

2005

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF

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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ARGUMENT

The court below improperly decided that when a surgeon forgets to remove gauze from his patient's facial tissue, his conduct is not an affront to the medical profession. In reaching this conclusion, the lower court erred in two ways. First, the long recognized doctrine of *res ipsa loquitur* allows a plaintiff to prove her case of medical negligence without relying on expert testimony. The court below should have applied this doctrine in the case at hand because Defendant's conduct "speaks for itself." Second, the lower court improperly held that Mrs. Pete could not rely on an affidavit of her treating physician, Dr. Doxey, even though Defendant had notice that Mrs. Pete intended to procure testimony from Dr. Doxey. Finally, in an earlier ruling, the court below erred when it refused to allow Mrs. Pete to present her case to a jury. Therefore, this Court should reverse the improper and incorrect rulings of the lower court and remand this case for a jury trial.

I. THE DISTRICT COURT SHOULD HAVE ALLOWED MRS. PETE TO PROCEED UNDER THE THEORY OF RES IPSA LOQUITUR BECAUSE AN EXPERT IS NOT NECESSARY TO SHOW THAT A SURGEON LEAVING GAUZE IN A PATIENT'S FACE IS NEGLIGENT.

The lower court should have allowed Mrs. Pete to rely on the long-recognized doctrine of *res ipsa loquitur* in the case at hand. Utah courts have generally recognized two circumstances in which a party may prove negligence under this doctrine: (1) where the conduct of a physician engages in conduct that "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 v. Salt Lake Reg'l Med. Ctr.*, 2000 UT App 225, ¶ 7, 8 P.3d 1037, 1039–40 (quoting *Nixdorf v. Hicken*, 612 P.2d 348, 353 (Utah 1980)); and (2)

where an appropriate foundation can be laid for the application of *res ipsa loquitur*. See, e.g., *Robb v. Anderton*, 863 P.2d 1322, 1327 (Utah Ct. App. 1993); *King v. Searle Pharm., Inc.*, 832 P.2d 858, 861 (Utah 1992); *Dalley v. Utah Valley Reg'l Med. Ctr.*, 791 P.2d 193, 196 (Utah 1990). Either one of these theories provides sufficient grounds for proceeding with proof of negligence through the doctrine.

A. Defendant's Conduct is an Affront to Medical Propriety.

First, Utah courts have dispensed with the requirement to provide expert testimony in medical malpractice cases where the conduct of a physician “affronts our notions of medical propriety.” *Baczuk*, 2000 UT App 225, ¶ 7, 8 P.3d at 1039–40. Specifically, if a layperson can realize that a patient’s injury “more probably than not resulted from negligence,” a plaintiff can proceed without providing further foundation.

A number of Utah courts have refused to require plaintiffs injured by obviously negligent doctors to present expert testimony. See, e.g., *Nixdorf*, 612 P.2d at 352 (holding that a patient was not required to present expert testimony when the physician lost a needle inside the body of his patient); *Fredrickson v. Maw*, 227 P.2d 772 (Utah 1951) (holding that expert testimony was not required to prove the negligence of a physician who carelessly left gauze in a surgical site following an operation), *overruled on other grounds by Swan v. Lamb*, 584 P.2d 814, 817 (Utah 1978). Because even lay people can understand that a surgeon who forgets to remove gauze from inside his patient’s facial tissue has been negligent, as has been recognized by Utah courts, the lower court erred in requiring Mrs. Pete to present expert testimony.

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Finally, Defendant's argument that negligently leaving surgical gauze in a patient's face is similar to purposefully leaving "screws, metal plates, shunts, etc." in patients cannot stand. *See* Br. of Appellee at 22–23. Even laypeople can see a clear difference between purposely leaving implements made of surgical steel to allow a bone to mend properly and negligently leaving gauze inside a patient to fester and cause infections. Some doctors even remove their patients' hearts and then leave mechanical devices in their patients' chests instead. However, this does not make Defendant's conduct any less negligent. In his brief, Defendant does not even argue that he left the gauze inside Mrs. Pete's facial tissue on purpose. Instead, he claims that it may have "snag[ged]" on the wiring. *Id.* at 23. A clear difference exists between leaving foreign objects inside a patient on purpose and through negligence, this Court should reverse the judgment of the lower court. Therefore, because Defendant's conduct fell well below the standard of care, as even lay people can understand, and because his conduct was an "affront" to medical propriety, the lower court erred by requiring expert testimony.

B. Mrs. Pete Proved the Foundation for Reliance on Res Ipsa Loquitur.

Next, even if this Court fails to find that Defendant's conduct is not an "affront" to medical propriety, Mrs. Pete provided a proper foundation to proceed on the doctrine of *res ipsa loquitur*. Specifically, Mrs. Pete provided the court with facts and proof as to each of the three foundational requirements for application of the doctrine: (1) that the injury would not ordinarily have occurred in the absence of negligence; (2) that the instrumentality causing the injury was under the exclusive control of the defendant; and

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(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.

In her memorandum opposing Defendant's motion for summary judgment, Mrs. Pete attached, among other things, portions of her deposition. In her deposition, Mrs. Pete testified that Defendant placed pieces of gauze in her facial tissue; that Defendant, in a follow up appointment, pulled only one piece of gauze from the surgical site; that two strips of gauze were removed from Mrs. Pete's facial tissue in December 2001; and that Mrs. Pete had no surgeries or other procedures in which gauze would have been inserted in that area since Defendant performed the 1970 surgery. (*See* R. 129–30). These facts, as presented to the lower court, establish the requisite foundation for proceeding under the doctrine of *res ipsa loquitur*, and that court's judgment should be reversed.

C. Mrs. Pete Properly Pled Reliance on Res Ipsa Loquitur.

Further, Mrs. Pete effectively pled in her Complaint the essential elements for proceeding under *res ipsa loquitur*. The most stringent pleading requirements cited by Defendant required a plaintiff seeking to proceed on a theory of *res ipsa loquitur* to plead "either by a separate count or by proper allegation to the effect that the negligence to be inferred from the general situation caused the injury." *Loos v. Mountain Fuel Supply Co.*, 108 P.2d 254, 259 (Utah 1940). However, Defendant failed to note that the Utah Supreme Court, in this same case, noted that specific language is not always required to plead a theory of *res ipsa loquitur*. *Id.* ("In some cases where specific acts of negligence are alleged in the complaint the specific allegations of violation of duty can be ignored and pleadings still show a cause of action based on *res ipsa loquitur*.") (citing *Angerman Co.*

v. Edgemon, 290 P. 169 (Utah 1930); *Dearden v. San Pedro, L.A. & S.L. R. Co.*, 93 P. 271 (Utah 1907)). In the case at hand, no specific language was required to plead reliance on the doctrine of *res ipsa loquitur*.

Utah adopted the Utah Rules of Civil Procedure ten years after the *Loos* case was decided, including the notice pleading requirements of the Rules, strengthens the conclusion that no specific language is required to be pled for Mrs. Pete to rely on the doctrine. *See, e.g.*, Utah R. Civ. P. 1(b) (noting that the effective date for the Utah Rules of Civil Procedure was January 1, 1950); Utah R. Civ. P. 8(a) (requiring in pleadings “a short plain statement of the claim showing that the pleader is entitled to relief”); Utah R. Civ. P. 8(e)(1) (“Each averment of a pleading shall be simple, concise, and direct. *No technical forms of pleading or motions are required.*”) (emphasis added); Utah R. Civ. P. 8(f) (“All pleadings shall be so construed as to do substantial justice.”). Under these rules, a plaintiff is only required to “give the defendant ‘fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.’” *Canfield v. Layton City*, 2005 UT 60, ¶ 14, 122 P.3d 622, 625 (quoting *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982)); *see also Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 406 (Utah 1998) (same); *Gill v. Timm*, 720 P.2d 1352, 1353 (Utah 1986) (same); *Blackham v. Snelgrove*, 280 P.2d 453, 455 (Utah 1955) (same).

In the case at hand, Mrs. Pete’s Complaint satisfies the requirements of notice pleading and included necessary allegations for her reliance on the doctrine of *res ipsa loquitur*. Specifically, her Complaint included allegations that (1) Defendant performed surgery for Mrs. Pete’s facial trauma; (2) Defendant placed gauze in and around Mrs.

Pete's right cheek and sinus; (3) Mrs. Pete would not have been injured but for Defendant's negligence. (R. at 4–5). Especially given the lenient and liberal nature of notice pleading, as adopted by the Utah Rules of Civil Procedure, Mrs. Pete properly pled a theory of *res ipsa loquitur*.

Another rule also supports a finding that Mrs. Pete properly pled, and was entitled to rely on, the doctrine of *res ipsa loquitur*. Specifically, Rule 9, Utah Rules of Civil Procedure, includes a number of items that are required to be stated with specificity. These include fraud, mistake, and condition of the mind (Rule 9(b)), and special damages (Rule 9(g)). Notice pleading is sufficient for other claims, allegations, and averments in pleadings, including reliance on *res ipsa loquitur*. Therefore, this Court should reverse the improper and incorrect judgment of the court below.

D. Pleading Negligence Will Not Bar Application of Res Ipsa Loquitur.

Finally, the doctrine of *res ipsa loquitur* should apply to the case at hand, and the decision of the court below must be reversed, because pleading a cause of action for negligence will not prevent a plaintiff from also asserting claims under the doctrine. Defendant incorrectly cites *Roylance v. Rowe*, 737 P.2d 232 (Utah Ct. App. 1987), for the proposition that a plaintiff may never rely on *res ipsa loquitur* when she knows basically how her injuries occurred.¹ However, *Roylance* specifically states a much more complete rule, which allows plaintiffs to proceed concurrently on both negligence claims and *res ipsa loquitur* claims, as follows:

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¹ See Br. of Appellee at 20.

Where the three conditions for application of *res ipsa loquitur* have been established, a mere *prima facie* showing of specific negligence does not prevent its use. Under such circumstances, the case should be submitted on both the theory of specific negligence and *res ipsa loquitur*. Thus, if proof by a plaintiff of specific acts of negligence on the defendant's part does not furnish a complete explanation of the accident, as where there are alternative theories of negligence, there is still room for an inference of negligence arising from the happening of the accident. Where, however, proof of specific negligence goes so far as to reveal all the facts and circumstances and fully explain the alleged negligent cause of injury by positive evidence, *res ipsa loquitur* has no function.

Id. at 235 (citing *Kusy v. K-Mart Apparel Fashion Corp.*, 681 P.2d 1232, 1236 (Utah 1984)).

In the case at hand, Defendant performed surgery on Mrs. Pete's sinuses and face. Shortly after the surgery, Defendant removed one piece of gauze from the surgical site. Over the next thirty years, Mrs. Pete never had other surgical operations requiring the placement of gauze around her sinuses. In 2001, an oral surgeon removed two purulent and infected pieces of gauze from Mrs. Pete's facial tissue. Mrs. Pete was unconscious during the surgery. Therefore, she cannot provide specific factual evidence that Defendant placed the specific pieces of gauze in and around her sinuses. She can only state that Defendant placed some gauze in and around her sinuses, as is evidenced by his removal of one piece of gauze during a follow-up appointment, and that she has never had any sort of operation since the 1970 surgery requiring the placement of gauze in or around her sinuses. Mrs. Pete cannot "fully explain" her injury. An inference must be made that Defendant failed to remove two strips of gauze during the follow-up appointment, or during the surgery. Therefore, Mrs. Pete is entitled to rely on the doctrine

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of *res ipsa loquitur* in addition to her negligence claim, and the decision of the court below should be reversed.

II. THE DISTRICT COURT IMPROPERLY STRUCK THE AFFIDAVIT OF DR. DOXEY BECAUSE DEFENDANT HAD NOTICE THAT DR. DOXEY WOULD BE OFFERING TESTIMONIAL EVIDENCE.

The lower court also erred when it failed to consider Dr. Doxey's affidavit. Specifically, by identifying Dr. Doxey—Mrs. Pete's treating physician—as a witness in her Initial Disclosures, Mrs. Pete put Defendant on notice that Dr. Doxey would be called to provide expert testimony. In a case very similar to the case at hand, the Utah Supreme Court held that a treating physician's affidavit should have been considered in defense to a motion for summary judgment even though the treating physician was not designated as an expert witness within the time limits set forth in the lower court's scheduling order. *Boice ex rel. Boice v. Marble*, 1999 UT 71, ¶ 12, 982 P.2d 565, 570.² Similarly, in the case at hand, Mrs. Pete notified Defendant that she intended to present Dr. Doxey's expert testimony in her Initial Disclosures. Therefore, the lower court erred in striking his affidavit.

Further, Defendant supported his Motion for Summary Judgment with the Defendant's own self-serving affidavit offering an expert opinion. Defendant was never designated as a witness, much less as an expert witness, in any document provided during

² Defendant's attempts to distinguish *Boice* are unavailing. Instead of striking the treating physician's affidavit for lack of foundation, as Defendant asserts, *see* Br. of Appellee at 17 n.4, the lower court in *Boice* refused to allow a treating physician to testify because "'she was not timely designated in the matter.'" *Boice*, 1999 UT 71, ¶ 4, 982 P.2d at 567. However, because the plaintiff had previously stated that he may call treating physicians to testify, the court held that the defendant had sufficient notice that the treating physician would be called as an expert. *Id.* ¶ 12, 982 P.2d at 570.

the discovery process. His arguments that Dr. Doxey's affidavit should have been stricken are disingenuous at best. It is completely inconsistent to submit for the court's consideration a party's self-serving opinions, when the party was never included on an expert witness list *or even in initial disclosures*, and then to move to strike an affidavit of a previously-identified treating physician offered to oppose the self-serving affidavit of the party. And contrary to Defendant's incorrect assertions, Mrs. Pete did object to Defendant's affidavit in the proceedings below. (*See R.* at 128–29).

The Defendant's statements that the Rules of Civil Procedure cannot allow a party to identify expert witnesses in initial disclosures is nonsensical, and the scenario presented under the Rules of Civil Procedure would not be entirely undone if parties were permitted to identify their expert witnesses in their initial disclosures. *See Br. of Appellee* at 16. The rules require disclosure of expert witnesses "within 30 days after the expiration of fact discovery." Utah R. Civ. P. 26(a)(3)(C). A disclosure made at the beginning of fact discovery is timely under this rule. Moreover, the requirement that parties make initial disclosures was created with an eye "to accelerate the exchange of basic information about the case and to eliminate paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives." *See Fed. R. Civ. P. 26, Advisory Committee Notes, 1993 Amendments, Subdivision (a); see also, e.g., Utah R. Civ. P. 26, Advisory Committee Notes for Discovery Rules Amendments, Objectives* (noting that "[t]he objective of the new model is simply to better manage litigation by planning" and by, among other things, "requir[ing] each party to disclose to other parties the names of persons with discoverable information supporting

that party's claims or defenses"); *Tucker v. State Farm Mut. Auto Ins. Co.*, 2002 UT 54, ¶ 7 n.2, 53 P.3d 947, 950 n.2 ("Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are 'substantially similar' to the federal rules." (citations omitted)).

Allowing a party to disclose expert witnesses in initial disclosures would not weaken these objectives. Instead, it would strengthen them. Instead of having the time between the close of fact discovery and the close of all discovery to depose expert witnesses, if a party receives notice of an expert witness at the beginning of the litigation process, the time in which they may depose the expert is multiplied greatly. Therefore, instead of creating an "unworkable scenario," the objectives of the initial disclosure requirements can be enhanced if parties are encouraged to identify their expert witnesses at that early stage.

In the case at hand, like in *Boice*, Mrs. Pete provided Defendant with notice that she would be calling her treating physician, Dr. Doxey, as an expert witness in this case by naming Dr. Doxey in her Initial Disclosures. Therefore, because Mrs. Pete identified Dr. Doxey in her Initial Disclosures, the court below erred in striking Dr. Doxey's affidavit.

III. MRS. PETE SHOULD HAVE THE OPPORTUNITY TO PRESENT HER CASE TO A JURY BECAUSE NO PREJUDICE RESULTED FROM WAITING TO REQUEST A JURY TRIAL.

Finally, the lower court improperly denied Mrs. Pete's motion for a jury trial. Based on the constitutional preservation of the right of civil litigants to a jury trial, *see* U.S. Const. amend. VII, a motion for a jury trial under Rule 39(b) should be granted

“absent strong and compelling reasons to the contrary.” *Megadyne Med. Prods. v. Aaron Med. Indus.*, 170 F.R.D. 28, 28 (D. Utah 1996) (quoting *AMF Turboscope Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965)). Further, in order to overcome a motion for a jury trial, a defendant ‘Must show more prejudice beyond a change in the nature of a fact finder.” *Id.* (citing *Figueroa v. Pratt Hotel Corp.*, 158 F.R.D. 306 (S.D.N.Y. 1994)).

Defendant, however, has not claimed any prejudice other than a mere “change in the nature of the fact finder.” *Id.* Specifically, Defendant only stated that he “consciously chose not to make a jury demand because of his preference to have the issues tried by the court.” Br. of Appellee at 27. As such, there is no prejudice, and Mrs. Pete’s motion for a jury trial should have been granted.

CONCLUSION

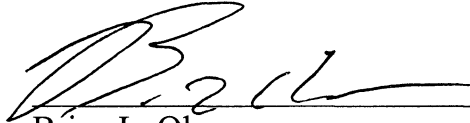
The lower court improperly granted summary judgment in favor of Defendant. In order to do so, the court below made at least two important errors: First, the court improperly ruled that the doctrine of *res ipsa loquitur* did not apply to the case, even though any lay person knows that surgical gauze does not remain in a patient’s facial tissue for thirty years in the absence of medical negligence. And second, the court improperly struck the affidavit of Mrs. Pete’s treating physician, even though Dr. Doxey had been identified to Defendant in Mrs. Pete’s Initial Disclosures. Finally, the court below also failed to grant Mrs. Pete’s motion for a jury trial even though Defendant would have suffered no prejudice, other than a change in the nature of the finder of fact.

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Therefore, Mrs. Pete respectfully requests that this Court reverse the rulings of the lower court and remand this matter for a trial, by jury, on the merits.

DATED this 25 day of January, 2006.

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

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

Brian L. Olson
John L. Collins

ATTORNEYS FOR PLAINTIFF-APPELLANT
JUNE W. COX PETE

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed a true and accurate copy of the above and foregoing document, postage prepaid, on this 27th day of January, 2006, to the following:

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

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John L. Collins