medical testimony to show that Defendant breached the standard of care when he left surgical gauze in her operative site for thirty years. In order to prevail on a medical malpractice claim under Utah law, a plaintiff must generally prove four elements: “(1) the standard of care (duty), (2) breach, (3) causation, and (4) damages.” *Robb v. Anderton*, 863 P.2d 1322, 1327 (Utah Ct. App. 1993) (citing *Dalley v. Utah Valley Reg’l Med. Ctr.*, 791 P.2d 193, 195–96 (Utah 1990); *Robinson v. Intermountain Health Care, Inc.*, 740 P.2d 262, 264 (Utah Ct. App. 1987)). However, “expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman.” *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980).

In holding that expert testimony was required in the case at hand, the district court erred because laypeople can understand that negligence has occurred when a surgeon forgets to remove gauze from within a patient’s body. The doctrine of *res ipsa loquitur* should be applied in such cases, allowing the “finder of fact [to] logically conclude that an injury was probably caused by negligence.” *Baczuk v. Salt Lake Reg’l Med. Ctr.*, 2000 UT App 225, ¶ 6, 8 P.3d 1037, 1039 (citing *King v. Searle Pharm., Inc.*, 832 P.2d 858, 862 (Utah 1992)).

The application of this doctrine “allows a plaintiff to raise an inference of negligence through circumstantial evidence.” *Baczuk*, 2000 UT App 225, ¶ 6, 8 P.3d at 1039 (citing *Dalley*, 791 P.2d at 196). To proceed under this doctrine, a plaintiff must generally establish three elements:

- (1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care;
- (2) the agency or instrumentality causing the accident was at the time of the accident under the exclusive management or control of the defendant; and
- (3) the plaintiff’s own use or operation of the agency or instrumentality was not primarily responsible for the accident.

*Robb v. Anderton*, 863 P.2d 1322, 1327 (Utah Ct. App. 1993) (quoting *King*, 832 P.2d at 861; and citing *Dalley*, 791 P.2d at 196). A plaintiff in a medical malpractice action, however, is not required to provide this foundation where “the medical procedure is so common or the outcome so affronts our notions of medical propriety that expert testimony is not required to establish what would occur in the ordinary course of events.” *Baczuk*, 2000 UT App 225, ¶ 7, 8 P.3d at 1039–1040 (quoting *Nixdorf*, 612 P.2d at 353). Therefore, this Court should reverse the decision of the district court and remand this matter for trial if (1) the failure to remove gauze strips from a surgical site “affronts our notions of medical propriety,” or (2) the three elements of *res ipsa loquitur* can be satisfied by Mrs. Pete.

A. *The Failure to Remove Gauze from a Surgical Site Is an Affront to Medical Propriety.*

First, Mrs. Pete is entitled to the application of the doctrine of *res ipsa loquitur* because Defendant’s conduct “affronts out notions of medical propriety.” *Id.* The conduct

of a physician rises to such a level of impropriety when it is within the common experience and knowledge of a layperson that the injury suffered by the patient “more probably than not resulted from negligence.” *Id.* ¶ 8, 8 P.3d at 1040. Where a patient underwent surgery on his fingers and emerged from the surgery with pressure injuries or burns on his buttocks and nerve damage to his leg, this Court held that “medical expertise” was not required “to understand the steps that must be taken to avoid such injuries.” *Id.* ¶ 11. Therefore, the court held that the injured patient could properly rely on the doctrine of *res ipsa loquitur* and reversed the judgment of the district court in favor of the negligent physician.

The Utah Supreme Court addressed the application of *res ipsa loquitur* with respect to a surgeon who left gauze inside his patient in *Fredrickson v. Maw*, 227 P.2d 772 (Utah 1951), *overruled on other grounds by Swan v. Lamb*, 584 P.2d 814, 817 (Utah 1978). In that case, a surgeon “carelessly left gauze, dressings, threads, and sutures” inside the surgical site when performing a tonsillectomy. *Id.* at 772. After recognizing the “well-recognized rule holding that when facts may be ascertained by the ordinary use of the senses of lay witnesses, it is not necessary that expert testimony be produced and relied upon,” the court noted that “actions involving negligence in leaving instruments, needles, sponges, bandages, gauze or foreign particles in incisions, wounds, or open cavities” fall into the no-expert-needed rule. *Id.* at 773. Specifically, the court noted that if “a surgeon should lose the instrument with which he operates in the incision which he makes in his patient, it would seem as a matter of common sense that scientific opinion

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could throw little light on the subject.” *Id.* (quoting *Wharton v. Warner*, 135 P. 235, 237 (Wash. 1913)).

Further, where a surgeon lost a needle inside a patient’s body while repairing the patient’s rectocele, the court held that no expert testimony was required to prove the surgeon’s negligence. *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980) (“[E]xpert testimony should not have been required to establish the professional standard of care under the facts of the present case.”). Specifically, the court ruled that “expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman.” *Id.* The court also noted that “[t]he loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies [the] type of treatment” where no expert testimony was required. *Id.*

In the case at hand, Defendant’s conduct was an affront to medical propriety, and the court below, therefore, erred in refusing to consider Defendant’s negligence under a *res ipsa loquitur* theory. Defendant left surgical paraphernalia inside Mrs. Pete’s facial tissue after performing surgery on her. By common knowledge, experience, and plain common sense, laypeople generally know that where a surgeon forgets or fails to remove surgical paraphernalia from a surgical site, the surgeon has negligently failed to satisfy his standard of care. The district court failed to consider the doctrine of *res ipsa loquitur*, and the judgment of the court below must be reversed.

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*B. Defendant's Negligence Speaks for Itself and Satisfies the Elements for the Application of Res Ipsa Loquitur.*

Second, even if Mrs. Pete is not entitled to the application of *res ipsa loquitur* because Defendant's conduct was an "affront" to medical propriety, the doctrine should be applied because each of its elements has been met. The assertion of a claim under the doctrine of *res ipsa loquitur* generally requires that the following three elements be shown: (1) that the injury would not have ordinarily occurred in the absence of negligence; (2) that the instrumentality causing the injury was under the exclusive control of the defendant; and (3) that the plaintiff's use of the instrumentality, if any, did not cause the injury. *See, e.g., Robb*, 863 P.2d at 1327; *King*, 832 P.2d at 861; *Dalley*, 791 P.2d at 196. Because each of these elements has been satisfied in the case at hand, Mrs. Pete is entitled to proceed under the doctrine of *res ipsa loquitur*.

As was mentioned *supra*, Utah courts have consistently held that where a physician leaves surgical paraphernalia imbedded within their patients, such injured patients are entitled to proceed on the doctrine of *res ipsa loquitur*. *See, e.g., Fredrickson*, 227 P.2d at 772 (holding the doctrine applicable where a surgeon failed to remove gauze from a surgical site); *Nixdorf*, 612 P.2d at 352 (holding that "[t]he loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies [the] type of treatment" where no expert testimony was required").

In the case at hand, Defendant left surgical paraphernalia, in the form of surgical gauze, in the operative site in 1970, and Mrs. Pete suffered damages as the direct and proximate result. Utah law is clear that when a surgeon leaves behind a foreign object in



a surgical site, no expert testimony is necessary with regard to the standard of care. It is well within the common knowledge and experience of laypeople that a physician failing to remove gauze, or other surgical paraphernalia, from a surgical site, has breached the applicable standard of care. The Defendant had exclusive control over the gauze, and Mrs. Pete never had any other facial or mouth surgery during which gauze could have been left in her facial tissue. Exhibit H at 55. Finally, as Mrs. Pete was unconscious during the surgery in which Defendant placed the gauze in the surgical site, she can have no responsibility for Defendant's negligence. Therefore, the district court erred in requiring Mrs. Pete to produce expert testimony, and the judgment of the court below should be reversed.

Courts in other American jurisdictions concur with this result. For instance, where a surgeon left a laparotomy sponge in a patient's body following her hysterectomy, the court applied *res ipsa loquitur*, holding that "[a] layman can understand, without expert testimony, that the unauthorized or unexplained leaving of an object inside a patient is negligence." *Coleman v. Rice*, 706 So. 2d 696, 698 (Miss. 1997). Further, where another doctor left a surgical sponge inside his patient, the court noted that "[t]he jury could infer negligence without any further showing, under the doctrine of *res ipsa loquitur*, because the event complained of is clearly one which 'ordinarily would not happen in the absence of negligence.'" *Burke v. Wash. Hosp. Ctr.*, 475 F.2d 364, 365 (D.C. Cir. 1973) (quoting

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*Raza v. Sullivan*, 432 F.2d 617, 620 (D.C. Cir. 1970); and citing *Quick v. Thurston*, 290 F.2d 360 (D.C. Cir. 1961)).<sup>1</sup>

Finally, the district court erred in requiring Mrs. Pete to provide expert testimony regarding Defendant's negligence because expert testimony in the case at hand is probably improper under the Utah Rules of Evidence. Specifically, Rule 702 only allows "a witness qualified as an expert by knowledge, skill, experience, training, or education" to present testimonial evidence of her opinions "[i]f scientific, technical, or other

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<sup>1</sup> See also, e.g., *Dietze v. King*, 184 F. Supp. 944, (E.D. Vir. 1960) (holding that, where a physician left a surgical sponge inside a patient, "[a] clearer case for the application of the doctrine [of *res ipsa loquitur*] in an action for medical malpractice cannot be shown"); *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 841 (Tex. Ct. App. 2003) ("Although *res ipsa loquitur* is generally inapplicable to malpractice cases, an exception is recognized when the nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen, requiring no expert testimony, such as negligence in leaving surgical instruments or sponges within the body.") (citing *Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990)); *Tice v. Hall*, 303 S.E.2d 832 (N.C. Ct. App. 1983) (holding that a plaintiff in a medical malpractice action was entitled to rely on the doctrine of *res ipsa loquitur* to show that a surgeon, who failed to remove a surgical sponge from the patient's body, breached the applicable standard of care), *aff'd* 313 S.E.2d 565 (N.C. 1984); *Wells v. Woman's Hosp. Found.*, 286 So. 2d 439, 442 (La. Ct. App. 1974) (applying the doctrine of *res ipsa loquitur* to apply where a physician failed to remove gauze from a surgical site); *Hestbeck v. Hennepin County*, 212 N.W.2d 361, 365–66 (Minn. 1973) (same); *Butts v. Watts*, 290 S.W.2d 777, 780 (Ky. 1956) (applying the doctrine of *res ipsa loquitur* to a case in which a dentist failed to remove a small portion of a tooth he extracted from a patient, and noting that "this court has held that leaving a gauze pad within the body of the patient is negligence per se and the fact that good surgeons sometimes do so is no excuse, because every man is responsible for the legal consequences of his own careless act") (citing *Barnett's Adm'r v. Brand*, 177 S.W. 461 (Ky. 1915); *Samuels v. Willis*, 118 S.W. 339 (Ky. 1909)); *Shearin v. Lloyd*, 98 S.E.2d 508, 511 (N.C. 1957) ("It has been established by this Court, and generally, that the leaving of such a foreign substance in the patient's body at the conclusion of an operation 'is so inconsistent with due care as to raise an inference of negligence.'") (quoting *Mitchell v. Saunders*, 13 S.E.2d 242, 246 (N.C. 1941); and citing *Buckner v. Wheeldon*, 33 S.E.2d 480 (N.C. 1945); *Pendergraft v. Royster*, 166 S.E. 285 (N.C. 1932)).

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Utah R. Evid. 702; *see also* John W. Strong, *et al.*, eds., *McCormick on Evidence* § 13, at 23 (Fifth ed. 1999) (noting that, in order to allow an expert witness to testify as to an inference, “the inference must be so distinctively related to a science, profession, business, or occupation as to be beyond the ken of lay persons”); Glen Weissenberger & James J. Duane, *Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority* § 702.3, at 361 (2002) (noting that, with respect to Federal Rule of Evidence 702, “the test for the use of expert testimony requires that the trier of fact be aided by the expert’s testimony”). A layperson can easily understand that a surgeon leaving gauze inside a patient’s facial tissue is negligent. Therefore, expert testimony should not have been required in the case at hand, and the judgment of the court below should be reversed.

## **II. THE DISTRICT COURT ERRED IN STRIKING THE EXPERT TESTIMONY PROFFERED BY MRS. PETE.**

Second, even if expert medical testimony is required in the case at hand, this Court should reverse the judgment of the court below because Mrs. Pete properly proffered expert medical testimony in her defense. Specifically, the district court’s refusal to consider the affidavit of Mrs. Pete’s treating physician was improper in at least two respects: First, a physician who provides medical treatment to a plaintiff for the injuries of which she is complaining falls outside the scope of Rule 26(a)(3)(B). And second, Mrs. Pete complied with the requirements of Rule 26(a)(3) by identifying her treating

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physician and by providing medical records, reports, and billing statements from her treating physician.

A. *Mrs. Pete Employed Her Treating Physician to Diagnose and Treat Her Symptoms, Not to Provide Expert Testimony.*

The district court erred when it treated “hired gun” expert witnesses, who are “specially employed to provide expert testimony in the case,” in the same manner as treating physicians, doctors who are hired by patients concerned with receiving medical treatment, not for specific use as a witness in a nonexistent and un contemplated court proceeding.

Where a plaintiff in a medical malpractice action introduced the affidavit of his treating physician in opposition to a motion for summary judgment, the Utah Supreme Court held that the affidavit should be considered. *Boice ex rel. Boice v. Marble*, 1999 UT 71, ¶ 12, 982 P.2d 565, 570. Even though the treating physician was not designated by name as an expert witness by the plaintiff, the court noted that by indicating that any of the plaintiff’s treating physicians could be called as expert witnesses, the defendant was put on notice that the testimony of the treating physician could be elicited at trial or in defense of a motion for summary judgment. *Id.*

The affidavit of the treating physician offered by Mrs. Pete should not have been excluded because treating physicians are not of the same class of witness as experts specially retained to provide testimony at trial. Therefore, because the district court erred in striking the affidavit of Mrs. Pete’s treating physician, this Court should reverse the judgment and order of the district court.

*B. Mrs. Pete Identified Her Expert Witnesses and Provided Defendant With their Reports in Her Initial Disclosures.*

Even if the district court committed no error in holding that a treating physician is an expert witness subject to Rule 26(a)(3)(B), that court erred when it concluded that Mrs. Pete failed to comply with the requirements of the rule. Rule 26(a)(3) essentially requires two things of parties intending to rely on expert testimony: (1) the party must identify the witness; and (2) the party must produce a report outlining the basis of the expert's opinion. Utah R. Civ. P. 26(a)(3)(A)–(B). Because Mrs. Pete satisfied each of these requirements in her initial disclosures to the Defendant, the judgment of the court below should be reversed.

First, Mrs. Pete identified her treating physicians to Defendant in her initial disclosures. The Rules do not prohibit a party from identifying her expert witnesses during her initial disclosures to the opposing party. While the rule requires that these expert witness disclosures must “be made within 30 days after the expiration of fact discovery,” the rules do not prohibit such disclosures from being made at any earlier point in litigation. Utah R. Civ. P. 26(a)(3)(C). In the case at hand, Mrs. Pete identified her treating physicians in her initial disclosures to Defendant. Therefore, she complied with Rule 26(a)(3)(A), and the district court's order striking the expert affidavit and judgment must be reversed.

Second, Mrs. Pete's treating physicians are not required to submit expert reports pursuant to Rule 26(a)(3)(B). That requirement only applies to witnesses who are “specially employed to provide expert testimony in the case.” Utah R. Civ. P.

26(a)(3)(B). Although a Defendant must be put on notice as to the bases of a hired gun expert through a report, a treating physician keeps notes and records as to his opinions in documents contemporaneous to treatment. Therefore, no expert report is required in the case at hand.

One court held, dealing with the federal counterpart to the Utah Rule 26(a)(3), that treating physicians are generally exempt from the written report requirement of the rules “because the treating physician prepares contemporaneous notes documenting his observations, findings and treatment regime.” *Strozier v. United States Postal Serv.*, No. Civ. A04CV00074MSKCBS, 2005 WL 2141709, \*2 (D. Colo. Aug. 19, 2005) (slip copy) (citing the Advisory Committee Notes to 1993 Amendments to Rule 26(a)(2)(B) (“a treating physician . . . can be deposed or called to testify at trial without any requirement for a written report”); *Sprague v. Liberty Mut. Ins. Co.*, 177 F.R.D. 78, 81 (D.N.H. 1998) (noting that, under the majority rule, an expert witness report is not required from a treating physician testifying as to opinions developed in treatment of a patient)). Therefore, Mrs. Pete’s treating physician was not required to submit a report outlining his expert opinions.

However, even if Mrs. Pete is required to submit an expert report to Defendant, Mrs. Pete satisfied this requirement by forwarding the notes and records kept by her treating physicians. Therefore, the district court erred in striking Mrs. Pete’s expert affidavit.

Although one Utah court has noted that the affidavit of an expert witness may be stricken by the trial court if the expert was not identified by the court-set deadlines

pursuant to Rule 16, this case should be distinguished for two reasons. *See Arnold v. Curtis*, 846 P.2d 1307, 1308 (Utah 1993). First, the plaintiff in that case never identified the witness to the defendant, and second, the physician involved was not a treating physician but was hired specifically to testify at trial. *Id.* In the case at hand, however, Mrs. Pete identified her expert in her initial disclosures to Defendant. Further, as a treating physician, Mrs. Pete's expert was not "retained or specially employed to provide expert testimony." Utah R. Civ. P. 26(a)(3)(B). Therefore, the court below erred in striking the affidavit of Mrs. Pete's treating physician, and the order and judgment of the court below should be reversed.

### **III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MRS. PETE'S REQUEST FOR A JURY BECAUSE DEFENDANT WOULD HAVE SUFFERED NO PREJUDICE.**

Finally, this Court should reverse the refusal of the court below to allow Mrs. Pete to present her case to a jury of her peers. Utah law allows a court to grant a motion for jury trial, even if the jury was not demanded in a timely manner. Utah R. Civ. P. 39(b); *see also* U.S. Const. amend. VII (preserving the right to jury trial in civil suits). An examination of cases ruling on the Federal Rules of Civil Procedure is proper in the case at hand because "the Utah Rules of Civil Procedure were fashioned after the Federal Rules of Civil Procedure," *Winegar v. Slim Olson, Inc.*, 252 P.2d 205, 207 (Utah 1953), although the decision whether or not to grant a motion for jury trial is discretionary. *James Mfg. Co. v. Wilson*, 390 P.2d 127, 128 (Utah 1964).

One federal case, arising out of the District of Utah, is instructive in the case at hand. The court examined case law out of the Tenth Circuit in determining whether to

grant a plaintiff's motion for trial by jury when the plaintiff waived its right to a jury trial "due to inadvertence." *Megadyne Med. Prods. v. Aaron Med. Indus.*, 170 F.R.D. 28, 28 (D. Utah 1996). This examination led the court to conclude that (1) "absent strong and compelling reasons to the contrary a district court should exercise its discretion under Rule 39(b) and grant a jury trial," *id.* (quoting *AMF Turboscope Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965)), and (2) in order to overcome a motion for jury trial, a defendant "must show more prejudice beyond a change in the nature of the fact finder." *Id.* (citing *Figueroa v. Pratt Hotel Corp.*, 158 F.R.D. 306 (S.D.N.Y. 1994)); *see also* *Green Const. Co. v. Kan. Power & Light Co.*, 1 F.3d 1005, 1011 (10th Cir. 1993) (holding that a defendant claiming that a case was too complex for presentation to a jury was not sufficient reason to deny a motion for jury trial). Because the defendant failed to show prejudice, or any other "strong and compelling reason," the *Megadyne* court granted the plaintiff's motion for jury trial. *Megadyne*, 170 F.R.D. at 29.

In the case at hand, no prejudice, or other "strong and compelling reason" exists for the district court's denial of Mrs. Pete's motion for trial by jury. Mrs. Pete filed her motion prior to the initiation of any discovery proceedings. In fact, the only actions to occur in the case prior to Mrs. Pete's filing of her motion for jury trial, were the filing of the complaint, the filing of Defendant's answer, the return of summons, and the voluntary dismissal of St. Mark's Hospital. (R. 1-27). Even though approximately five months had elapsed from the filing of the complaint to Mrs. Pete's motion for jury trial, the case was still in a very early preliminary stage of litigation, and no prejudice would have resulted from granting Mrs. Pete her jury trial.



Further, Mrs. Pete did not fail to request a jury in a timely manner, pursuant to Rule 38, as the result of her inadvertence. Instead, she intended to timely file her jury demand within ten days after the last responsive pleading was filed. However, because St. Mark's Hospital was able to show sufficient authority, indicating that it could not be held liable for Mrs. Pete's injuries, she dismissed St. Mark's from the suit. Therefore, her jury demand was not timely under Rule 38, although it would have been had St. Mark's not been dismissed. Because Mrs. Pete's failure to timely request a jury was not merely the result of inadvertence, and because there is no "strong" or "compelling" reason to deny Mrs. Pete's request for a jury trial, this Court should reverse the order of the court below and should remand this case for trial by jury.

### CONCLUSION

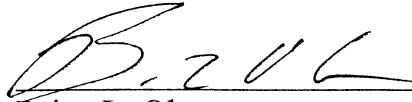
The district court erred in at least three respects: Pursuant to the doctrine of *res ipsa loquitur*, Mrs. Pete was not required to submit expert testimony to prove that Defendant was negligent in failing to remove gauze that he inserted into Mrs. Pete's facial tissue. Further, the expert affidavits Mrs. Pete submitted in support of her case should have been considered because she complied with Rule 26(a)(3). Finally, Mrs. Pete is entitled to present her evidence to a jury because no prejudice would result from such a trial and her failure to file a timely jury demand was not due to mere inadvertence. Therefore, for the foregoing reasons, Mrs. Pete respectfully requests that the judgment and order of the district court be reversed and that this matter be remanded for trial.

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DATED this 27 day of October, 2005.

GALLIAN, WILCOX, WELKER & OLSON, L.C.

A handwritten signature in black ink, appearing to read "B. L. Olson", written over a horizontal line.

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**IN THE UTAH COURT OF APPEALS**

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JUNE W. COX PETE,

Plaintiff-Appellant,

vs.

DR. ROBERT L. YOUNGBLOOD, ST.  
MARKS HOSPITAL, and JOHN DOES I-  
IV, XYZ CORPORATIONS I-IV,

Defendants-Appellee.

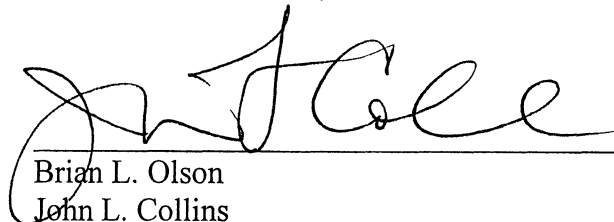
**CERTIFICATE OF SERVICE**

Court of Appeals No. 20050268-CA

I hereby certify that a true and accurate copy of the Brief of Appellant and the Addendum to Brief of Appellant was mailed, postage prepaid on this 31<sup>st</sup> day of October, 2005, to the following:

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### **ADDENDUM**

Because binding the Addendum with her Brief would make this Brief unreasonably thick, and pursuant to Utah R. App. P. 24(a)(11), Mrs. Pete has bound her Addendum separately and files her Addendum concurrently with this Brief.