No. 127942
Consolidated with No. 127944

IN THE

SUPREME COURT OF ILLINOIS

WILLIAM "WES" JOHNSON, Plaintiff-Appellee, v. LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, Defendants-Appellants.	)	On Petition for Leave to Appeal From the Illinois Appellate Court, Fourth District, No. 4-21-0038 There Heard on Appeal From The Eleventh Judicial Circuit, McLean County, Illinois, Trial Court No. 2018 L 126 The Honorable Rebecca S. Foley, Judge Presiding

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BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS SARAH HARDEN AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER

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Nature of the Case

This action was brought to recover damages occasioned by the alleged medical negligence of the defendants in the performance of a total hip arthroplasty. The trial court granted the defendants summary judgment with respect to the claims brought pursuant to the doctrine of *res ipsa loquitur*. The appellate court reversed the judgment of the trial court. No questions are raised on the pleadings.

Issues Presented for Review

(1) Whether *res ipsa loquitur* applies to a claim for medical malpractice when the plaintiff has presented, by expert opinion testimony, specific evidentiary facts as to how the claimed negligence occurred.

(2) Whether a plaintiff must first present competent expert testimony that a duty is owed by the defendant in order for *res ipsa loquitur* to apply in a claim for medical malpractice as a matter of law.

(3) Whether the application of *res ipsa loquitur* in a claim for medical malpractice requires that everyone involved with the patient be named as a defendant, even those Defendants against whom Plaintiff offers no evidence of deviation from the standard of care, and further where Plaintiff's expert concedes those Defendants acted appropriately.

Statement of Jurisdiction

This Court has jurisdiction under Supreme Court Rule 315.

Plaintiff brought suit against Lucas Armstrong, M.D., McLean County Orthopedics, Ltd., Sarah Harden ("Tech Harden"), and Advocate Health and Hospitals Corporation, d/b/a Advocate BroMenn Medical Center ("Advocate") in the Circuit Court of the Eleventh Judicial District, McLean County, Illinois. (C 27 – C 34). On October 30,

2020, the trial court made an oral ruling, granting summary judgment for Tech Harden and Advocate on the allegations of negligence pursuant to *res ipsa loquitur*. (C 29 – C 31; R 12 – R 13). On January 5, 2021, the Court entered an Order that Tech Harden and Advocate's Motion for Summary Judgment was granted, judgment was entered on their behalf, and there was no just reason for delaying enforcement or appeal of the judgment pursuant to Illinois Supreme Court Rule 304. (C 898).

Plaintiff filed his Notice of Appeal on January 6, 2021, seeking review of the trial court's January 5, 2021 Order granting Tech Harden and Advocate's Motion for Summary Judgment in the Appellate Court of Illinois, Fourth District. (C 904 – C 905).

The Fourth District Appellate Court issued its published opinion, *Johnson v. Armstrong, et al.*, 2021 IL App (4th) 210038, on October 28, 2021. Tech Harden and Advocate timely filed their Petitions for Leave to Appeal on December 1, 2021. This Court allowed the Defendants' Petitions for Leave to Appeal on January 26, 2022.

Statutes Involved

735 ILCS 5/2-622. Healing art malpractice

(c) Where the plaintiff intends to rely on the doctrine of "res ipsa loquitur", as defined by Section 2-1113 of this Code, the certificate and written report must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint that he is relying on the doctrine of "res ipsa loquitur".

735 ILCS 5/2-1113. Medical malpractice – res ipsa loquitur

In all cases of alleged medical or dental malpractice, where the plaintiff relies upon the doctrine of *res ipsa loquitur*, the court shall determine whether that doctrine applies. In making that determination, the court shall rely upon either the common knowledge of laymen, if it determines that to be adequate, or upon expert medical testimony, that the medical result complained of would not have ordinarily occurred in the absence of negligence on the part of the defendant. Proof of an unusual, unexpected or untoward medical result which ordinarily does not occur in the absence of negligence will suffice in the application of the doctrine.

735 ILCS 5/8-2501. Expert Witness Standards.

In any case in which the standard of care given by a medical profession is at issue, the court shall apply the following standards to determine if a witness qualifies as an expert witness and can testify on the issue of the appropriate standard of care.

(a) Relationship of the medical specialties of the witness to the medical problem or problems and the type of treatment administered in the case;

(b) Whether the witness has devoted a substantial portion of his or her time to the practice of medicine, teaching or University based research in relation to the medical care and type of treatment at issue which gave rise to the medical problem of which the plaintiff complains;

(c) Whether the witness is licensed in the same profession as the defendant; and

(d) Whether, in the case against a nonspecialist, the witness can demonstrate a sufficient familiarity with the standard of care practiced in this State.

Statement of Undisputed Facts

A. The Occurrence

On October 6, 2016, Lucas Armstrong, M.D. ("Dr. Armstrong") performed a total left hip arthroplasty on Plaintiff William "Wes" Johnson ("Plaintiff") at Advocate using the direct anterior approach. (C 28). Sarah Harden and Pamela Rolf ("Tech Rolf"), surgical technologists employed by Advocate, assisted in the operating theater. (C 557 – C 558; C 564). Plaintiff alleges that he sustained an injury to the femoral nerve during the surgery due to the placement of the retractor. (C 28, C 33).

It is undisputed that the surgeon, Dr. Armstrong, was in exclusive control of the scalpels and retractors at all times. (C 560 – C 561; C 567; C 590 – C 591). In particular, Dr. Armstrong made the incision and was in control of the placement and re-positioning of the retractors during Plaintiff's hip arthroplasty. (C 559; C 568; C 591).

Tech Harden is a certified surgical technologist. (C 557). During Plaintiff's total left hip arthroplasty, Tech Harden neither placed nor repositioned any retractor. (C 559 –

C 560). Tech Harden never exercised independent control over any retractors, scalpels, or other surgical tools during Plaintiff's surgery. (C 559 – C 561; C 571).

Tech Harden's only contact with the retractor during Plaintiff's surgery was to hold the instrument in place after Dr. Armstrong placed it. (C 559 - C 561; C 670). All of Tech Harden's actions during Plaintiff's surgery were at the direction of Dr. Armstrong, and consistent with his instructions. (C 591; C 670). All of Tech Harden's care and conduct in the instant matter was consistent with the standard of care for a surgical scrub tech. (C 561). Dr. Armstrong testified that Tech Harden acted exactly as he expected her to at all times. (C 591). Plaintiff's retained expert, Dr. Bal, agreed that he had no criticisms of Tech Harden, and further agreed that Tech Harden acted as he would have expected her to have acted in all respects. (C 670 – C 671).

Following the surgery, Plaintiff had a femoral nerve palsy that he did not have prior to the total left hip arthroplasty. (C 577). Dr. Armstrong agreed that as of January 2017, Plaintiff's medical records indicated that he had a left femoral neuropathy that is specific to the branches of the vastus lateralis and rectus femoris muscles. (*Id.*) Dr. Armstrong testified that permanent nerve injury is a known risk of total hip arthroplasty. (C 578).

B. The Complaint

On September 18, 2018, Plaintiff filed a four-count complaint for medical malpractice, alleging negligence against Dr. Armstrong (Count I) and *respondeat superior* against his employer, McLean County Orthopedics (Count II); and *res ipsa loquitur* against Dr. Armstrong, Tech Harden and Tech Rolf (Count III) and *respondent superior* against Tech Harden and Tech Rolf's employer, Advocate (Count IV). (C 27- C 31).

The Complaint alleges that Harden and Rolf were scrub nurses who assisted Dr. Armstrong during Plaintiff's total hip arthroplasty, and that Plaintiff's femoral nerve injury occurred while the retractors, scalpel, electrocautery device, and other surgical instruments were under their control. (C 30).

After Tech Rolf confirmed that she did nothing other than hand the retractor to Dr. Armstrong, Plaintiff voluntarily dismissed her from the case. (C 246, C 570 – C 571).

C. Plaintiff's Supreme Court Rule 213(f)(3) expert

The sole Rule 213(f)(3) expert disclosed by Plaintiff was Dr. Sonny Bal, an orthopedic surgeon. (C 596 – C 598). Dr. Bal was neither disclosed to offer an opinion as to the standard of care applicable to Tech Harden, nor was he disclosed as having any criticisms of her care. (*Id.*) At Dr. Bal's deposition, he affirmed that he had never practiced as a nurse or surgical technologist and was not offering any opinions regarding the standard of care applicable to Tech Harden. (C 670 – C 671).

Dr. Bal opined that Plaintiff sustained a complete injury to two branches of the left femoral nerve. (C 666, C 671). Dr. Bal agreed that he also used the same anterior approach as Dr. Armstrong, but in his opinion, the injury to Plaintiff's femoral nerve was caused by Dr. Armstrong's medial location of the incision, which increased the risk of nerve injury because it required the placement of the retractor to be against the femoral nerve, leading to the permanent total denervation. (C 658 – C 660, C 666 – C 667). In Dr. Bal's opinion, such injury does not occur in the absence of negligence. (C 667).

Dr. Bal further explained that while the operative record did not state that the retractor was placed against the femoral nerve, he based his opinion on the facts that "the two branches that suffered complete injury are the vastus lateralis and the intermedius, and

those would be closer to the retractor than the branch to the medialis, which is further medial." (C 666). Specifically, Dr. Bal opined that retractor placement was more likely than not a causative factor in the femoral nerve injury in light of which branches were injured. (C 666, C 672). Dr. Bal did not offer any other criticisms of the surgical procedure itself, nor did he offer an alternative explanation as to how the permanent nerve palsy could or might have occurred. (C 659, C 661, C 663, C 672).

Dr. Bal testified that neither Tech Harden nor any other nurse had any involvement in the incision. (C 670). He further testified that the typical procedure for the placement of the surgical retractors was followed in this case. (*Id.*) He agreed that the surgeon exercises his independent judgment where to place the retractors, and then actually places the retractors. (*Id.*) After the surgeon has placed the retractors, he may then ask a nurse or scrub tech to hold them in the surgeon's selected and placed position. (*Id.*)

Dr. Bal testified there was no indication in the records and depositions he reviewed that Tech Harden exercised any independent judgment in the placement of the retractors. (*Id*.) Dr. Bal would expect a nurse or scrub nurse/surgical technician to act exactly as directed by the surgeon. (C 671). In this case, Dr. Bal agreed that Tech Harden did not do anything unexpected or surprising in performing her duties and acted exactly as the surgeon, Dr. Armstrong, wanted her to. (C 670 – C 671).

D. Procedural History

1. Circuit Court of the Eleventh Judicial District

On August 28, 2020, Defendants Harden and Advocate moved for summary judgment on Plaintiff's claims pursuant to the doctrine of *res ipsa loquitur*. (C 525 – C 676). Following argument on October 30, 2020, the trial court ruled in their favor. (R 1 –

R 13). Specifically, the trial court found that summary judgment was warranted on two grounds: (1) Plaintiff did not disclose any expert qualified to offer opinions regarding the standard of care applicable to Tech Harden, nor was there any evidence in the record of any negligent act or omission by Tech Harden; and (2) the undisputed testimony demonstrated that Tech Harden only held the retractor after placement by Dr. Armstrong, never exercising the necessary control to apply *res ipsa loquitur* because it was undisputed that Tech Harden acted only, and as specifically, directed by the surgeon. (R 11 – R 13).

On November 4, 2020, Plaintiff moved the trial court to reconsider its grant of summary judgment based on a First District case, *Willis v. Morales*, 2020 IL App (1st) 180718, decided on June 15, 2020, or in the alternative, dismiss the remaining claim for *res ipsa loquitur* against Dr. Armstrong, adopt Supreme Court Rule 304(a) language, and stay the remaining counts until resolution of the appeal. (C 788 – C 791).

On December 8, 2020, the trial court heard argument and denied the Motion to Reconsider. (C 24). A Report of Proceedings from that hearing was not included in the record on appeal. (R 1).

On December 15, 2020, Dr. Armstrong's oral Motion for Summary Judgment as to Count III *(res ipsa loquitur*) was granted over Plaintiff's objection. (C 25). The remaining counts against Dr. Armstrong and McLean County Orthopedics were stayed pending resolution of the *res ipsa loquitur* issues. (*Id*.) A Report of Proceedings for that hearing was not included in the record on appeal. (R 1).

On December 22, 2020, the trial court entered an Order granting Dr. Armstrong's Motion for Summary Judgment on Count III (*res ipsa loquitur*), and found no just reason to delay enforcement or appeal pursuant to Supreme Court Rule 304(a). (C 882). On

January 5, 2021, the trial court entered an order granting Tech Harden and Advocate summary judgment, and found that there was no just reason for delaying enforcement or appeal pursuant to Supreme Court Rule 304. (C 898). Plaintiff appealed. (C 904).

2. Appellate Court of Illinois, Fourth District

On October 28, 2021, the appellate court published its Opinion reversing summary judgment on behalf of Tech Harden, Advocate BroMenn, and Dr. Armstrong. Specifically, the Fourth District found that Plaintiff had made a *prima facie* showing of the elements of *res ipsa loquitur*, that he "was injured (1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control." *Johnson*, ¶ 42 (citing *Heastie v. Roberts*, 226 Ill.2d 515, 531-532 (2007)).

First, the Fourth District held that Plaintiff demonstrated that his injury was not one that would typically occur in the absence of negligence through Dr. Bal's opinion that Plaintiff suffered a "severe and permanent" injury to the femoral nerve due to placement of the retractor, a type of injury which Plaintiff contended was not a known risk of total hip replacement surgery. *Id.*, ¶¶48, 51-52. The Fourth District found that Dr. Bal's deposition testimony was sufficient to create a question of fact as to the cause of Plaintiff's injury as to not just the surgeon, but also to Tech Harden. *Id.*, ¶ 54.

Second, the Fourth District held that Tech Harden exercised sufficient "control" of the retractor to apply *res ipsa loquitur*. The appellate court did acknowledge that Tech Harden, Dr. Armstrong, and Dr. Bal all unequivocally agreed that Tech Harden only held the retractor at Dr. Armstrong's instruction, and that Dr. Armstrong was responsible for the retractor at all times. *Id.*, ¶¶ 55, 58. However, the Fourth District found that this

evidence – that Tech Harden did nothing more than hold the retractor – was "precisely why [she] was in control of the retractors in the sense necessary to support the elements of *res ipsa loquitur*," explaining that **if** she "*did* move an instrument or hold that instrument incorrectly and an injury occurred as a result, the technician would be liable." (emphasis in original) *Id.*, ¶ 59. According to the Appellate Court, Plaintiff made a *prima facie* showing of *res ipsa loquitur* because the undisputed evidence showed that the retractor caused the injury, Harden merely held the retractor as directed by Dr. Armstrong, and Dr. Bal opined that the femoral nerve injury did not occur in the absence of negligence. *Id.*, ¶ 60.

Third, the Fourth District held that Plaintiff did not need to offer expert opinion from a duly-licensed surgical technologist as to the standard of care applicable to Tech Harden. Rather, the Appellate Court ruled that the only opinion testimony required was that of Plaintiff's orthopedic surgery expert that Plaintiff's injury would not ordinarily occur in the absence of negligence; and that opinion alone satisfied both the duty and the control element of *res ipsa loquitur* sufficient to establish a duty of care as to all defendants, regardless of whether the surgeon could testify to the standard of care of the surgical tech. *Id.*, ¶¶ 65 – 68. Accordingly, the court held that *res ipsa* applied to all defendants alleged to be in control of the instrumentality that allegedly caused the injury; that all those involved must be named defendants; and no further standard of care testimony was required as to those defendants other than the surgeon. *Id.* The Fourth District further determined that the undisputed evidence demonstrating that Tech Harden did nothing wrong was not a defense, and that Tech Harden must remain a defendant regardless. *Id.*, ¶ 66.

In reaching its decision, the Fourth District declined to follow its own previous opinion in *Taylor v. City of Beardstown*, 142 Ill.App.3d 584 (4th Dist. 1986), which affirmed summary judgment on behalf of defendants in a medical malpractice case brought pursuant to the doctrine of *res ipsa loquitur* because the plaintiff failed to demonstrate the applicable standard of care. In so holding, the *Johnson* court acknowledged that "this court held in *Taylor* that testimony regarding standard of care and deviation from that standard was required to invoke the *res ipsa* doctrine," but nevertheless overturned the trial court's granting of summary judgment based upon that very reason. *Id.*, ¶ 69.

Argument

I. Standard of Review

A motion for summary judgment is reviewed *de novo. In re Estate of Case,* 2016 IL App (2d) 151147, ¶ 25. The appellate court can affirm summary judgment on any basis in the record. *Id.*

The trial court's decision to deny the application of *res ipsa loquitur* is reviewed *de novo. Heastie v. Roberts*, 226 Ill.2d 515, 531 (2007).

II. Applicable Law

Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c); *Sollami v. Eaton*, 201 Ill. 2d 1, 6 (2002).

In an action for medical malpractice, the plaintiff bears the burden of establishing: (1) the relevant standard of care as to each defendant; (2) that the defendant deviated from the standard of care; and (3) that the deviation was a proximate cause of the plaintiff's

injury. *Purtill v. Hess*, 111 Ill.2d 229, 241-42 (1986). The plaintiff must present at least some evidence on every element essential to his cause of action, otherwise the plaintiff has not established a *prima facie* case and a judgment in favor of the defendant is appropriate as a matter of law. *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 123 (2004).

In all cases of alleged medical negligence where the plaintiff relies upon the doctrine of *res ipsa loquitur*, the court shall determine whether that doctrine applies. 735 ILCS 5/2-1113. The determination of *res ipsa's* applicability may be made prior to trial. *Napoli v. Hinsdale Hosp.*, 213 Ill.App.3d 382, 387 (1st Dist. 1991). The burden is on the plaintiff to establish all the elements of *res ipsa loquitur* in order to accede to its benefits. *Taylor*, 592.

A plaintiff seeking to rely on *res ipsa loquitur* must show: (1) he was injured, (2) the injury was received from an instrumentality that was under the defendant's control, and (3) in the normal course of events, the injury would not have occurred if the defendant had used ordinary care while the instrumentality was under her control. *Rahic v. Satellite Air-Land Motor Serv., Inc.,* 2014 IL App (1st) 132899, ¶ 32. The doctrine of *res ipsa loquitur* will not apply in a medical malpractice case unless a duty of care is owed by the defendant to the plaintiff, and there has been a breach of that duty. *Taylor,* 593.

The plaintiff must demonstrate the element of *res ipsa loquitur*, "that the injury would not occurred in the absence of negligence," either by presenting expert testimony to support the allegations, or by demonstrating that the defendant's conduct was so grossly remiss that it falls within the common knowledge of laymen. *Smith v. South Shore Hospital,* 187 Ill.App.3d 847, 858 (1st Dist. 1989). In all cases that require expert testimony to support a claim of medical malpractice, including those which rely upon *res ipsa loquitur*,

the plaintiff must establish the applicable standard of care and the defendant's breach of that duty by expert testimony from an expert licensed in the same school of medicine as the defendant. *Taylor,* 594; *Sullivan*, 123.

III. The Fourth District erred when it ruled that *res ipsa loquitur* applied in this case.

Res ipsa loquitur is not intended to act as a sanctuary for the plaintiff who cannot make his *prima facie* case for medical malpractice. *Taylor*, 592-593. Furthermore, where the plaintiff has identified specific facts upon which his expert relies for opinions to support a specific deviation from the standard of care, *res ipsa loquitur* is not intended to be a "back-up plan" and provide the plaintiff with an insurance policy supporting his case if the jury does not accept his expert's opinions and theory of liability. Simply put, there should be no place for *res ipsa loquitur* in cases where the plaintiff has a specific theory of negligence, and further *res ipsa loquitur* should never be endorsed as a tool to save the plaintiff's case where there is no evidence whatsoever to establish a *prima facie* claim.

The doctrine of *res ipsa loquitur* exists to provide an evidentiary tool to plaintiffs that serves to allow the trier of fact to draw an inference of negligence on the part of the defendant where plaintiff is unable to secure the evidentiary facts to support his claim, but regardless, the injury would not have occurred in the absence of negligence. *See, Imig v. Beck,* 115 Ill.2d 18, 26-27 (1986); *Darrough v. Glendale Heights Community Hospital*, 234 Ill.App.3d 1055, 1059 (2nd Dist. 1992). *Res ipsa loquitur* was never intended to obviate the requirement that that plaintiff must still prove all of the elements of his case. *Imig*, 27. Here, the Appellate Court misapplied and impermissibly expanded the doctrine of *res ipsa loquitur* as to all defendants. In particular, Plaintiff's expert opined to specific breaches of the standard of care by Defendant Armstrong and a specific theory that those

breaches were the proximate cause of the injury (so *res ipsa loquitur* is unnecessary and should not apply), but with respect to Tech Harden and Advocate, there was **no** expert testimony whatsoever supporting any deviation from the standard of care by Tech Harden. In fact, Plaintiff's expert conceded that Tech Harden acted exactly as she should have in all respects. Accordingly, the trial court correctly ruled that *res ipsa loquitur* should never have been applied to support Plaintiff's claim against Defendants Harden and Advocate, and the Appellate Court erred by reversing this decision.

Illinois law has long treated claims of healing art malpractice differently from other kinds of personal injury claims. In 1982, the legislature enacted 735 ILCS 5/2-1113, which requires the trial court to make an independent determination whether the doctrine of *res ipsa loquitur* applies, and where the common knowledge of laymen is inadequate, "shall rely upon" expert medical testimony that the medical result complained of would not have ordinarily occurred in the absence of negligence on the part of the defendant. *See,* P.A. 82-783, Art. III § 43, eff. July 13 1982.

In 1985, the legislature enacted both 735 ILCS 5/2-622 and 735 ILCS 5/8-2510. *See*, P.A. 82-280, §8-2501, added by P.A. 84-7, ¶ 1, eff. Aug. 15, 1985. § 2-622 mandates that complaints for medical malpractice are supported by affidavits of merit from both a duly qualified health professional and plaintiff's counsel. Sub-section (c) further requires a plaintiff who intends to rely on the doctrine of *res ipsa loquitur* to prove his claim to include the same in the qualified health professional's certificate of merit and written report. *Id.* 735 ILCS 5/8-2501 then requires that the expert medical testimony be competent and be offered by an expert licensed in the same school of medicine as the defendant who can establish their familiarity with the standard of care. *Sullivan,* 112-114.

Finally, if *res ipsa loquitur* has been adequately pled, **and** the plaintiff has developed the necessary expert evidence in support, **and** the trial court has made an independent determination that *res ipsa loquitur* applies, then, and only then, can the jury be given Illinois Pattern Instruction 105.09 as approved by the Supreme Court Committee on Jury Instructions in Civil Cases:

> **105.09 Res Ipsa Loquitur--Burden Of Proof--Professional Negligence--Where No Claim Of Contributory Negligence**
>
> [Under Count ____,] The plaintiff has the burden of proving each of the following propositions:
>
> First: That [patient's name] was injured.
>
> Second: That the injury [was received from] [occurred during] a [name of instrumentality or procedure] which [was] [had been] under the defendant's [control] [management].
>
> Third: That in the normal course of events, this injury would not have occurred if the defendant had used a reasonable standard of professional care while the [name of instrumentality or procedure] was under his [control] [management].
>
> If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the [instrumentality or procedure] while it was under his [control] [management].
>
> If you do draw such an inference, and if you further find that [patient's name]'s injury was proximately caused by that negligence, your verdict should be for the plaintiff [under this Count]. On the other hand, if you find that any of these propositions has not been proved, or if you find that the defendant used a reasonable standard of professional care for the safety of [patient's name] in his [control] [management] of the [instrumentality or procedure], or if you find that the defendant's negligence, if any, was not a proximate cause of [patient's name]'s injury, then your verdict should be for the defendant [under this Count].
>
> [Whether the injury in the normal course of events would not have occurred if the defendant had used a reasonable standard of professional care while the [instrumentality or procedure] was under his [control] [management] must be determined from expert testimony presented in this trial. You must not attempt to determine this question from any personal knowledge you have.]

Res ipsa loquitur does not alter Plaintiff's burden to first demonstrate evidence of the requisite elements of a medical malpractice claim by expert opinion evidence. *Taylor,*

593. In the case at bar, the Fourth District appropriately acknowledged that the cause of Plaintiff's femoral nerve injury is not within the common knowledge exception and that expert medical opinion testimony is required to support a claim that professional negligence from the improper use and/or placement of a retractor caused that injury. *Johnson,* ¶ 68. However, the Fourth District erred by failing to acknowledge that Plaintiff wholly failed to demonstrate *any* evidence of the elements of a malpractice claim with respect to Tech Harden and Advocate, regardless of the theory of recovery. Accordingly, the trial court was required to grant them summary judgment as a matter of law, and the Fourth District erred in holding otherwise.

IV. *Res ipsa loquitur* is not applicable to this case because Plaintiff has offered specific evidence, by expert opinion testimony, as to the cause of his injury.

This Supreme Court has previously acknowledged that in a medical malpractice case, if the specific and actual force which initiated the motion or set the instrumentality in operation were known unequivocally, leaving no reason for inference that some other unknown negligent act or force was responsible, the *res ipsa* doctrine cannot be invoked. *Heastie*, 539 (citing *Collgood, Inc. v. Sands Drug Co*., 5 Ill.App.3d 910, 916 (1972); and 65A C.J.S. Negligence § 759, at 555 (2000) ("The *res ipsa loquitur* rule aids the injured party who does not know how the specific cause of the event that results in his or her injury occurs, so if he or she knows how it comes to happen, and just what causes it, there is no need for the presumption or inference of the defendant's negligence as afforded by the rule".)) This very Court's prior ruling and reasoning in *Heastie* is directly on point and controlling herein because Plaintiff has disclosed opinion testimony through his expert, Dr. Bal, as to exactly what Plaintiff contends occurred. Plaintiff has a theory, supported by Plaintiff's interpretation of the evidence, that Dr. Armstrong made his incision too medially

which necessitated that he place his retractor against the femoral nerve, thereby causing the injury in question. Plaintiff has every right to present this theory to the jury for consideration, and Defendant Armstrong has every right to present evidence in opposition thereto. There is no place for, or reason to apply, the doctrine of *res ipsa loquitur* because Plaintiff has an unequivocal theory of negligence. There is no uncertainty or other potential cause asserted by Plaintiff's expert. Therefore, *res ipsa* cannot apply as a matter of law. *Id.*

The Appellate Court primarily relied on three decisions, *Spidle v. Steward,* 79 Ill.2d 1 (1980), *Kolakowski v. Voris,* 83 Ill.2d 388 (1980), and *Poole v. University of Chicago,* 186 Ill.App.3d 554 (1st Dist. 1989), to support its holding that Plaintiff was entitled to apply *res ipsa loquitur*. *Johnson*, ¶¶ 49-50, 59, 70-71. For the reasons set forth below, each of those cases is distinguishable on its face, and the Fourth District erred in finding that they supported the application of *res ipsa loquitur* as a matter of law to Tech Harden and Advocate.

At the outset, both *Spidle and Kolakowski* were decided in 1980, *prior* to the adoption of 735 ILCS 5/2-1113 (in 1982), and 735 ILCS 5/2-622 and 735 ILCS 5/8-2501 (in 1985), all of which support the trial court's appropriate ruling that Tech Harden and Advocate were entitled to summary judgment on Plaintiff's claims pursuant to *res ipsa loquitur* because Plaintiff failed to demonstrate any expert evidence, by a duly licensed surgical technologist, as to the standard of care applicable to Tech Harden or a deviation therefrom.

In *Spidle v. Steward*, the plaintiff developed a fistula following a hysterectomy to treat recurrent attacks of pelvic inflammatory disease. The plaintiff sued her surgeon, Dr.

Steward, as well as another physician and the hospital, both of whom settled prior to jury deliberations. At the close of the plaintiff's case, the trial court directed a verdict for the remaining defendant, Dr. Steward, for two counts based on *res ipsa* and refused to give a *res ipsa* instruction. The jury found for Dr. Steward on the claims of negligence. The appellate court affirmed the trial court. *Spidle v. Steward*, 68 Ill.App.3d 134, 135-136 (4th Dist. 1979). The Supreme Court affirmed the jury verdict on the negligence claims, but held that it was reversible error for the trial court to deny the *res ipsa* instruction. *Spidle*, 79 Ill.2d at 8-10.

Both the trial court and the appellate court found that the testimony of the plaintiff's expert gynecologist did not establish that her injury did not ordinarily occur in the absence of negligence, only that the injury was "rare and unusual," so *res ipsa loquitur* did not apply. The Supreme Court disagreed, noting that while it could not conclude from the plaintiff's expert's testimony whether he meant fistula formation after hysterectomies is usually a result of negligence, the expert also testified that it was inadvisable to operate on the plaintiff if her pelvic inflammatory disease was in an acute stage. *Id.*, 9-10.The Supreme Court noted that there was evidence that she was in an acute stage and that Dr. Steward had said after the surgery that he "operated a little too soon." *Id.*, 9-10. Taken together, all of that evidence permitted a jury to infer negligence under *res ipsa loquitur*. *Id.*, 10.

Spidle is further distinguishable from the claim against Tech Harden and Advocate because there was expert opinion testimony as to the sole defendant surgeon at issue. Further, the parties in *Spidle* agreed that the "instrumentality" of the injury was the decision to proceed with the operation itself, and plaintiff's expert offered no specific criticisms of the surgical procedure or the cause of the fistula. *Spidle*, 68 Ill.App3d at 135-136. By

contrast, in this case, Plaintiff's expert, Dr. Bal, has opined that the hip replacement surgery was appropriate, and the placement of the prosthetic met the standard of care, but that the specific cause of Plaintiff's injury was the negligent placement of the retractor against his femoral nerve. (C 659 – C 660; C 666 – C 667). Unlike *Spidle*, the issue here is not whether a general opinion – that an injury does not result from a surgery in the absence of negligence – is sufficient to apply *res ipsa loquitur*, but whether the specific conclusive evidence offered by Dr. Bal against Dr. Armstrong as to the cause of Plaintiff's injury still entitles him to *res ipsa loquitur* against Tech Harden and Advocate. It should not.

In *Kolakowski v. Voris,* a patient was ultimately rendered a quadriplegic following a spinal disc surgery. The plaintiff sued three physicians and the hospital, all under a theory of *res ipsa loquitur*. *Id.*, 391-393. During the procedure, one of the defendant doctors implanted a plug of bone into the space left by the removed disc. Plaintiff's lone expert opined that the damage to the spinal cord was caused by forcing a bone plug against the spinal cord. He offered no other opinions as to negligence by the hospital. The hospital moved for summary judgment on two bases: it did not have exclusive control; and the plaintiff's introduction of specific negligence defeated his right to rely on the doctrine of *res ipsa loquitur*. The First District reversed, finding there were genuine issues of facts which precluded summary judgment, and the Supreme Court affirmed the appellate court.

As discussed above, *Kolakowski* pre-dates the Illinois legislature's adoption of the current statutory scheme as to when the trial court may apply *res ipsa loquitur* to a claim of medical malpractice. In addition, as set forth in Section VI(C), the trial court in this case appropriately ruled that Plaintiff failed to demonstrate the requisite control necessary to

apply *res ipsa loquitur* to Tech Harden, and for that reason alone, *Kolakowski* is distinguishable on its face.

Further, the facts of this case are also precisely the sort *Kolakowski* acknowledged would bar the application of *res ipsa loquitur*: "If a plaintiff knows in what respects the defendant was guilty of negligence and presents any specific evidence of the negligent act, the doctrine of *res ipsa loquitur* is no longer applicable because direct evidence is no longer in exclusive control of the defendant." *Id.,* 397. Here, Dr. Bal offered specific evidence of negligence against Dr. Armstrong, including citation to the operative record and EMG findings, as conclusive evidence that the retractor caused direct injury to the femoral nerve. (C 659 – C 660).

Finally, one of the concerns in *Kolakowski,* as cited by *Johnson*, was that without the aid of *res ipsa loquitur* in the surgical setting, a patient would be unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. *Johnson*, ¶ 70 (citing *Kolakowski*, 395-396). Notwithstanding the implied bad faith suggested on the part of defendants, that concern is not borne out in this case. There is no question here that Dr. Armstrong alone was responsible for placing and repositioning the alleged instrumentality of the injury, the retractor, because Dr. Armstrong testified to this fact. This is not the case posited by this Court in *Kolakowski* where the medical defendants suppressed evidence of what occurred. Even the Appellate Court herein acknowledges that Dr. Armstrong was responsible for the retractor "at all times." *Id.*, ¶ 58. Accordingly, the potential harm to plaintiffs that *Kolakowski*, and by extension *Johnson*, seek to prevent by the application of *res ipsa loquitur* simply does not exist here.

In both *Spidle* and *Kolakowski*, writing in dissent, Justice Ryan was concerned about the over-application of *res ipsa loquitur*. In *Spidle,* Justice Ryan expressed his concern that the theory of *res ipsa loquitur* as applied by the majority opinion "virtually created a strict liability in malpractice cases under the guise of *res ipsa loquitur*," where "given only a scintilla of evidence, the jury is permitted to speculate that the basis for drawing the inference of negligence" permitted by *res ipsa loquitur* against the defendant exists. *Id.*, 24.

In *Kolakowski,* Justice Ryan quoted at length from Professor Prosser, which he noted was "more restrictive than the position" set forth in the majority opinion:

> When the plaintiff shows that the railway car in which he was a passenger was derailed, there is an inference that the defendant has somehow been negligent. When he goes further and shows that the derailment was caused by an open switch, he destroys any inference of other causes; but the inference that the defendant has not used proper care in looking after its switches is not destroyed, but considerably strengthened.
>
> If he goes further still and shows that the switch was left open by a drunken switchman on duty there is nothing left to infer; and if he shows that the switch was thrown by an escaped convict with a grudge against the railroad, he has proved himself out of court. It is only in this sense that when the facts are known there is no inference, and *res ipsa loquitur* simply vanishes from the case.

Justice Ryan than concluded that the plaintiff should be bound by the evidence of the specific acts which he produces, and that such "limitation must be placed upon the use of the *res ipsa loquitur* principle in order to have any meaningful factual determination and in order to prevent pure speculation and conjecture." *Id.*, 400-401. Viewed in this context, then, the adoption of §2-622, §2-1113 and §8-2501 into the Code of Civil Procedure can be reasonably interpreted as a legislative response to the types of concerns raised by Justice

Ryan about imposing liability on medical malpractice defendants with nothing more than speculation.

Finally, in *Poole v. University of Chicago*, the plaintiff's expert offered multiple criticisms of the operative procedure that resulted in a bi-lateral paralysis of the vocal chords. Specifically, the expert testified that the defendant doctor did not clear the trachea without locating/protecting the vocal chords, and he used electrocautery equipment. *Id.*, 559. In *Poole*, the *res ipsa* instruction was necessary because the evidence established that the paralysis resulted from the injury to the vocal chords, but there was not conclusive evidence to prove how or why the vocal chords were injured. *Id.*, 560. That contrasts with the case *sub judice*, where Dr. Bal offered the sole and specific opinion that the medial location of the incision resulting in the placement of the retractor in that incision caused the injury. (C 658 – C 660, C 666 – C 667). It was not an either/or proposition as offered in *Poole*. Rather, it was a singular criticism, *i.e.,* that the incision and placement of the retractor injured the nerve.

In deciding *Johnson,* instead of recognizing the significant efforts of the Illinois legislature and courts to ensure that all aspects of a medical malpractice claim are supported by sufficient evidence before a jury is asked to decide liability, the Fourth District exempts claims brought under a theory of *res ipsa loquitur*:

> The essence of *res ipsa loquitur* is that the *injury* speaks for itself. Were it otherwise, there would be no need for the doctrine. Armstrong and Harden would be home free because Johnson could never find an expert to suggest that either one did something specifically wrong because all of the records and testimony would point in the opposite direction.

Id., ¶ 67. That statement crystalizes the Appellate Court's fundamental misunderstanding of the undisputed evidence in this case because Plaintiff *did find* and disclose an expert

with specific opinions as to exactly what was done wrong. Then, proceeding upon this misunderstanding, the Fourth District confounds the purpose behind *res ipsa loquitur* and impermissibly expands it to practically any case where a plaintiff adds to his specific theory the further contention that the injury would not have occurred even if the specific act of negligence that was alleged is not proven. This decision, if allowed to stand, presents a windfall to plaintiffs where juries will be instructed that even if they choose to disregard the plaintiff's specific allegations of deviation from the standard of care, they may still infer negligence occurred.

The Fourth District fails to recognize that injury does not in and of itself demonstrate lack of skill or negligence and would not, standing alone, support a *res ipsa loquitur* cause of action. *Mazzone v. Holmes*, 197 Ill.App.3d 886, 899-900 (1st Dist. 1990). *Res ipsa loquitur* is a way for plaintiffs to proceed in cases where there is a clear injury that can *only* be caused by negligence, but the nature of the occurrence makes it impossible to prove what precisely went wrong. *Res ipsa loquitur* is not intended to fill in the gaps when plaintiff has an injury but no other evidence to support a claim of medical malpractice.

Res ipsa loquitur exists as a method for a plaintiff to prove his case by circumstantial evidence when the direct evidence is primarily within the knowledge and control of the defendant. *Poole*, 558. It permits an inference of negligence, which then shifts the burden to the defendant to refute that inference. *Id.* The burden-shifting is considered equitable because defendants are typically in a better position than the plaintiff to determine who caused the harm. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 257 (1990). However, it is up to the trial court to determine when it is appropriate to shift the burden of that inference to the defendant. *Imig*, 27; *Heastie*, 532.

In medical malpractice cases, *res ipsa loquitur* fills a very particular need. For example, if a plaintiff's expert offers an opinion that a defendant physician deviated from the standard of care in multiple respects but cannot identify which deviation more likely than not caused the injury (as in *Poole*), that plaintiff should not be barred from proceeding on his malpractice claim simply because he lacks evidence as to which specific act of negligence caused his injury. Just as it would be unfair to allow a jury to speculate as to a defendant's liability when there is no evidence as to a negligent act that caused the plaintiff's injury, it would be unfair to prevent a jury from considering the plaintiff's claim simply because there were multiple deviations and his expert cannot, after the fact, narrow down the specific cause. In that context, *res ipsa loquitur* is appropriate because the plaintiff has demonstrated that the defendant was responsible for all *reasonable* causes to which the accident could be attributed. *Raleigh v. Alcon Laboratories, Inc.*, 403 Ill.App.3d 863, 869 (1st Dist. 2010). Conversely, the plaintiff has no need for the presumption of the defendant's negligence when he knows the specific cause of the event that results in his injury. *Heastie*, 539.

Johnson acknowledged that Plaintiff's injury was caused by the retractor. *Id.*, ¶¶ 51, 53. The only criticisms offered by Plaintiff's expert, Dr. Bal, are against Dr. Armstrong for placing the retractor against the femoral nerve. (C 666). There was no other possible or competing cause suggested by Plaintiff's expert. He offers no criticisms of Tech Harden's care, nor does he suggest that any action she took caused Plaintiff's injury. (C 670 – C 671). If allowed to stand, the *Johnson* decision would allow Plaintiff first to offer that specific evidence of negligence against Dr. Armstrong, *and then proceed* to offer to the jury the additional option to infer and speculate that Armstrong and/or Tech Harden may

have also been negligent in some other unspecified way. This then impermissibly triggers the burden shifting requirement imposed by *res ipsa,* requiring Tech Harden to prove a negative — that she was not negligent notwithstanding the undisputed fact that Plaintiff had not suggested otherwise. The practical effect of allowing both here is to allow Plaintiff to say to the jury, "***Here's how Dr. Armstrong caused my femoral nerve injury, but you can also speculate that Tech Harden caused the injury in some other way for which I have no evidence***."

Plaintiff has no need for the presumption of Tech Harden's negligence afforded by *res ipsa loquitur* because he has specific knowledge of the actual force that caused his injury – Dr. Armstrong's alleged negligent placement of the retractor against his femoral nerve, which is the basis for the medical malpractice claim against Dr. Armstrong and his group which remains pending in McLean County. (C 25). Dr. Bal's opinion as to the negligent cause of Plaintiff's femoral nerve injury is specific enough evidence to prevent the application of *res ipsa loquitur* as a matter of law, and the Fourth District erred in holding otherwise.

V. Plaintiff did not demonstrate a *prima facie* case for medical malpractice against Tech Harden.

A. As an orthopedic surgeon, Dr. Bal was not competent to offer an opinion as to the standard of care applicable to Tech Harden, a surgical technologist.

It is axiomatic that the plaintiff in a medical malpractice action bears the burden of proving each element of his claim. *Walski v. Tiesenga*, 72 Ill.2d 249, 257 (1978). Without expert testimony defining the standard of care against which the defendant practitioner's conduct is to be judged, there is no means by which the jury may find the defendants deviated from the standard. *Id.*, 262. Even where the plaintiff relies on the doctrine of *res*

ipsa loquitur, he is still required to establish the applicable standard of care. *Taylor*, 592. A plaintiff's failure to establish a standard of care by expert testimony is a fatal deficiency in a medical malpractice action. *Curtis v. Goldenstein*, 125 Ill.App.3d 562, 565 (3rd Dist. 1984). Here, the trial court correctly ruled that Plaintiff failed to meet his burden to prove his case against Tech Harden and Advocate by competent expert opinion evidence from a surgical technologist. (R 12 – R 13).

The foundational requirements for expert testimony in a medical malpractice action are a threshold beneath which the plaintiff cannot fall without failing to sustain the allegations of his complaint. *Garley v. Columbia LaGrange Memorial Hosp.*, 351 Ill.App.3d 398, 407 (1st Dist. 2004). A medical expert may only offer opinions where: 1) he is a licensed member of the school of medicine about which he purports to testify; and 2) he has proved his familiarity with other practitioners' methods, procedures, and treatments. *Sullivan,* 112. If the offered expert fails to satisfy either of the first two foundational requirements, "the trial court must disallow the expert's testimony." *Id.*, 113.

Plaintiff alleged he suffered injury to the femoral nerve during surgery, an injury which requires expert opinion testimony to establish the applicable standard of care. *Walski,* 257. Plaintiff did not disclose any witness to offer expert opinion testimony as to either the standard of care applicable to Tech Harden or that she failed to comply with it. Rather, Plaintiff disclosed only one Rule 213(f)(3) controlled expert, Dr. Sonny Bal, who conceded that he was not offering opinions as to the standard of care for a surgical technologist. (C 670 – C 671). Dr. Bal confirmed the contents of his CV at his discovery deposition, which lists no education as a surgical technologist. (C 601, C 653). Finally, Dr. Bal has never practiced as a surgical technologist. (C 670 – C 671).

735 ICLS 5/8-2501 sets forth four standards to determine whether a witness qualifies as an expert witness in cases where the standard of care for the medical profession is at issue. One of those standards is whether the witness is licensed in the same profession as the defendant. 735 ILCS 5/8-2501(c). The Registered Surgical Assistant and Registered Surgical Technologist Title Protect Act, 225 ILCS 130/*et seq*., sets forth a unique licensing and regulatory scheme for certified surgical technologists. Here, Dr. Bal is unequivocally *not* a surgical technologist. Accordingly, on its face, Section 8-2501 disqualifies Dr. Bal from offering expert opinions against Tech Harden.

This Supreme Court has recognized repeatedly that as a practitioner of surgical technology, Tech Harden was entitled to have her conduct tested by the standards of her specific school. *Sullivan,* 123; *Dolan v. Galluzzo,* 77 Ill.2d 279, 283 (1979). In *Sullivan v. Edward Hospital,* the Supreme Court considered claims against the defendant hospital (for the actions of a nurse), and a physician, with respect to a fall in a hospital by an elderly patient who was a fall risk. Plaintiff disclosed a specialist in internal medicine with substantial experience in the area of patient fall protection. He was the only expert disclosed on the nursing standard of care. The trial court entered a directed verdict for the hospital after plaintiff's only medical expert was ruled incompetent to testify as to the standard of care for the nursing profession.

In affirming the trial court, the Supreme Court adopted the "persuasive" reasoning of the *amicus* American Association of Nurse Attorneys (TAANA):

> "A physician, who is not a nurse, is no more qualified to offer expert, opinion testimony as to the standard of care for nurses than a nurse would be to offer an opinion as to the physician standard of care. * * * Certainly, nurses are not permitted to offer expert testimony against a physician based on their observances of physicians or their familiarity with the procedures involved. An operating room nurse, who stands shoulder to shoulder with

> surgeons every day, would not be permitted to testify as to the standard of care of a surgeon. …. Nor would a nurse be permitted to testify that, in her experience, when she calls a physician, he/she usually responds in a certain manner. Such testimony would be, essentially, expert testimony as to the standard of medical care."

Id., 120-121. *Sullivan* expressly upheld the trial court's ruling that Plaintiff's expert physician was incompetent to offer opinion evidence as to the nursing standard of care, affirmed that expert testimony may only be offered by a nurse properly licensed under the Nursing and Advance Practice Nursing Act, and declined the "plaintiff's invitation to deviate therefrom." *Id.*, 123. The result should be no different here. The trial court's reliance upon this Court's prior holding in *Sullivan* for its determination that Dr. Bal could not render testimony against a surgical tech should be held valid, and the Fourth District's failure to recognize this foundational requirement should be overturned. (R 12); *Sullivan*, 123; *Garley,* 410.

In opposing summary judgment, Plaintiff argued that only an orthopedic surgeon could offer any opinion on standard of care in this case. (R 8). The appellate courts have previously considered whether any exceptions exist to the general prohibition against physicians offering standard of care opinions against nurses and surgical scrub techs as initially set forth in *Dolan* and expanded upon in *Sullivan,* and have found such exception only in the very limited situation where the allegations of negligence concern what nursing communications a physician is entitled to rely on in the context of rending the patient care. This exception has never been asserted by Plaintiff and is not an issue in this case.

In *Wingo v. Rockford Memorial Hospital*, 292 Ill.App.3d 896 (2nd Dist. 1997), the plaintiff alleged negligence against the physician and hospital in failing to adequately treat and improperly releasing an expectant mother from the hospital, causing her infant's brain

damage. The plaintiffs and physician reached a settlement agreement during jury deliberations. The jury returned a verdict against the hospital in excess of $10 million. The defendant hospital appealed, arguing in part that the trial court erred in allowing the plaintiffs to present expert testimony from three doctors to establish the applicable standard of care for the Hospital's nurse with respect to the communications that the physicians expected from the nurses as to the patient's condition.

The Second District affirmed the plaintiff's verdict, finding that the facts in *Wingo* did not fit within the license requirement of *Dolan* (which held that an orthopedic surgeon could not be permitted to testify as to the standard of care applicable to a podiatrist) because the alleged nursing negligence did not concern a nursing procedure, but rather what a nurse is required to communicate to the physician about what transpired since the physician last saw the patient. *Id.*, 906. For that reason, it was appropriate for the physician to testify about what he is entitled to rely upon in the area of communication from a nurse in the context of an obstetrical team rendering care to a patient in hospital. *Id.*

At the time *Wingo* was decided, the Second District noted that no Illinois case had directly applied *Dolan* to prevent a *physician* from establishing the applicable *nursing* standard of care. *Wingo,* 905-906. However, in 2004, this Supreme Court decided *Sullivan*, which clearly **does** stand for the proposition that a physician cannot establish the applicable nursing standard of care. *Sullivan* also specifically distinguished *Wingo*, finding that communication between a physician and a nurse was not at issue in *Sullivan*, just as it is not at issue in this case. *Sullivan*, 118-119.

The Fourth District has also previously considered whether a physician can offer an opinion as to the nursing standard of care, in *Petryshyn v. Slotky*, 387 Ill.App.3d 1112

(4th Dist. 2008). In *Petryshyn,* the plaintiff sued the hospital and the obstetrician who performed her c-section after discovering that a pressure catheter had been left in her uterine cavity. The hospital settled prior to trial. At trial, the surgeon introduced exculpatory deposition testimony from the plaintiff's expert regarding the standard of care for surgical team nurses. Specifically, the plaintiff's expert testified as to the relative responsibilities of a nurse and physician during a c-section, and the "intrinsically intertwined interactions between those responsibilities as to the physician and nurse care for the same patient." *Id.*, 1121. Under those circumstances, the plaintiff's expert was qualified to testify as an expert that (1) a surgical team physician conducting a C-section relies on communication from nursing team members regarding the patient's care; and (2) the failure to communicate information about the patient was a breach of the nurse's standard of care.

The jury returned a verdict for the obstetrician, and the patient moved for a new trial, which the trial court granted. The surgeon appealed, and the appellate court held that the obstetrician was qualified as an expert to testify to the surgical team nurses' standard of care, reversing the trial court to deny plaintiff a new trial. The *Petryshyn* court noted that *Sullivan* did not overrule *Wingo*, and in so doing, appears to recognize a limited exception "when the allegations of negligence concern communications between members of difference schools of medicine acting as part of the same team." *Petryshyn*, 1119.

The limited exceptions to *Dolan* and *Sullivan* examined in *Wingo* and *Petryshyn* simply do not apply to this case. First, they do not apply because Dr. Bal does not offer any criticisms of Tech Harden, nor does he suggest that any action by her proximately caused Plaintiff's injury. (C 670 – C 671). Next, there are ***no*** allegations of negligence in the

Complaint with respect to the communications between Dr. Armstrong and Tech Harden. (C 30 – C 31). Finally, Dr. Bal did not offer any opinions that there was as a failure to communicate between Dr. Armstrong and Tech Harden, or that communication between them (or a lack thereof) proximately caused Plaintiff's femoral nerve injury. (C 597; C 670 – C 671). Accordingly, no communication exception to the general rule applies in the case at bar, and Dr. Bal was not competent to offer any standard of care testimony against Tech Harden.

The trial court correctly ruled that Dr. Bal was not qualified to offer standard of care opinions against Tech Harden because he does not practice in her school of medicine, necessitating summary judgment for Tech Harden and Advocate. (R 12); *Sullivan*, 123.

B. The trial court appropriately entered summary judgment for Tech Harden and Advocate because Plaintiff failed to establish any evidence that Tech Harden deviated from the applicable standard of care or that any action by Tech Harden was a proximate cause of his injuries.

Even assuming, *arguendo*, that Dr. Bal was competent to offer an opinion as to the standard of care applicable to Tech Harden, Plaintiff's claim nonetheless fails because Dr. Bal conceded that he had no criticisms of Tech Harden, and *she acted exactly as he would have expected her too*. (C 670 – C 671). Therefore, even if Dr. Bal is somehow held to be competent to establish the duty owed by a surgical tech, Dr. Bal has unequivocally testified that there was no breach of this duty.

Further, in addition to establishing standard of care and breach, expert testimony is also required as to the defendant's alleged deviations and the causal link between the conduct and the plaintiff's alleged injury. *Seef v. Ingalls Memorial Hosp.,* 311 Ill.App.3d 7, 18-19 (1st Dist. 1999). The lack of expert testimony to connect the allegedly negligent

act complained of to the plaintiff's claimed injury creates a missing link in the plaintiff's *prima facie* case. *Snelson v. Kamm*, 204 Ill.2d 1, 49 (2003). In the absence of expert testimony that any act by the defendant could be said, within a reasonable degree of medical certainty, to have caused the plaintiff's injuries, it would be impossible for a verdict in the plaintiff's favor to stand and a judgment in the defendant's favor is appropriate. *Saxton v. Toole*, 240 Ill.App.3d 204, 210-211 (1st Dist. 1992). A mere possibility is not sufficient to sustain the plaintiff's burden of proof of proximate cause; the causal connection must not be contingent, speculative, or merely possible. *Id.*, 210. When a medical provider's actions conform to the accepted practice, there is no breach of duty and no liability. *Comte v. O'Neil*, 125 Ill.App.2d 450, 453 (4th Dist. 1970).

Here, Plaintiff failed to establish **any** evidence, expert opinion or otherwise, that Tech Harden did anything she should not have done during his surgery, or that anything she did do caused his femoral during nerve injury. Even assuming, *arguendo*, that Dr. Bal *was* competent to offer an opinion about the standard of care for a surgical technologist *and* had done so, he offered neither an opinion that Tech Harden deviated from the expected conduct for a surgical technologist, nor that any of her actions proximately caused Plaintiff's injury.

In Dr. Bal's opinion, a scrub nurse/surgical technician is expected to act exactly as the surgeon has directed them, and he agreed that Tech Harden acted exactly as directed by the surgeon, Dr. Armstrong. (C 670 – C 671). At his deposition, Dr. Bal opined that Plaintiff's injury was caused by the incision, which he believed was too medial, resulting in an improper placement of the surgical retractors. (C 658 – C 659). Dr. Bal agreed that Tech Harden had no involvement whatsoever with Plaintiff's incision. (C 670). Dr. Bal

further agreed that the surgeon performing the procedure exercises his or her independent judgment as to the location and placement of the retractors. (*Id.*) In this case, Dr. Bal found no evidence indicating Tech Harden had any involvement in the placement of the retractors into Plaintiff's incision. (*Id.*) He also offered no opinion that any action by Tech Harden proximately caused Plaintiff's injury.

Plaintiff offered no expert opinion evidence as to any of the three elements necessary to demonstrate a *prima facie* case for medical malpractice against Tech Harden. Accordingly, that failure to present any expert testimony that negligent conduct by Tech Harden was the proximate cause of his injury was fatal to his claim, and the trial court necessarily and correctly entered summary judgment in Tech Harden's favor. (R 12 – R 13); *Wiedenbeck v. Searle*, 385 Ill.App.3d 289, 292-293 (1st Dist. 2008). Further, as Advocate's liability was predicated solely on vicarious liability for the actions of its employee, Tech Harden, summary judgment in Advocate's favor was also required. IPI 50.01.

VI. The Fourth District erred when it obviated the requirement that standard of care must be established and instead determined this requirement was satisfied merely by expert testimony proffered against a co-defendant in a different school of medicine.

A. *Taylor v. City of Beardstown* is consistent with the requirement under Illinois law that in claims of medical malpractice, including those brought under the doctrine of *res ipsa loquitur*, Plaintiff must demonstrate the duty owed to him under the applicable standard of care by competent medical testimony from an expert licensed in the same school of medicine as the defendant.

The four elements of any tort claim are duty, breach, and damages proximately caused. *Ward v. K Mart Corp.*, 136 Ill.2d 132, 140 (1990). In all tort cases, if the defendant has no duty to the plaintiff, there can be no liability for his injury as a matter of law.

Bucheleres v. Chicago Park District, 171 Ill.2d 435, 447 (1996). A claim for medical malpractice is no different. *Comte,* 453. The "standard of care" establishes the duty element of the defendant practitioner to the plaintiff and is defined by one applying the same degree of knowledge, skill and ability an ordinarily careful professional would exercise under similar circumstances. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill.2d 278, 295 (2000); *See also*, IPI 105.01 (Revised April 2020) and Notes on Use (Revised September 2011). *Res ipsa loquitur* may be invoked in the absence of other direct evidence, but it incorporates the same concept of ordinary care that suffuses tort law, requiring, in the case of medical malpractice, expert opinion evidence that the injury does not ordinarily occur in the absence of negligence. IPI 105.09; *Rahic*, ¶ 33.

As set forth at length in Section IV, *supra,* the large body of medical malpractice law in Illinois requires the plaintiff to establish the applicable standard of care by competent opinion evidence from an expert licensed in the same school of medicine as the defendant. That requirement is not altered when a plaintiff seeks to prove his claim of medical malpractice in reliance on the application of *res ipsa loquitur*.

The Fourth District, in *Taylor v. City of Beardstown,* 142 Ill.App.3d 584 (4th Dist. 1986), had prior occasion to consider precisely whether a plaintiff may rely on the doctrine of *res ipsa loquitur* in a medical malpractice case when he has otherwise failed to demonstrate expert opinion evidence as to the standard of care. In *Taylor,* the patient fell several times after admission to the hospital, breaking his hip and passing away four months later. *Id*., 588-89. The special administrator of the estate filed a complaint for wrongful death and survival against the defendant hospital and physician, alleging in part the failure to provide necessary fall prevention measures and failure to timely treat. *Id.*

The defendants moved for summary judgment, and the plaintiff sought leave to amend her complaint to plead *res ipsa loquitur*. *Id*., 590. The trial court denied plaintiff leave to amend her complaint, and granted the defendants summary judgment because plaintiff failed to demonstrate the applicable standard of care. On appeal, the plaintiff argued that that the trial court erred when it denied her leave to file an amended complaint pleading *res ipsa loquitur*, and that she was not required to submit expert testimony as to the applicable standard of care in response to the motions for summary judgment.

The Fourth District Appellate Court affirmed the trial court, noting that in the first instance, the trial court decides whether as a matter of law the *res ipsa loquitur* doctrine applies. *Id.*, 592-593. The *Taylor* court further noted that in cases of medical malpractice, *res ipsa loquitur* does not apply *unless* a duty of care is owed by the defendant to the plaintiff:

> The doctrine [of *res ipsa*] will not apply unless a duty of care is owed by the defendant to the plaintiff, and it is established that a breach of duty occurred when the defendant did not measure up to the applicable standard. Thus, to invoke the doctrine, a proper foundation must be alleged and the elements established. Of particular importance in pleading *res ipsa* is the first element, involving results which would not ordinarily occur were it not for the negligent conduct of the defendant. That element will be established either by presenting expert testimony to that effect, or else by showing the complained of conduct was so grossly remiss that it falls within the common knowledge and understanding of nonmedical persons, thereby obviating the need for expert evidence.

Id., 593.

Taylor reasonably held that pleading medical malpractice under a theory of *res ipsa loquitur* did not eliminate the plaintiff's preliminary obligation to prove the medical provider's duty to the patient with expert opinion evidence as to the applicable standard of

care, and the failure to do so required summary judgment on behalf of the defendants. *Id.*, 592-593, 600-601.

In the trial court herein, Plaintiff argued that Dr. Bal, a surgeon, was competent to offer a standard of care opinion against Tech Harden. *Johnson*, ¶ 24. Plaintiff so argued notwithstanding the admission by his own expert, Dr. Bal, that he would not be offering such opinion and, in fact, had no criticisms of her care. (C 670 – C 671). On appeal, the Fourth District held that the *only* expert testimony necessary was Dr. Bal's opinion that Plaintiff's femoral nerve injury does not occur in the absence of negligence, thereby allowing Plaintiff to proceed against *all* defendants, improperly eliminating the seminal requirement that Plaintiff must first establish the duty owed by Tech Harden through competent expert testimony from a qualified opinion witness. *Johnson,* ¶¶ 64-65, 68. The Fourth District instead chose to apply *res ipsa loquitur* as a substitute for this requirement simply because Dr. Bal opined as to his criticism of Defendant Armstrong that the injury would not occur in the absence of negligence. Essentially, the appellate court found that *res ipsa loquitur* applied to everyone in the room whether Plaintiff supplied evidence as to those individuals' standard of care or not. *Id.*, ¶¶ 43, 68. The Fourth District cites no authority that supports such a conclusion, and this ruling, if allowed to stand, would eliminate the long standing statutory and common law requirement that Plaintiff must establish a duty owed by **each** defendant against whom a claim is asserted.

To put it another way, when proving a claim of medical malpractice through direct evidence, negligence can only be found where there is evidence that the defendant did something that a reasonably careful practitioner would not have done in the same circumstances, and as a result, the plaintiff was injured. *See, e.g., Jones,* 295; and IPI

105.01 (citing Notes on Use). Conversely, when proving a claim of medical malpractice pursuant to the doctrine of *res ipsa loquitur*, the evidence must demonstrate that the defendant owed a duty, but the evidence of what he did wrong is lacking. Only then, where the plaintiff's injury does not ordinarily occur in the absence of negligence, can negligence be inferred.

Here, Plaintiff offers no evidence as to what Tech Harden *should* have done, let alone should have done differently, and therefore, there is no basis to allow the jury to infer that his injury does not occur in the absence of Tech Harden's negligence. Accordingly, *res ipsa loquitur* could not, as matter of law, apply to Tech Harden, and vicariously to Advocate, and the trial court appropriately granted summary judgment.

Inexplicably, the Fourth District in its opinion here, acknowledged that under *Taylor*, "testimony regarding the standard of care and deviation from that standard was required to invoke the *res ipsa* doctrine." *Johnson*, ¶ 69. Nevertheless, *Johnson* expressly declined to following *Taylor,* noting:

> [A] far as we can tell, the only other case to make such an explicit statement or rely on *Taylor* for that proposition is *Smith v. South Shore Hospital*, 187 Ill.App.3d 847, 857-858, 543 N.E.2d 868, 783 (1989), which itself has never been cited for that proposition. Indeed, in *Solon v. Godbole*, 163 Ill. App. 3d 845, 850, 516 N.E.2d 1045, 1048 (1987) (quoting *Plost v. Louis A. Weiss Memorial Hospital*, 62 Ill. App. 3d 253, 258, 378 N.E.2d 1176, 1180 (1978)), the Third District noted, "[A] plaintiff may proceed to trial without an expert '*** where the theory is "*res ipsa loquitur*." ' " We decline to follow *Taylor*.

Johnson, ¶ 69.

In so holding, *Johnson* has essentially flipped the order in which *Taylor* held that *res ipsa loquitur* should be applied in medical malpractice cases. In *Taylor*, whether *res ipsa loquitur* applies is the *end* of the analysis, and may not be considered until *after* Plaintiff has otherwise established his *prima facie* case for medical malpractice by expert

opinion evidence as to the applicable standard of care, deviation therefrom, and injury proximately caused by the deviation. Conversely, in *Johnson*, the application of *res ipsa loquitur* has now been transformed to become the *beginning* of the analysis, improperly transforming an evidentiary rule into its own cause of action, obviating the statutorily required elements of negligence and taking it outside of Illinois law governing the prosecution of healing arts malpractice.

In *Smith v. South Shore Hospital,* 187 Ill.App.3d 847 (1st Dist. 1989), the First District relied on *Taylor,* to affirm summary judgment on the claim brought pursuant to *res ipsa loquitur* because the plaintiff had not offered any acceptable evidence to establish an applicable standard of care as to either defendant, nor had he offered any evidence from which an inference of negligence may be drawn. *Smith* held that the doctrine of *res ipsa loquitur* will only apply in a medical malpractice case "if the defendant owes a duty of care to the plaintiff and there has been breach of that duty. Under the doctrine, the trier of fact may not draw an inference of negligence based solely on the happening of a rare and unusual result. Evidence must be introduced to establish the rare and unusual event, and it must be coupled with proof of a negligent act." *Id.*, 857-858. Contrary to the Fourth District's assertion that "the *injury* speaks for itself," *Smith* noted that "the showing of a bad result does not itself mean that someone was negligent nor will a bad result standing alone support a *res ipsa loquitur* cause of action." *Id.*, 858.

The Fourth District's opinion herein dismisses *Smith*, asserting that it has "never been cited" for *res ipsa*. However, this Supreme Court relied upon it in approving the pattern instruction on *res ipsa loquitur* in professional negligence cases, IPI 105.09. The Notes on Use to IPI 105.09 specifically cite to *Smith* for the proposition that when the

relevant *res ipsa* issue does not fall within the common knowledge exception, the jury must determine from expert testimony alone whether the injury would have occurred in the normal course of events had the defendant used a reasonable standard of care.

Taylor and *Smith* remain accurate statements of the law in Illinois. The Fourth District erred in refusing to apply either and affirm summary judgment in favor of Tech Harden and Advocate.

B. The Fourth District mis-applies *dicta* from the First and Third Districts to wrongly hold that expert opinion evidence is not required in a medical malpractice case where the theory is *res ipsa loquitur*.

The Fourth District also apparently dismissed *Taylor* because it was decided in 1986, but then relied on *dicta* in *Solon v. Godbole,* 163 Ill.App.3d 845, decided by the Third District in 1987, where the interpretation of *res ipsa loquitur* was not even at issue. *Johnson*, ¶ 69. *Solon* involved a claim of medical malpractice arising out of a failure to biopsy a lump that turned out to be cancerous. The defendant physician moved for summary judgment, supported by his own affidavit (a concept for which the court also cited approvingly to *Taylor*), and the motion was granted. *See, Solon*, 849. On appeal, the plaintiff argued that whether a lump should be biopsied was so obvious, no expert testimony was needed.

The Third District affirmed summary judgment, holding that the plaintiff had been required to support his allegations of negligence with expert opinion in order to create a question of fact because it was not within the common knowledge of a lay person how to diagnose and treat a metastasis of cancer. *Id.,* 850. *Solon* generally stated that one of the exceptions where a medical malpractice plaintiff may proceed to trial without an expert is where the theory is *res ipsa loquitur,* citing a 1978 case from the First District, *Plost v.*

Louis A. Weiss Hospital, 62 Ill.App.3d 253. However, the Third District noted that *res ipsa loquitur* was not at issue in *Solon* because the plaintiffs did not allege it. *Solon,* 850. Until *Johnson*, no published Illinois case had cited *Solon* for the proposition that in general, expert opinion evidence is not necessary in a medical malpractice case where the theory is *res ipsa loquitur*.

In fact, *Solon* over-states the holding in *Plost*, another case where *res ipsa loquitur* was *not* at issue. *Plost* considered whether the trial court should have continued the trial date to allow the plaintiff to obtain a new expert witness. The primary holding in *Plost* was that "a trial court should not and cannot properly close discovery as to a party's witnesses or limit a party's witnesses to those previously disclosed, even during trial," a holding which is unquestionably no longer the law in Illinois. *Id.*, 257; *See also, e.g.*, Supreme Court Rule 213; Supreme Court Rule 218; and *Adami v. Belmonte*, 302 Ill.App.3d 17, 24 (1st Dist. 1998).

More to the point, *res ipsa loquitur* was not plead by the plaintiff in *Plost*, nor was it at issue. The sole reference to *res ipsa loquitur* in *Plost* was made in passing, that "conceivably, a medical malpractice plaintiff can proceed to trial without an expert where the theory is '*res ipsa loquitur*.'" *Plost*, 258. *Plost* did not suggest that the plaintiff could have proceeded to trial without an expert witness in that case, nor that it was the type of case to which *res ipsa* was applicable.

Even if reasonable for the Fourth District to apply *dicta* from *Plost* in support of its holding in the case at bar, *Plost* still recognizes that in the context of medical malpractice, "there are relatively few situations… where *res ipsa loquitur* can be shown." *Id.* Here, the Fourth District does not identify why *this* case should be one of those "relatively few

situations," particularly when a claim for medical malpractice against Dr. Armstrong remains pending in the trial court. (C 25).

The Fourth District's declination to honor the express holdings in *Taylor* and *Smith* in favor of *dicta* from *Solon* and *Plost* creates confusion within the Fourth District, and conflict between the districts. *See, e.g., O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill.2d 421, 438-439 (2008). More importantly, it also creates the manifestly unfair result now demonstrated in this case, that because Plaintiff has alleged an alternative theory of negligence pursuant to the doctrine of *res ipsa loquitur*, a jury must be instructed to now speculate as to Tech Harden's liability despite Plaintiff's total failure to demonstrate any expert opinion evidence as to the standard of care applicable to a surgical technologist, that Tech Harden deviated from that standard, or that Plaintiff's injury was caused by her deviation.

C. The Fourth District erred in finding that Plaintiff demonstrated sufficient evidence that Tech Harden exercised "control" over the retractor, and that the same established her duty of care.

The Fourth District mis-apprehends and mis-applies the holding of *Willis v. Morales*, 2020 IL App (1st) 180718, to reach its improper conclusion in this case. In *Willis*, the plaintiff alleged that she sustained a compression nerve injury to her arm following a twelve-hour abdominal and breast surgery. She brought suit against the surgeon, two anesthesiologists, and three nurse anesthetists for infusing too much fluid and failing to position her correctly before and during the surgery. The trial court granted the defendants' motion *in limine* (one of a hundred that the trial court reviewed) to bar evidence from the plaintiff's experts that the injury to the median nerve ordinarily would not occur without

negligence, on the grounds that the experts knew the "specific and actual force" that caused the injury.

The appellate court reversed, holding that while the experts agreed that the injury was caused by compression, ***they noted several possible sources***, including the arm straps, positioning of the plaintiff during surgery, the surgeon leaning on the plaintiff, and the fluid overload administered by the anesthetists. Accordingly, because the plaintiff's experts could not conclusively establish the cause of the plaintiff's injury, she could rely on circumstantial evidence – and a *res ipsa loquitur* instruction – to establish her claim. *Id.*, ¶ 42.

The circumstances presented in *Willis* are wholly different from the instant case. First, the failure to demonstrate evidence as to the applicable standard of care for each defendant licensed in a different school of medicine was not at issue in *Willis*, as notably, the plaintiff in that case offered expert opinion evidence **as to each of the defendants**. *Willis*, ¶¶ 19, 22-24, 26. Second, there is no question in the instant case that Plaintiff sustained his femoral nerve injury during the surgery, whereas in *Willis*, there was a question as to *when* the injury occurred – during the surgery or after – such that Justice Hyman dissented, being of the opinion that the conflicting evidence of when the injury even occurred prevented the application of *res ipsa loquitur* as a matter of law. *See, Willis*, ¶¶ 66-79.

In *Willis,* the appellate court found that the plaintiff could proceed under *res ipsa loquitur* because each named defendant testified that they had some responsibility for the safety of the patient with respect to positioning, and plaintiff had supported claims against each with competent expert testimony. Such evidence contrasts sharply with this case,

where Plaintiff's sole expert offered a single opinion that the subject injury was likely the result of the incision being too medial and placement of the retractors, and all of the witnesses, including Plaintiff's expert, agreed that Tech Harden had no involvement in either.

Johnson cites to *Willis* for the proposition that the facts of the surgery and the injury are enough to permit the application of *res ipsa loquitur. Johnson,* ¶ 43 (citing *Willis,* ¶ 37). Every surgical case is not a *res ipsa loquitur* case, nor does an unconscious plaintiff automatically allow for the application of *res ipsa loquitur*. *See, e.g., Smith*, 858; *Loizzo v. St. Francis Hospital*, 121 Ill.App.3d 172, 179 (1st Dist. 1984). Rather, *res ipsa loquitur may* be applicable if there is no direct evidence as to the cause of Plaintiff's injury, *and* Plaintiff is unconscious, *and* under the defendant's control. It is not the surgery which creates the control, but the "instrumentality" of the injury in each specific case.

Johnson confuses the surgery itself with the instrumentality that caused the injury. Here, Dr. Bal opined that the cause of Plaintiff's femoral nerve injury was the medial incision and placement of the retractor. (C 660). The retractor – **not** the mere fact of the surgery – is the instrumentality of the injury. If the surgery was the instrumentality of the injury, then all cases involving a poor outcome would potentially trigger the application of *res ipsa,* a scenario which should never be endorsed. Further, Plaintiff would have been required to name every person present in the operating theater as a defendant – not only Dr. Armstrong and Tech Harden, but other nurses, surgical techs, the anesthesiologist and any other person who helped or assisted that day.

Notwithstanding its reasoning, the Appellate Court recognized that the retractor caused Plaintiff's injuries:

> Advocate is correct that Harden, Armstrong, and even Bal testified at their depositions that Armstrong was the only person to place, reposition, or otherwise move the retractor. They all similarly testified that although Harden physically held the retractor, she did so only as instructed by Armstrong. In other words, Armstrong was responsible for the retractor at all times.

Johnson, ¶ 58. Despite this recognition of the lack of evidence against Tech Harden, the Fourth District inexplicably held that this *absence* is the reason that she must remain a defendant in the case, essentially because something else *might* have happened, which is the very definition of speculation. *Id.*, ¶ 59; *See, e.g., Berke v. Manilow*, 2016 IL App (1st) 150397, ¶¶ 21 - 29.

Before *res ipsa loquitur* can be applied, it must be shown that the defendant was responsible for all reasonable causes to which the injury could be attributed, or that the injury can be traced to a specific instrumentality or cause for which the defendant is responsible. *Raleigh*, 869. In this case, Plaintiff can do neither.

The evidence is undisputed in this case that Tech Harden was not responsible for any possible cause to which Plaintiff's injury could be attributed to, reasonable or otherwise. Plaintiff's retained expert testified that (1) Dr. Armstrong was responsible for the retractor at all times; (2) Tech Harden had no involvement in the placement or repositioning of the retractor; and (3) Tech Harden did nothing unexpected or surprising in performing her duties and acted exactly as Dr. Armstrong wanted her to. (C 670 – C 671) *See, Johnson*, ¶ 58. If Plaintiff is allowed to submit his claim against Tech Harden for medical malpractice to the jury under a theory of *res ipsa loquitur*, Plaintiff will not just be asking the jury to speculate as to how Tech Harden might have caused his injury, but worse, will require the jury to affirmatively ignore evidence from Plaintiff's own expert that Tech Harden actions were appropriate and expected under the circumstances.

Plaintiff cannot proceed under *res ipsa* simply because Tech Harden touched the retractor, the alleged instrumentality of the injury. Contact with the instrumentality is not the test – management or control is the test. For purposes of *res ipsa loquitur*, sufficient control and management is established if the instrument that causes the injury was in the control or management of the defendant at a time prior to the injury and there is no change in conditions or intervening act that could reasonably have caused the event resulting in the injury. *Darrough,* 1060. For Plaintiff to invoke the doctrine of *res ipsa loquitur* against Tech Harden, he must proffer evidence that she exercised "control" over the retractors – that is, that somehow simply holding the retractor amounted to a change in condition or intervening act that reasonably could have caused Plaintiff's nerve injury. *See, e.g., Id.,* 1061.

In this case, there is ***no*** evidence that Tech Harden holding the retractor after Dr. Armstrong placed it was an "intervening act" because there is no evidence that she caused any "change in condition" of the placement of the retractor. Indeed, both Dr. Armstrong and Plaintiff's expert, Dr. Bal, testified unequivocally that Tech Harden acted exactly as directed by Dr. Armstrong, and there is no evidence that she moved or altered the retractor's placement in any way. Tech Harden's involvement here is akin to that of the retractor itself, an inert object acted upon only by Dr. Armstrong. Allowing Plaintiff to maintain his claim against Tech Harden is like allowing Plaintiff to sue the retractor. Tech Harden's mere contact with the retractor without the accompanying management or control renders the doctrine of *res ipsa loquitur* absolutely inapplicable to her as a matter of law.

The Fourth District's assertion that Tech Harden simply holding a retractor after placement by Dr. Armstrong demonstrates the requisite control over the retractor necessary

for the application of *res ipsa loquitur* is without any legal authority. Further, such a holding is an open invitation to the jury to speculate not only in *this* case about what *might* have happened rather than make a determination as to liability based on the evidence before it, but to juries statewide, who will be put in the position of deciding medical malpractice claims that otherwise lack sufficient evidence upon which a reasonable jury could find in favor of the plaintiff simply because the plaintiff invoked *res ipsa loquitur*.

D. The Fourth District has created a split between the districts by refusing to allow a defendant to negate the inference of negligence created by *res ipsa loquitur* with undisputed and unrebutted evidence that the defendant complied with the applicable standard of care.

The Fourth District held that Plaintiff did not need an expert to establish Tech Harden's standard of care because:

> The whole point of the *res ipsa* doctrine is to provide an alternative method of proof when the injury would be otherwise unexplainable. Once a plaintiff establishes, through sufficient expert testimony, that the injury is one that would not ordinarily occur in the absence of negligence, and *res ipsa* applies, all defendants alleged to be in control of the instrumentality that allegedly caused the injury must be named defendants, and no further standard of care testimony is required.
>
> If Advocate were correct, the same argument could be made successfully in the prototypical *res ipsa* case: a sponge left in a patient following surgery. Had this occurrence happened to Johnson, it would be no defense for Harden or Armstrong to state that the undisputed evidence shows that neither of them did anything wrong or that Johnson did not present any testimony as to what a reasonably careful surgeon or surgical technician would have done. The sponge was still left in the patient, and *someone's* negligence during that operation was responsible for that error.

Johnson, ¶¶ 65-66.

As set forth in Section III, *infra,* the Fourth District's operating premise – that Plaintiff's femoral nerve injury was otherwise unexplainable absent *res ipsa loquitur* – is

itself a mis-application of the doctrine of *res ipsa loquitur*. Moreover, the multiple references in the *Johnson* opinion to retained surgical sponge cases were mirrored throughout the oral argument in the appellate court, where the Fourth District was immovably focused on comparing this case – alleged improper placement of a retractor during a hip replacement surgery – with a hypothetical retained surgical sponge case. (*See, e.g.,* Oral Argument at 8:02 – 9:29; 17:25-19:37; 20:08-21:08; 26:45-27:09; 33:30-34:42; 35:44-36:16, *Johnson v. Armstrong,* 2021 IL App (4th) 210038 (No. 1-21-0038), https://www.illinoiscourts.gov/courts/appellate-court/oral-argument-audio/). Time and again, counsel distinguished between the two scenarios, noting that leaving a sponge inside of a patient was never appropriate, whereas the question in the instant case involved the placement of a retractor during a surgery, the use of which no one, including Plaintiff's retained expert, disputes was appropriate and within the standard of care for a reasonably careful orthopedic surgeon in the exercise of ordinary care. (C 670).

Despite the repeated analogy at argument, and the reference to it in the opinion, the Fourth District's opinion in *Johnson* did not cite to *any* retained surgical sponge cases, let alone one that supports its holding that because Plaintiff alleged *res ipsa loquitur*, it is not a defense for Harden or Armstrong that the "undisputed evidence" demonstrates Plaintiff's failure to present competent testimony as to the applicable standard of care and a deviation therefrom by the Defendants.

In fact, the existing case law on precisely this issue holds otherwise. In *Forsberg v. Edward Hospital*, 389 Ill.App.3d 434 (2nd Dist. 2009), the plaintiff sued the defendant hospital and surgeon for medical malpractice, alleging that the doctor left a sponge inside a surgical wound. The hospital settled. The complaint did not attach a physician's report

certifying that the claim had a meritorious basis. The defendant physician moved for summary judgment, arguing that the plaintiff had failed to establish by expert evidence that he breached the standard of care. The defendant submitted his own expert opinion, via his deposition, establishing that he had complied with the standard of care because the circulating nurse was responsible for all sponge counts before and after the operation. Plaintiff responded with a 2-622 report, which the trial court declined to consider as substantive evidence, and granted the defendant physician's motion for summary judgment. The Second District affirmed.

Forsberg recognized that a sponge left inside of a patient establishes a *prima face* case of malpractice because "a sponge in the abdomen" bespeaks "to the man in the street some carelessness on the part of somebody," but also noted that such fact is not irrebuttable proof of negligence. *Id.*, 442-443. It is *not* negligence *per se*. *Id.*, 444.

In cases involving sponge counts, a surgeon may place and remove the sponges, but the nurses/surgical techs are responsible to keep the count. *Id.*, 437; *See*, *e.g., Willaby v. Bendersky,* 383 Ill.App.3d 853, 859, 863 (1st Dist. 2008). In particular, the doctor is not vicariously liable because the nurses are not his employees, nor is the doctor directly liable because his reliance on the nursing staff's sponge count is reasonable and complies with the standard of care. *Forsberg,* 444. Any inference of negligence based on the bare fact that a sponge was left inside a plaintiff's surgical wound is "negated by unrefuted evidence" that the surgeon complied with the standard of care, entitling him to summary judgment. *Id. Forsberg* also noted that a surgeon may not be held liable for the nursing staff's negligence without proof that the surgeon was independently negligent in relying

on the nursing staff. *Id.*, 445. That is, that the surgeon handled the sponges was not enough to impose liability upon him simply because a sponge was left inside the patient.

Contrary to the Fourth District's unsupported assumption, under *Forsberg* it *is* a defense for Tech Harden if the undisputed evidence shows that she did nothing wrong, or that Plaintiff did not present any testimony as to what a reasonably careful surgical technician would have done. *See, e.g. Johnson*, ¶ 66. The undisputed evidence demonstrates that Tech Harden's care of Plaintiff was consistent with the standard of care for a surgical scrub tech, and that Dr. Armstrong alone exercised exclusive management and control over the placement and movement of the retractor, despite the fact Tech Harden held it in place. (C 559- C 561; C 571; C 591; C 670). Dr. Bal agrees that he would expect Tech Harden to follow the surgeon's directions, and that all of the evidence indicates she did only that. (C 671). Tech Harden is employed by Advocate; Dr. Armstrong is not. (C 29 – C 31; C 557; C 591). There are no allegations that Tech Harden is vicariously liable for Dr. Armstrong. (C 27 – C 31). Because there is no independent evidence of negligence by Tech Harden, including that it was negligent for her to rely on the instructions of the surgeon, she was entitled to summary judgment.

Res ipsa loquitur does nothing more than create an inference of negligence after which the burden shifts to the defendant to dispel that inference. *Imig*, 28. Even were *res ipsa* to apply herein, which as set forth above, it does not, Tech Harden and Advocate *did* rebut any inference of negligence.

Res ipsa loquitur, like the retained surgical sponge in *Forsberg*, offers only a rebuttable *inference* of negligence. That inference is negated by unrefuted evidence to the contrary, and in that circumstance, summary judgment is not only appropriate but

necessary. If *Johnson* is allowed to stand, a conflict will exist between the Second and Fourth Districts whether the inference of negligence raised by *res ipsa loquitur* may be negated by undisputed evidence that the defendant complied with the standard of care. Such a conflict creates not only confusion, but allowing the Fourth District's opinion to stand is fundamentally unfair to the defendants for whom the parties agree no independent evidence of negligence exists.

Conclusion

For the reasons set forth herein, Defendants-Appellants Advocate Health and Hospitals Corporation, d/b/a Advocate BroMenn Medical Center, and Sarah Harden, ask that this Honorable Court affirm the trial court's January 5, 2021 Order granting summary judgment in their favor.

SARAH HARDEN and ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, Defendants-Appellants,

By: /s/ Stacy K. Shelly
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No. 127942
Consolidated with No. 127944

IN THE

SUPREME COURT OF ILLINOIS

WILLIAM "WES" JOHNSON, Plaintiff-Appellee, v. LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, Defendants-Appellants.	)	On Petition for Leave to Appeal From the Illinois Appellate Court, Fourth District, No. 4-21-0038 There Heard on Appeal From The Eleventh Judicial Circuit, McLean County, Illinois, Trial Court No. 2018 L 126 The Honorable Rebecca S. Foley, Judge Presiding

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.

/s/ Stacy K. Shelly
Stacy K. Shelly

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2021 IL App (4th) 210038

NO. 4-21-0038

FILED
October 28, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WILLIAM "WES" JOHNSON, Plaintiff-Appellant, v. LUCAS ARMSTRONG; McLEAN COUNTY ORTHOPEDICS, LTD.; SARAH HARDEN; and ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a Advocate BroMenn Medical Center, Defendants-Appellees.	)	Appeal from the Circuit Court of McLean County No. 18L126 Honorable Rebecca S. Foley, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Justices DeArmond and Cavanagh concurred in the judgment and opinion.

OPINION

¶ 1 In September 2018, plaintiff, William "Wes" Johnson, filed a complaint alleging defendants, Lucas Armstrong, McLean County Orthopedics, Ltd. (McLean County Orthopedics), Sarah Harden, and Advocate Health and Hospitals Corporation, d/b/a Advocate BroMenn Medical Center (Advocate BroMenn), negligently performed a hip replacement surgery that resulted in Johnson's suffering permanent nerve damage. Johnson advanced two legal theories of recovery: ordinary negligence and *res ipsa loquitur*. Johnson sought to hold Armstrong and Harden directly liable and McLean County Orthopedics and Advocate BroMenn indirectly liable under the doctrine of *respondeat superior*.

¶ 2 In August 2020, defendants Advocate BroMenn and Harden (collectively referred to as Advocate) filed a motion for summary judgment, arguing that Johnson had failed to

(1) establish the standard of care for Harden or that she deviated from the standard of care and (2) demonstrate that he met the requirements to invoke the doctrine of *res ipsa loquitur*. In October 2020, the trial court conducted a hearing on Advocate's motion and granted summary judgment in its favor.

¶ 3 In December 2020, Armstrong made an oral motion for summary judgment on the remaining *res ipsa* count, which the trial court granted. The court subsequently entered written orders, entering judgment in the defendants' favor on the *res ipsa* counts and making a finding that the orders were final and appealable pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 4 Johnson appeals, arguing that the trial court erred by entering summary judgment against him because (1) he made a *prima facie* showing of the elements of *res ipsa loquitur* and (2) his expert was qualified to testify to the applicable standard of care for Harden. We agree and reverse.

¶ 5 I. BACKGROUND

¶ 6 A. The Complaint

¶ 7 In September 2018, Johnson filed a four-count complaint alleging defendants negligently injured him during a left, total hip arthroplasty (THA) performed by Armstrong and assisted by Harden. The complaint alleged that the surgery was performed at Advocate BroMenn in October 2016. Following surgery, Johnson had femoral nerve palsy, and subsequent testing revealed he had "severe left femoral neuropathy that is specific to the branches to the vastus lateralis and rectus femoris muscles." (We note that these are two of the muscles that comprise a person's quadriceps.) Johnson alleged, "The lesion appears complete with no evidence of voluntary motor unit potential activation."

¶ 8 Count I alleged ordinary negligence against Armstrong and specifically claimed that Armstrong (1) failed to protect Johnson's femoral nerve, (2) improperly "retract[ed]" Johnson's femoral nerve, or (3) directly injured Johnson's femoral nerve. Count II alleged McLean County Orthopedics was vicariously liable under the doctrine of *respondeat superior*.

¶ 9 Count III alleged that Armstrong and Harden were negligent pursuant to the doctrine of *res ipsa loquitur*. More specifically, Johnson asserted that (1) Armstrong was assisted by Harden, (2) the injury to Johnson's femoral nerve occurred while the retractors and other surgical instruments were under Armstrong and Harden's control, and (3) Johnson's injuries ordinarily would not have occurred if the standard of care was met. Count IV asserted the same claim against Advocate BroMenn on the basis that Advocate BroMenn employed Harden.

¶ 10 B. Advocate's Motion for Summary Judgment

¶ 11 In August 2020, Advocate filed a motion for summary judgment in which it argued the following. First, Advocate claimed Johnson had not disclosed any expert to testify as to the standard of care for nurse Harden or that she breached her standard of care. Second, Advocate asserted that Johnson's disclosed expert was not qualified to give an opinion on the nursing standard of care and did not offer one at his deposition. Third, Advocate contended that Johnson had not made a *prima facie* case that he was entitled to rely on the doctrine of *res ipsa loquitur* as to Harden because (1) the undisputed facts showed Harden did not have control over the instrumentality of the injury and (2) Johnson's expert did not testify at his deposition that Harden acted negligently. In support of its motion, Advocate attached the depositions of Harden, Pamela Rolf, Armstrong, and Sonny Bal, Johnson's expert.

¶ 12 1. *Deposition of Sarah Harden*

¶ 13 Harden testified that she was a surgical technician, commonly called a "scrub tech."

She described her duties as follows: "A second scrub will hold a retractor wherever it is placed by the doctor, and that is pretty much it." "I don't use anything. I hold things." "I hold what I'm told to hold—whatever the doctor tells me to do, I do." Harden repeatedly stated it was not her responsibility to, nor did she ever, place, reposition, move, or otherwise use any instrument during surgery, including retractors. Those actions were always performed by the surgeon, and the surgeon was responsible for the instruments at all times. Harden testified that she had no independent recollection of the surgery but, based on her review of the medical records, she complied with the standard of care.

¶ 14 2. *Deposition of Lucas Armstrong*

¶ 15 At his deposition, Armstrong agreed Johnson did not have femoral nerve palsy before the THA surgery and did have it afterwards. Armstrong stated he placed and moved the retractors and Harden would have done nothing more than hold them. Armstrong further stated that, although he had no independent recollection of the surgery, if Harden would have done something abnormal while holding the retractor, such as moving it, he would have noted that in the records. Armstrong testified that he complied with the standard of care and disagreed that the type of injury Johnson sustained would not ordinarily occur absent negligence.

¶ 16 3. *Deposition of Sonny Bal*

¶ 17 Sonny Bal testified as an expert witness for Johnson. Bal, a retired orthopedic surgeon, stated that before he retired, he performed between 100 and 200 THAs per year on average and most commonly used the anterior approach, which was the same approach used by Armstrong in this case. Bal agreed that, "as a general proposition," "nerve palsies are a recognized complication of hip replacement surgery." Bal also agreed that, in general, merely because a femoral nerve injury occurs does not mean there is a breach in the standard of care ("I would need

more data."). In his career, Bal had two patients develop femoral nerve palsies after THAs. One was caused by internal bleeding putting pressure on the nerve, and the other had an unknown cause. Bal agreed that the cause of femoral nerve palsies was often unknown.

¶ 18 Bal testified, "There's evidence of direct injury to the [femoral] nerve based on the EMG findings." Bal believed the injury was caused by a retractor, an instrument used to hold tissue to allow the surgeon to see the surgical site. Regarding the cause of Johnson's injury, Bal testified as follows:

> "The documents I reviewed show misplacement too far medial of the incision, and then twice in the operative record, the doctor documents the placement of the anterior retractor. While documentation does not say that the retractor was up against the femoral nerve, that is my opinion ***.
>
> * * *
>
> *** [Armstrong] does mention placing the retractor up against the rectus femoris muscle, which is where it should be placed, and then moving it to an intracapsular location when he repositioned it once during the operation."

Bal agreed that "[a]s it's stated, [there was] nothing inappropriate about that." Bal agreed that Armstrong's incision, though too far medial, was still within the standard of care.

¶ 19 Bal clarified his testimony that femoral nerve palsies can occur in the absence of negligence and stated the following:

> "There are two distinct types of femoral nerve neuropathies, and I want to make sure we're clear on the distinction.
>
> Transient femoral neuropathy injury, neuropraxia palsy, as referred to in this paper *** occurs in the absence of negligence. It is transient; it has a good

prognosis; strength returns, and the patient goes on with a temporary time period during which there is a deficit that improves rapidly, and those are what I've encountered in my practice. That palsy can occur and does occur in the absence of negligence from a variety of factors.

My testimony here is a complete injury to the femoral nerve, as occurred here, verified by repeat EMG and subsequent treatment by a nerve specialist like Dr. Tung, does not occur absent negligence."

¶ 20 Bal supported his opinions by stating as follows:

"The medial placement of the incision; the fact that the retractor was moved during surgery; the fact that the two branches that suffered complete injury are to the vastus lateralis and the intermedius, and those would be closer to the retractor than the branch to the medialis, which is further medial; and the fact that the article [presented to Bal by defense counsel during the deposition] clearly states a retractor tip is strikingly close to the femoral nerve when placed near the anterior rim of acetabulum, and one study demonstrated alarmingly high pressures around the nerve during retractor placement."

¶ 21 Throughout the deposition, Bal indicated that, based on his experience and literature he reviewed, only transient femoral nerve palsies were known complications and outcomes that occurred in the absence of negligence. Bal testified that Johnson suffered a complete injury to two branches of his femoral nerve and the loss of muscle function and other symptoms he experienced were permanent. In sum, Bal indicated his opinion was that the permanent injury suffered did not occur in the absence of negligence.

¶ 22 C. The Hearing on Advocate's Motion for Summary Judgment

¶ 23 In October 2020, the trial court conducted a hearing on Advocate's motion for summary judgment. Advocate argued that Johnson had not disclosed a nursing expert and Bal was not qualified to give an opinion as to the standard of care for a surgical technician. Advocate further argued that Johnson had not demonstrated that Harden exercised any control over the retractor that allegedly caused the injury; Armstrong placed and moved the retractor, and Harden merely held it in place. Harden had no part in deciding where to place the retractor or whether to move it.

¶ 24 Johnson acknowledged, "with reference to the fact that we don't have a nursing expert, that's absolutely correct, but that's because a nursing expert cannot render an opinion on what is or is not appropriate with respect to an orthopedic surgical procedure." Johnson maintained, "As a matter of law, it has to be testimony from an orthopedic surgeon, and we have that here." Bal opined the injury was caused by a retractor and the undisputed facts showed that Harden held the retractor. ("I think the evidence at trial will be that she held the retractors only after they were placed or moved by Dr. Armstrong, but that doesn't affect the fact that she's the one holding the retractors and that's when the damage occurred.") Johnson further noted that Bal unequivocally stated that the type of injury sustained, complete denervation of two quadriceps, does not occur in the absence of negligence.

¶ 25 Advocate noted that "all the testimony says that [Harden] did exactly what was expected." Advocate maintained that Johnson had to show Harden performed a negligent act and he had failed to do so.

¶ 26 The trial court agreed with Advocate. The court explained that Johnson was still required to show the standard of care and a breach of that standard. "Plaintiff has disclosed only one expert, Dr. Sonny Bal." The court ruled that Bal was not qualified to give an opinion relative to the nursing standard of care because "he does not practice within the same school of medicine

as Nurse Harden, namely nursing." The court further noted that the record did not contain any evidence that Harden committed a negligent act or omission.

¶ 27 The trial court stated as follows: "All witnesses testified that Defendant Armstrong, as the surgeon, placed the retractor. While Defendant Harden may have physically held the retractor upon placement, it was only at the direction of Defendant Armstrong. She did not exercise any independent control over any surgical tools, according to the testimony." "Furthermore, the witnesses agree she only acted as directed, and she did not take any actions other than those directed by Dr. Armstrong. Accordingly, the retractor was never under the exclusive control of Nurse Harden." The trial court granted summary judgment to Harden and to Advocate BroMenn because Advocate BroMenn was named as a defendant solely under *respondeat superior*.

¶ 28 D. Subsequent Proceedings

¶ 29 In November 2020, Johnson filed a motion to reconsider the trial court's granting of Advocate's motion for summary judgment. In December 2020, the trial court conducted a hearing on that motion and denied it.

¶ 30 Later in December 2020, at a hearing on a discovery matter, Armstrong orally moved for summary judgment, and the trial court granted his oral motion. On December 22, 2020, the trial court entered a written order entering summary judgment in favor of Armstrong on count III and finding no just reason for delaying enforcement or appeal of that order pursuant to Rule 304(a). The trial court stayed any pending litigation on the remaining counts against Armstrong and McLean County Orthopedics.

¶ 31 In January 2021, the trial court entered a written order (1) granting summary judgment in favor of Advocate and (2) finding no just reason for delaying the appeal of its order.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 Johnson appeals, arguing that the trial court erred by entering summary judgment against him because (1) he made a *prima facie* showing of the elements of *res ipsa loquitur* and (2) he did not need a nursing expert to testify to the applicable standard of care for Harden. We agree and reverse.

¶ 35 As an initial matter, the defendants make several arguments that Johnson has, for various reasons, forfeited his ability to challenge the trial court's judgment. We disagree with these assertions and address this case.

¶ 36 A. The Applicable Law

¶ 37 1. *Summary Judgment*

¶ 38 Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Monson v. City of Danville*, 2018 IL 122486, ¶ 12, 115 N.E.3d 81. When examining whether a genuine issue of material fact exists, a court construes the evidence in the light most favorable to the nonmoving party and strictly against the moving party. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22, 131 N.E.3d 488.

¶ 39 Summary judgment is a drastic means of disposing of litigation and "should be allowed only when the right of the moving party is clear and free from doubt." (Internal quotation marks omitted.) *Id.* A trial court's entry of summary judgment is reviewed *de novo*. *Id.*

¶ 40 2. Res Ipsa Loquitur

¶ 41 "The doctrine of *res ipsa loquitur* allows the trier of fact to draw an inference of negligence from circumstantial evidence when direct evidence of the cause of the injury is primarily within the knowledge and control of the defendant. [Citation.] [T]he doctrine is not a separate theory of liability [but] a type of circumstantial evidence which permits the trier of fact to infer negligence when the precise cause of injury is not known by the plaintiff." (Internal quotation marks omitted.) *Poole v. University of Chicago*, 186 Ill. App. 3d 554, 558, 542 N.E.2d 746, 748-49 (1989).

¶ 42 "The trial court must decide whether the doctrine applies as a question of law, subject to *de novo* review." *Willis v. Morales*, 2020 IL App (1st) 180718, ¶ 36, 169 N.E.3d 74. "[A] plaintiff seeking to rely on the *res ipsa* doctrine must plead and prove that he or she was injured (1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control." *Heastie v. Roberts*, 226 Ill. 2d 515, 531-32, 877 N.E.2d 1064, 1076 (2007).

¶ 43 "If the plaintiff was unconscious at the time of the injury, and under the defendants' control, then the plaintiff has adequately shown the control element for *res ipsa loquitur*, even if she cannot establish the exact instrumentality that caused the injury." *Willis*, 2020 IL App (1st) 180718, ¶ 37. Further, "if [the plaintiff] can convince a finder of fact that the injury occurred during the surgery, 'it can be inferred *** that the instrumentality of the injury was the handling' of [the plaintiff] by defendants." *Id.* (quoting *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 338 Ill. App. 3d 812, 820, 789 N.E.2d 394, 401 (2003)).

¶ 44 "[U]nder Illinois precedent, [a] plaintiff is not required to show that his injuries were more likely caused by any particular one of the defendants in order to proceed with his

res ipsa claim, nor must he eliminate all causes of his injuries other than the negligence of one or more of the defendants." *Heastie*, 226 Ill. 2d at 533-34. "In order to show the first element of *res ipsa loquitur*, an occurrence that ordinarily does not happen in the absence of negligence, a plaintiff is not required to show that the injury in question never happens without negligence, only that it does not ordinarily happen without negligence." *Adams v. Family Planning Associates Medical Group, Inc.*, 315 Ill. App. 3d 533, 545, 733 N.E.2d 766, 775-76 (2000).

¶ 45 "A plaintiff need not conclusively prove all the elements of *res ipsa loquitur* in order to invoke the doctrine. He need only present evidence reasonably showing that elements exist that allow an inference that the occurrence is one that ordinarily does not occur without negligence." *Dyback v. Weber*, 114 Ill. 2d 232, 242, 500 N.E.2d 8, 12 (1986).

> "Illinois law does not require a plaintiff to show the actual force which initiated the motion or set the instrumentality in operation in order to rely on the *res ipsa* doctrine. To the contrary, if the specific and actual force which initiated the motion or set the instrumentality in operation were known unequivocally, leaving no reason for inference that some other unknown negligent act or force was responsible, the *res ipsa* doctrine could not even be invoked." *Heastie*, 226 Ill. 2d at 539.

¶ 46 B. Johnson Made a *Prima Facie* Showing of the Elements of *Res Ipsa Loquitur*

¶ 47 1. *The Injury Was One That Ordinarily Does Not Occur Absent Negligence*

¶ 48 Bal's testimony indicated that he had performed hundreds of hip replacements and had not encountered an injury such as the one Johnson had. Bal further stated that his review of the literature regarding injuries to the femoral nerve during a total hip replacement showed that the injuries experienced were transient or temporary and, to the extent such injuries continued, they were not anywhere near as severe as those Johnson experienced. Bal's deposition testimony

adequately set forth his opinion that a severe and permanent injury to the femoral nerve does not occur in the absence of negligence and the factual bases therefor.

¶ 49 In *Spidle v. Steward*, 79 Ill. 2d 1, 8, 402 N.E.2d 216, 219 (1980), the Illinois Supreme Court acknowledged that had the expert in that case testified that the injury would not have occurred ordinarily in the absence of negligence, such testimony "would have established directly plaintiff['s] initial burden with respect to the probability component." "Such a direct answer *** would be sufficient initially even though it would not have constituted proof that [the injury at issue] never happen[s] without negligence." *Id.* at 9.

¶ 50 In *Poole*, the plaintiff's expert testified that although vocal cord paralysis was a known risk of a subtotal thyroidectomy, "*bilateral* vocal cord paralysis ordinarily would not have occurred in the absence of a deviation from the standard of care." (Emphasis in original.) *Poole*, 186 Ill. App. 3d at 556. The appellate court held that the jury should have been given the *res ipsa loquitur* instruction even though (1) the defense expert testified that the bilateral injury was a known complication and (2) the plaintiff's evidence "did not conclusively prove how or why the nerves [responsible for the injury] were damaged." *Id.* at 559-60.

¶ 51 Bal opined that a retractor caused the injury. His opinion was based on the medial location of the incision, which would have increased the proximity of the retractor to the branches of the femoral nerve that were ultimately permanently injured and increased the risk of damage. Bal acknowledged that the location of the incision was not a violation of the standard of care despite the increased risk of nerve damage.

¶ 52 Although Bal agreed that femoral nerve injuries were a known risk of total hip replacement surgery, he clarified that the type and degree of such injuries were limited to transient symptoms that eventually resolved or to mild symptoms that were generally tolerable. Bal

unequivocally stated that Johnson's injury, a permanent denervation of multiple branches of the femoral nerve resulting in the inability to use two of his quadricep muscles, was not the type of injury that would have occurred in the absence of negligence.

¶ 53 Almost 40 years ago, this court examined whether the plaintiff in a medical malpractice case presented sufficient evidence in her case in chief to invoke the *res ipsa* doctrine and withstand a directed verdict. See *McMillen v. Carlinville Area Hospital*, 114 Ill. App. 3d 732, 737-38, 450 N.E.2d 5, 10 (1983). In affirming the directed verdict in the defendant's favor, we noted that the expert testified merely that the plaintiff's reaction was unexpected and the doctor " 'couldn't rule it out completely' " that the injection caused the injury. *Id.* at 738. We then concluded, "It is thus apparent that while plaintiff might have had a scintilla of evidence in support of her elements, that is insufficient ***." *Id.* By contrast, Bal testified the retractor caused the injury and explained that the injury was not merely unexpected, but instead was so severe that it would not have occurred absent negligence.

¶ 54 Bal's deposition testimony was sufficient to establish a genuine issue of material fact regarding the cause of Johnson's injury. Johnson was not required to eliminate all possible causes of the injury, nor was he required to show that the injury could *only* be the result of negligence. The plain language of the *res ipsa* statute is clear: "Proof of an unusual, unexpected or untoward medical result which *ordinarily* does not occur in the absence of negligence *will suffice* in the application of the doctrine." (Emphases added.) 735 ILCS 5/2-1113 (West 2018). Bal's testimony went much further, opining that he had never seen nor read about such an injury occurring in the absence of negligence. Although defendants are correct that an unexpected result is not enough on its own to invoke the *res ipsa* doctrine, such a result is sufficient when coupled with expert testimony that the result does not ordinarily occur in the absence of negligence. *Spidle*,

79 Ill. 2d at 9.

¶ 55 2. *Harden Had Control of the Retractor for* Res Ipsa *Purposes*

¶ 56 Advocate contends Johnson failed to establish that the instrumentality of the injury—the retractor—was within the control of Harden or other agents of Advocate BroMenn. In fact, Advocate argues, the deposition testimony unequivocally shows that Armstrong had exclusive control over the retractors because each occurrence witness testified to the same. We disagree. As we explain, Advocate misconstrues the showing necessary to establish control.

¶ 57 "In *res ipsa loquitur* and alternative liability situations, all parties who could have been the cause of the plaintiff's injuries are joined as defendants." *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 257, 560 N.E.2d 324, 339-40 (1990). "A plaintiff's failure to name as defendants all of the entities who might have caused his injuries is fatal to the action since the plaintiff must eliminate the possibility that the accident was caused by someone other than any defendant." (Internal quotation marks omitted.) *Raleigh v. Alcon Laboratories, Inc.*, 403 Ill. App. 3d 863, 869, 934 N.E.2d 530, 536 (2010).

¶ 58 Advocate is correct that Harden, Armstrong, and even Bal testified at their depositions that Armstrong was the only person to place, reposition, or otherwise move the retractor. They all similarly testified that although Harden physically held the retractor, she did so only as instructed by Armstrong. In other words, Armstrong was responsible for the retractor at all times.

¶ 59 However, this testimony establishes precisely why Harden was in control of the retractors in the sense necessary to support the elements of *res ipsa loquitur*. As explained, *res ipsa loquitur* is a form of proof available when the plaintiff can establish that an injury would not have occurred in the absence of negligence but cannot conclusively establish the precise cause

of the injury. *Poole*, 186 Ill. App. 3d at 558. Harden testified that the job of a surgery technician is to follow the surgeon's instructions precisely and not move or use (other than by holding in place) any surgical instrument. Obviously, if a surgical technician *did* move an instrument or hold that instrument incorrectly and an injury occurred as a result, the technician would be liable.

¶ 60 The undisputed evidence shows that Harden held the retractor. Bal testified that, in his opinion, the retractor caused the injury. Bal further testified that permanent and severe nerve damage to the femoral nerve does not occur in the absence of negligence. Accordingly, Johnson made a *prima facie* showing of the elements of *res ipsa loquitur*.

¶ 61 Although none of the people present during the surgery testified at their depositions that Harden acted improperly, this is not unexpected. Even Bal agreed during his deposition that from his review of the medical records, Armstrong complied with the standard of care. But that is precisely why the *res ipsa loquitur* doctrine applies: the injury speaks for itself. Bal explained that even though the documentation *says* all of the right things, in his opinion—based on his education and experience—the outcome was one that would not have occurred in the absence of negligence. That is, if the medical records and deposition testimony of the occurrence witnesses accurately reflected what happened, then Johnson would not have suffered permanent nerve damage.

¶ 62 In *Willis*, the experts testified that the plaintiff's injuries could have occurred in any number of ways caused by any number of people, such as a nurse placing too much pressure on a particular area. Likewise, in this case, Harden could have accidentally or unknowingly held the retractor in such a way as to cause the injury.

¶ 63 It is important to note that the inference of negligence is not the same in every case or even as to each defendant. Bal's opinion was that Armstrong improperly placed the retractor so as to damage the femoral nerve. At trial, even if Advocate did not present any evidence, the jury

would be free to reject the inference of negligence based on the mere fact that none of the witnesses identified a single thing Harden did wrong. See *Imig v. Beck*, 115 Ill. 2d 18, 27, 29, 503 N.E.2d 324, 329 (1986) ("The inference may be strong, requiring substantial proof to overcome it, or it may be weak, requiring little or no evidence to refute it. The weight or strength of such inference will necessarily depend on the particular facts and circumstances of each case and is normally a question of fact to be determined by the jury." "Since the doctrine gives rise only to a permissive inference, in most cases a directed verdict for the plaintiff will not be appropriate, even where the defendant presents no explanation or rebuttal, because it must be left to the jury whether to draw the inference of negligence from the circumstances of the occurrence."). But if Johnson did not include Harden as a defendant, Armstrong could, quite rightly, argue to the trial court that the *res ipsa* doctrine was not appropriate because Harden had physical control over the instrumentality of the injury during the surgery.

¶ 64 3. *Johnson Did Not Need an Expert To Establish Harden's Standard of Care*

¶ 65 The whole point of the *res ipsa* doctrine is to provide an alternative method of proof when the injury would be otherwise unexplainable. Once a plaintiff establishes, through sufficient expert testimony, that the injury is one that would not ordinarily occur in the absence of negligence, and *res ipsa* applies, all defendants alleged to be in control of the instrumentality that allegedly caused the injury must be named defendants, and no further standard of care testimony is required.

¶ 66 If Advocate were correct, the same argument could be made successfully in the prototypical *res ipsa* case: a sponge left in a patient following surgery. Had this occurrence happened to Johnson, it would be no defense for Harden or Armstrong to state that the undisputed evidence shows that neither of them did anything wrong or that Johnson did not present any testimony as to what a reasonably careful surgeon or surgical technician would have done. The

sponge was still left in the patient, and *someone's* negligence during that operation was responsible for that error.

¶ 67 The essence of *res ipsa loquitur* is that the *injury* speaks for itself. Were it otherwise, there would be no need for the doctrine. Armstrong and Harden would be home free because Johnson could never find an expert to suggest that either one did something specifically wrong because all the records and testimony would point in the opposite direction.

¶ 68 Here, Johnson needs an expert to explain to the jury whether or not the type of injury in this case is the total-hip-replacement equivalent of leaving a sponge in a patient. However, the circumstances of the injury themselves—*i.e.*, going to a hospital, being rendered unconscious, and having surgery performed—unquestionably establish that those in control of the patient have a duty to exercise ordinary care and not injure the patient by violating that duty. In essence, the *control* element of the *res ipsa* doctrine is sufficient to establish a duty of care. Expert testimony is required to show that the injury is not one that would ordinarily occur absent negligence. The jury must then decide whether the resulting inference of negligence is sufficient to establish liability.

¶ 69 Advocate cites *Taylor v. City of Beardstown*, 142 Ill. App. 3d 584, 491 N.E.2d 803 (1986). We acknowledge that 35 years ago, this court held in *Taylor* that testimony regarding the standard of care and deviation from that standard was required to invoke the *res ipsa* doctrine. *Id.* at 593. We note that, as far as we can tell, the only other case to make such an explicit statement or rely on *Taylor* for that same proposition is *Smith v. South Shore Hospital*, 187 Ill. App. 3d 847, 857-58, 543 N.E.2d 868, 873 (1989), which itself has never been cited for that proposition. Indeed, in *Solon v. Godbole*, 163 Ill. App. 3d 845, 850, 516 N.E.2d 1045, 1048 (1987) (quoting *Plost v. Louis A. Weiss Memorial Hospital*, 62 Ill. App. 3d 253, 258, 378 N.E.2d 1176, 1180 (1978)), the

Third District noted, "[A] plaintiff may proceed to trial without an expert '*** where the theory is "*res ipsa loquitur*." ' " We decline to follow *Taylor*.

¶ 70 Additionally, Illinois Supreme Court cases indicate that a plaintiff need demonstrate only a *prima facie* case of the elements of *res ipsa loquitur* to be entitled to proceed to trial using that method of proof. This reasoning makes sense because the plaintiff may have no idea how the injury happened and, as in this case, the medical records may state that everything occurred normally and the providers complied with the standard of care. Quoting a California case, the Illinois Supreme Court wrote the following:

> " 'The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. *** [I]t is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of someone's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.
>
> * * *
>
> *** The control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation.' " *Kolakowski v. Voris*, 83 Ill.

2d 388, 395-96, 415 N.E.2d 397, 400-01 (1980) (quoting *Ybarra v. Spangard*, 154 P.2d 687, 689-90, 25 Cal. 2d 486, 490-92 (Cal. 1944)).

¶ 71 The Illinois Supreme Court also wrote the following in *Spidle*:

"In addition, the [*res ipsa*] doctrine is useful in combatting the reluctance of medical personnel to testify against one another. (*Sanders v. Frost* (1969), 112 Ill. App. 2d 234, 241; Prosser, Torts sec. 39, at 227 (4th ed. 1971).) Doctors, for example, 'may be more willing to testify that the injury was of a kind which would not ordinarily occur in the exercise of due care than they would be to specify those acts which constituted negligence.' Note, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, 60 Nw. U.L. Rev. 852, 865 (1966)." *Spidle*, 79 Ill. 2d at 6.

¶ 72 III. CONCLUSION

¶ 73 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 74 Reversed and remanded.

No. 4-21-0038

Cite as:	*Johnson v. Armstrong*, 2021 IL App (4th) 210038
Decision Under Review:	Appeal from the Circuit Court of McLean County, No. 18-L-126; the Hon. Rebecca S. Foley, Judge, presiding.
Attorneys for Appellant:	James P. Ginzkey, of Ginzkey Law Office, of Bloomington, for appellant.
Attorneys for Appellee:	Peter W. Brandt and Kevin M. Toth, of Livingston, Barger, Brandt & Schroeder, LLP, of Bloomington, for appellee Lucas Armstrong. Stacy K. Shelly, Troy A. Lundquist, and Scott A. Schoen, of Langhenry, Gillen, Lundquist & Johnson, LLC, of Princeton, for appellees Advocate Health and Hospitals Corporation and Sarah Harden.

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

WILLIAM "WES" JOHNSON
Plaintiff/Petitioner

Reviewing Court No: 4-21-0038
Circuit Court/Agency No: 2018L000126
Trial Judge/Hearing Officer: REBECCA FOLEY

v.

LUCAS ARMSTRONG, ET AL.
Defendant/Respondent

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Date: 03/10/2021 08:56

RECORD SHEET

Number of records: 273

Case Number: 2018L0000126

2018L0000126

William Johnson vs. Lucas Armstrong, et al.

WILLIAM JOHNSON; Plaintiff
vs
LUCAS ARMSTRONG, SARAH HARDEN, PAMELA ROLF, MCLEAN COUNTY ORTHOPEDICS, LTD., ADVOCATE HEALTH AND HOSPITALS CORPORATION D/B/A ADVOCATE BROMENN MEDICAL CENTER; Defendants

WILLIAM JOHNSON; Plaintiff
vs
BRIAN STENGER, JORDAN PROSSER; Respondents

Nature of Case: Money Damage over $50,000

Attorneys: GINZKEY, JAMES
BRANDT, PETER
BRANDT, RACHEL
LUNDQUIST, TROY
SCHOEN, SCOTT
LUNDQUIST, TROY
SCHOEN, SCOTT
BRANDT, PETER
LUNDQUIST, TROY
SCHOEN, SCOTT

Date	Reporter	Judge	Description
09/18/2018			CASE ASSIGNED TO JUDGE LAWRENCE
09/18/2018			EFILE DOCKETING - Complaint filed
09/18/2018			Case set for: Case Management Conference on 3/7/2019 at 10:00 AM with Judge PG Lawrence, Room 5D.
09/19/2018			Filing fees/fines/costs/penalties paid $267.00 on 09/19/2018, receipt # 5530966, balance remaining $.00 - JOHNSON, WILLIAM "WES" - DOB: RACE: Unknown SEX: Unknown .
09/20/2018			EFILE DOCKETING - Motion for Substitution of Judge filed
09/20/2018			EFILE DOCKETING - Proposed Order for Substitution of Judge received
09/25/2018		LAWRENCE, PAUL	Unscheduled court appearance Held. Motion for Substitution of Judge is granted. Cause is re-assigned to Judge Foley.
09/25/2018			EFILE DOCKETING - Order For Substitution of Judge e-filed to attorney and filed
09/25/2018			EFILE DOCKETING - Entry of Appearance with Jury Demand filed
09/26/2018			Case set for: Unscheduled court appearance on 9/26/2018 at 12:00 AM with Judge PG Lawrence, Room 5D.
09/27/2018			Filing fees/fines/costs/penalties paid $379.50 on 09/27/2018, receipt # 5531054, balance remaining $.00 - ARMSTRONG, LUCAS - DOB: RACE: Unknown SEX: Unknown .
09/27/2018			EFILE DOCKETING - Motion for Extension of Time With Which to Plead filed
09/27/2018			EFILE DOCKETING - Notice of Service of Discovery Documents filed
09/27/2018			EFILE DOCKETING - Motion for HIPAA Qualified Protective Order filed
09/28/2018		LAWRENCE, PAUL	Case Management Conference Vacated. Case set for: Case Management Conference on 3/7/2019 at 10:00 AM with Judge R Foley, Room 5B.

Case Number: 2018L0000126

2018L0000126

William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
09/28/2018			Notice to Appear (03/07/19) filed.
10/02/2018			Motion for HIPPA Qualified Protective Order and Motion for Extention of Time to Plead set November 9, 2018 at 10:00 a.m. (15 minutes). Attorney Brandt to Notice.
10/02/2018			Case set for: Motion on 11/9/2018 at 10:00 AM with Judge R Foley, Room 5B.
10/02/2018			EFILE DOCKETING - Summons for Discovery issued to Brian Stenger and eFiled to attorney
10/02/2018			EFILE DOCKETING - Praecipe filed
10/02/2018			EFILE DOCKETING - Summons for Discovery issued to Jordan Prosser and eFiled to attorney
10/02/2018			EFILE DOCKETING - Praecipe filed
10/02/2018			EFILE DOCKETING - Response to Defendants Lucas Armstrong and McLean County Orthopedics, Inc. Motion for Extension of Time Within Which to Plead filed
10/03/2018			EFILE DOCKETING - Notice of Hearing filed
10/05/2018			EFILE DOCKETING - Notice of Service of Discovery Documents filed
10/18/2018			EFILE DOCKETING - Affidavit of Service on Brian Stenger returned - Served 10/15/18 and filed
10/24/2018			EFILE DOCKETING - Affidavit of Service on Brian Stenger returned - Served 10/15/18 and filed
10/30/2018			EFILE DOCKETING - Summons issued to Sarah Harden and e-filed to attorney
10/30/2018			EFILE DOCKETING - Praecipe - Advocate Health and Hospitals Corp. filed
10/30/2018			EFILE DOCKETING - Summons issued to Advocate Health and Hospitals Corp. and e-filed to attorney
10/30/2018			EFILE DOCKETING - Praecipe - Pamela Rolf filed
10/30/2018			EFILE DOCKETING - Summons issued to Pamela Rolf and e-filed to attorney
10/30/2018			EFILE DOCKETING - Praecipe - Sarah Harden filed
11/09/2018		FOLEY, REBECCA	Motion Held. Plaintiff by Ginzkey; Defendant Armstrong and MCO by R. Brandt. Motion for Extension of Time granted. Defendants to file responsive pleading within 14 days. Motion for HIPAA Order continued generally. Defendants to answer Plaintiff's written discovery within 45 days.
11/14/2018			EFILE DOCKETING - Notice of Service of Discovery Documents filed
11/19/2018			EFILE DOCKETING - Answer to Complaint filed

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2018L0000126

William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
11/20/2018			EFILE DOCKETING - Affidavit of Service on Advocate Health and Hospitals Corporation- Served 11/13/18 filed
11/20/2018			EFILE DOCKETING - Affidavit of Service on Pamela Rolf- Served 11/13/18 filed
11/20/2018			EFILE DOCKETING - Affidavit of Service on Sarah Harden- Served 11/14/18 filed
11/21/2018			EFILE DOCKETING - Motion to Strike Armstrong Answer filed
11/28/2018			Motion to Strike Armstrong Answer set December 27, 2018 at 11:00 a m. (15 minutes). Counsel to Notice.
11/28/2018			Case set for: Motion on 12/27/2018 at 11:00 AM with Judge R Foley, Room 5B.
11/28/2018			EFILE DOCKETING - Notice of Hearing filed
12/11/2018			EFILE DOCKETING - Affidavit of Service on Sarah Harden returned - Served 11/14/18 filed
12/11/2018			EFILE DOCKETING - Affidavit of Service on Pamela G. Rolf returned - Served 11/13/18 filed
12/12/2018			EFILE DOCKETING - Notice of Service of Discovery Documents filed
12/12/2018			EFILE DOCKETING - Notice of Discovery Deposition - William "Wes" Johnson filed
12/18/2018			EFILE DOCKETING - Subpoena to Produce Documents, Information, or Objects, or to Permit Inspection of Premises in Civil Actions filed
12/21/2018			EFILE DOCKETING - Response to Plaintiff's Motion to Strike Armstrong Answer filed
12/27/2018		FOLEY, REBECCA	Motion Held. Plaintiff by Ginzkey; Defendant by P. Brandt. Motion to Strike Armstrong Answer argued and granted in part and denied inpart. Order entered and distributed. See Order.
12/27/2018			EFILE DOCKETING - Order on Motion to Strike - Granted in part and denied in part filed
01/10/2019			EFILE DOCKETING - Appearance - Advocate Health and Hospitals Corp., Pamela Rolf filed
01/10/2019			EFILE DOCKETING - Notice of Filing filed
01/10/2019			EFILE DOCKETING - Motion for Qualified Protective Order filed
01/10/2019			EFILE DOCKETING - Motion for Extension of Time filed
01/10/2019			EFILE DOCKETING - Jury Demand filed
01/11/2019			Motion for Extension of Time and Motion for Qualified Protective Order set January 31, 2019 at 11:30 a.m. Counsel to Notice.
01/11/2019			Case set for: Motion on 1/31/2019 at 11:30 AM with Judge R Foley, Room 5B.

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
01/14/2019			EFILE DOCKETING - Amended Answer to Complaint filed
01/14/2019			EFILE DOCKETING - Notice of Service of Discovery Documents filed
01/15/2019			Filing fees/fines/costs/penalties paid $379.50 on 01/15/2019, receipt # 5531918, balance remaining $.00 - ADVOCATE HEALTH AND HOSPITALS CORPORATION D/B/A ADVOCATE BROMENN MEDICAL CENTER .
01/16/2019		FOLEY, REBECCA	Motion Rescheduled. January 31, 2019 setting moved to February 22, 2019 at 11:00 a m. by counsel. Counsel to Notice. Case set for: Motion on 2/22/2019 at 11:00 AM with Judge R Foley, Room 5B.
01/16/2019			EFILE DOCKETING - Notice of Motions filed
01/22/2019		FOLEY, REBECCA	Motion Vacated. February 22, 2019 setting vacated by counsel.
02/06/2019			EFILE DOCKETING - Proposed Agreed HIPAA Qualified Protective Order received
02/14/2019			EFILE DOCKETING - Notice of Service of Discovery Documents - Supplemental Request to Plaintiff filed
02/19/2019			EFILE DOCKETING - Notice of Service of Discovery Documents - Lucas Armstrong, MD's Supplemental Answers and Responses filed
02/19/2019			Case set for: Unscheduled court appearance on 2/19/2019 at 12:00 AM with Judge R Foley, Room 5B.
02/19/2019		FOLEY, REBECCA	Unscheduled court appearance Held. Agreed HIPAA Qualified Protective Order entered. See Order.
02/19/2019			EFILE DOCKETING - Agreed HIPAA Qualified Protective Order sent to attorney and filed
02/19/2019			Motion for Extension of Time set 02/22/19 at 11:00 a.m. Counsel to Notice.
02/19/2019			Case set for: Motion on 2/22/2019 at 11:00 AM with Judge R Foley, Room 5B.
02/22/2019		FOLEY, REBECCA	Motion Held. Plaintiff by Molchin; Defendant Armstrong by R. Brandt; Defendant Advocate by Schoen. Advocate to file responsive pleading by 03/22/19. Advocate to submit Agreed HIPAA Order. Order entered and distributed.
02/22/2019			EFILE DOCKETING - Case Management Order filed
02/28/2019			EFILE DOCKETING - Notice of Filing and Proof of Service - Interrogatories and Requests to Plaintiff filed
03/06/2019			EFILE DOCKETING - Notice of Filing - Subpoena Duces Tecum filed

Date: 03/10/2021 08:56

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
03/06/2019			EFILE DOCKETING - Subpoena Duces Tecum Issued to Washington University Physicians
03/06/2019			EFILE DOCKETING - Subpoena Duces Tecum Issued to Advocate Bromenn Medical Center
03/06/2019			EFILE DOCKETING - Subpoena Duces Tecum Issued to OSF Illinois Neurological Institute
03/06/2019			EFILE DOCKETING - Notice of Deposition for Copying of Records filed
03/07/2019		FOLEY, REBECCA	Case Management Conference Held. Plaintiff by Ginzkey; Defendant Armstrong by R. Brandt; Defendant Advocate by Schoen. Written discovery exchanged. Plaintiff's deposition being scheduled. Respondent in Discovery dismissed. See Order. Case set for: Conference Call on 5/31/2019 at 09:45 AM with Judge R Foley, Room 5B.
03/07/2019			EFILE DOCKETING - Order Dismissing Stenger and Prosser filed
03/19/2019			EFILE DOCKETING - Amended Notice of Discovery Deposition filed
03/22/2019			EFILE DOCKETING - Defendants Advocate Health and Hospitals Corporation d/b/a Advocate Bromenn Medical Center, Sarah Harden, and Pamela Rolf's Answer to Plaintiff's Complaint filed
03/22/2019			EFILE DOCKETING - Notice of Filing filed
03/26/2019			EFILE DOCKETING - Motion to Strike Advocate Answer filed
03/27/2019			EFILE DOCKETING - Notice of Service of Discovery Documents filed
03/27/2019			EFILE DOCKETING - Proposed Agreed Stipulated Protective Order of Confidentiality received
03/29/2019			Case set for: Unscheduled court appearance on 3/29/2019 at 12:00 AM with Judge R Foley, Room 5B.
03/29/2019		FOLEY, REBECCA	Unscheduled court appearance Held. Agreed Stipulated Protective Order of Confidentiality entered. See Order.
03/29/2019			EFILE DOCKETING - Order Approving Agreed Stipulated Protective Order of Confidentiality filed
04/01/2019			Motion to Strike Advocate Answer set 04/19/19 at 11:30 a.m. Counsel to Notice.
04/01/2019			Case set for: Motion on 4/19/2019 at 11:30 AM with Judge R Foley, Room 5B.

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
04/01/2019		FOLEY, REBECCA	Conference Call Rescheduled. May 31, 2019 setting moved to April 19, 2019 at 11:30 by agreement of counsel. Case set for: Conference Call on 4/19/2019 at 11:30 AM with Judge R Foley, Room 5B.
04/08/2019			EFILE DOCKETING - Notice of Service of Discovery Documents filed
04/10/2019			EFILE DOCKETING - Notice of Service of Discovery Documents filed
04/12/2019			EFILE DOCKETING - Notice of Discovery Deposition - Craig Carmichael, M.D. filed
04/12/2019			EFILE DOCKETING - Notice of Deposition of Dr. Dan Marley filed
04/12/2019			EFILE DOCKETING - Subpoena Duces Tecum Issued to Dr. Dan Marley
04/12/2019			EFILE DOCKETING - Notice of Filing of Subpoena Duces Tecum filed
04/19/2019		FOLEY, REBECCA	Conference Call Held.
04/19/2019		FOLEY, REBECCA	Motion Held. Plaintiff by Ginzkey; Advocate by Schoen. Agreed Order re: Motion to Strike Answer entered. See Order.
04/19/2019			EFILE DOCKETING - Order Continuting Plaintiff's Motion to Strike filed
05/22/2019			EFILE DOCKETING - Notice of Service of Discovery Documents filed
05/29/2019			EFILE DOCKETING - Notice of Filing filed
05/29/2019			EFILE DOCKETING - Subpoena Duces Tecum issued to McLean County Neurology and e-filed to attorney for service
05/29/2019			EFILE DOCKETING - Subpoena Duces Tecum issued to Illinois Neuroligical Institute and e-filed to attorney for service
05/29/2019			EFILE DOCKETING - Notice of Deposition filed
05/31/2019			Case set for: Hearing on 5/31/2019 at 09:45 AM with Judge R Foley, Room 5B.
05/31/2019		FOLEY, REBECCA	Hearing Held. Plaintiff by Ginzkey; Defendant by R. Brandt; RIDs by Schoen. Agreed Order re: RID depositions and extension of conversion deadline entered. See Order. Case set for: Case Management Conference on 7/11/2019 at 10:30 AM with Judge R Foley, Room 5B.
05/31/2019			EFILE DOCKETING - Order Regarding Respondents in Discovery filed
06/10/2019			EFILE DOCKETING - Notice of Discovery Deposition of Pamela Rolf filed

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
06/10/2019			EFILE DOCKETING - Notice of Discovery Deposition of Sarah Harden filed
07/11/2019		FOLEY, REBECCA	Case Management Conference Held. Plaintiff by Ginzkey; Defendant by Butzen; RIDs by Schoen. RIDs to be deposed by early August. Case set for: Status hearing on 9/18/2019 at 10:00 AM with Judge R Foley, Room 5B.
07/22/2019			EFILE DOCKETING - Notice of Discovery Deposition of Dr. Trisha Summerlin filed
08/05/2019			EFILE DOCKETING - Notice of Discovery Deposition - Tim Rylander filed
08/16/2019			EFILE DOCKETING - Amended Notice of Discovery Deposition - Sarah Harden filed
08/19/2019			Filing fees/fines/costs/penalties paid $2.50 on 08/19/2019, receipt # 5533752, balance remaining $.00 - JOHNSON, WILLIAM "WES" - DOB: RACE: Unknown SEX: Unknown .
08/21/2019			EFILE DOCKETING - Notice of Discovery Deposition of Dr. Daniel Marley filed
09/16/2019			EFILE DOCKETING - Notice of Discovery Deposition - Lucas Armstrong filed
09/18/2019		FOLEY, REBECCA	Status hearing Held. Plaintiff by Ginzkey; Defendant Advocate by Schoen; Defendant Armstrong by P. Brandt. Mr. Ginzkey to submit order re: RIDs. Case set for: Status hearing on 12/6/2019 at 10:00 AM with Judge R Foley, Room 5B.
10/16/2019			EFILE DOCKETING - Notice of Service of Discovery Documents filed
10/24/2019			EFILE DOCKETING - Motion for HIPAA Qualified Protective Order filed
10/28/2019			EFILE DOCKETING - Proposed HIPAA Qualified Protective Order received
10/30/2019			EFILE DOCKETING - Motion to Set for Trial filed
11/04/2019			Motion for Qualified Protective Order set 11/14/19 at 11:30 a m. Counsel to Notice.
11/04/2019			Case set for: Motion on 11/14/2019 at 11:30 AM with Judge R Foley, Room 5B.
11/04/2019			EFILE DOCKETING - Notice of Hearing on Motion for HIPAA Qualified Protective Order filed
11/07/2019			EFILE DOCKETING - Response to Plaintiff's Motion to Set Matter for Trial filed
11/07/2019			Plaintiff's Motion to Set Trial set 11/14/19 at 11:30 a m. Counsel to Notice.
11/07/2019			EFILE DOCKETING - Notice of Hearing on Motion to Set Trial filed

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2018L0000126

William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
11/14/2019		FOLEY, REBECCA	Motion Held. Plaintiff by Ginzkey; Defendant Advocate by Schoen; Defendant Armstrong by P. Brandt. Plaintiff's Motion to Set Matter for Trial argued and denied. Case set for: Status hearing on 3/17/2020 at 10:00 AM with Judge R Foley, Room 5B.
11/14/2019		FOLEY, REBECCA	Status hearing Vacated.
11/20/2019			EFILE DOCKETING - Motion for Voluntary Dismissal Without Prejudice - Pamela Rolf filed
11/20/2019			EFILE DOCKETING - Proposed Order for Voluntary Dismissal of Pamela Rolf received
11/25/2019			Case set for: Unscheduled court appearance on 11/25/2019 at 12:00 AM with Judge R Foley, Room 5B.
11/25/2019		FOLEY, REBECCA	Unscheduled court appearance Held. Order of Voluntary Dismissal (Pamela Rolf) entered. See Order.
11/25/2019			EFILE DOCKETING - Order Dismissing Defendant Pam Rolf Without Prejudice filed
11/25/2019			EFILE DOCKETING - Notice of Discovery Deposition filed
12/06/2019			EFILE DOCKETING - Rule 218 Management Order filed
12/06/2019			Case set for: Hearing on 12/6/2019 at 10:00 AM with Judge R Foley, Room 5B.
12/06/2019		FOLEY, REBECCA	Hearing Held. Plaintiff by Ginzkey. By agreement, Rule 218 Management Order entered and distributed. See same.
12/10/2019			Motion for Entry of HIPAA Order set December 30, 2019 at 10:30 a m. Counsel to Notice.
12/10/2019			Case set for: Motion on 12/30/2019 at 10:30 AM with Judge R Foley, Room 5B.
12/10/2019			Case set for: Conference Call on 12/30/2019 at 10:30 AM with Judge R Foley, Room 5B.
12/10/2019			EFILE DOCKETING - Amended Notice of Hearing- Defendant Armstrong's Motion for HIPAA Qualified Protective Order set 12.30.19 filed
12/10/2019			EFILE DOCKETING - Amended Notice of Discovery Deposition (Court Reporter Change Only) filed
12/16/2019			EFILE DOCKETING - Plaintiff's Supreme Court Rule 213(f)(1) and (f)(2) Witness Disclosure filed
12/16/2019			EFILE DOCKETING - Notice of Mailing filed
12/16/2019			EFILE DOCKETING - Defendant's Rule 213(f)(1) and (2) Disclosures filed
12/17/2019			EFILE DOCKETING - Defendants Advocate Health and Hospitals Corporation d/b/a Advocate BroMenn Medical Center, and Sarah Harden's 213(f)(1) and (f)(2) Disclosures filed

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
12/30/2019			EFILE DOCKETING - HIPAA Qualified Protective Order filed
12/30/2019		FOLEY, REBECCA	Conference Call Held.
12/30/2019		FOLEY, REBECCA	Motion Held. Attorneys Ginzkey, P. Brandt and Schoen appear. By agreement, HIPAA Qualified Protective Order entered and distributed.
01/07/2020			EFILE DOCKETING - Notice of Discovery Deposition filed
01/13/2020			EFILE DOCKETING - Notice of Discovery Deposition of Dr. Ethan Ergene filed
02/06/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed
02/13/2020			EFILE DOCKETING - Notice of Discovery Deposition filed
02/24/2020			EFILE DOCKETING - Notice of Filing filed
02/24/2020			EFILE DOCKETING - Subpoena Duces Tecum issued to Chris Dangles, M.D. and filed
02/24/2020			EFILE DOCKETING - Notice of Deposition filed
02/25/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed
03/06/2020			EFILE DOCKETING - Notice of Filing of Proposed Agreed Protective Order filed
03/06/2020			EFILE DOCKETING - Proposed Agreed Protective Order received
03/17/2020		FOLEY, REBECCA	Status hearing Held. Plaintiff by Ginzkey; Defendants and MCO by R. Brandt; Defendant Advocate by Schoen. Discovery ongoing. Status set 5-7-20 at 10:00 a m. Case set for: Status hearing on 5/7/2020 at 10:00 AM with Judge R Foley, Room 5B.
04/02/2020			EFILE DOCKETING - Protective Order filed
04/02/2020			Case set for: Unscheduled court appearance on 4/2/2020 at 12:00 AM with Judge R Foley, Room 5B.
04/02/2020		FOLEY, REBECCA	Unscheduled court appearance Held. By agreement, Protective Order entered. See same.
04/14/2020			EFILE DOCKETING - Plaintiffs' Supreme Court Rule 213(f)(3) Witness Disclosure of Sonny Bal, M.D. filed
04/21/2020			EFILE DOCKETING - Amended Notice of Discovery Deposition filed
04/28/2020			EFILE DOCKETING - NOtice of Service of Discovery Documents with Certificate of Service
04/28/2020			EFILE DOCKETING - Notice of Telephonic Hearing filed

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
05/07/2020		FOLEY, REBECCA	Status hearing Held. Plaintiff by Ginzkey; Defendants Armstrong and MCO by R. Brandt; Defendant Advocate by Schoen. Advocate finalizing discovery, which should be burned to a disc and sent out within 14 days. Defense counsel to consult with their respective clients re: deposing Plaintiff's expert via video. Conference call set 5-19-20 at 9:30 a m. Plaintiff to coordinate. Case set for: Conference Call on 5/19/2020 at 09:30 AM with Judge R Foley, Room 5B.
05/11/2020			EFILE DOCKETING - Notice of Continued Telephonic Hearing filed
05/19/2020		FOLEY, REBECCA	Conference Call Held. Plaintiff by Ginzkey; Armstrong and MCO by P. Brandt; Advocate by Schoen. Advocate has provided discovery responses. Defendants to schedule Plaintiff's expert witness deposition to be taken in-person. Deadline for Defendants to depose Plaintiff?s expert (5-15-20) vacated. Conference call set 6-18-20 at 9:30 a m. Plaintiff to coordinate call. Case set for: Conference Call on 6/18/2020 at 09:30 AM with Judge R Foley, Room 5B.
05/22/2020			EFILE DOCKETING - Notice of Telephonic Hearing filed
06/01/2020			EFILE DOCKETING - Notice of Discovery Deposition filed
06/12/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed.
06/16/2020			EFILE DOCKETING - Notice of Service of Discovery Documents Filed.
06/18/2020		FOLEY, REBECCA	Conference Call Held. Plaintiff by Ginzkey; Defendant Advocate by Schoen; Defendants Armstrong and MCO by R. Brandt. By agreement, Defendants' 213(f)(3) disclosure deadline extended to 8-28-20. Counsel to confirm trial date of 1-11-21 with clients and experts and report back to the court. Conference call set 7-14-20 at 9:00 a m. Case set for: Conference Call on 7/14/2020 at 09:00 AM with Judge R Foley, Room 5B.
06/19/2020			EFILE DOCKETING - Notice of Service of Discovery Documents and Proof of Service filed
06/19/2020			EFILE DOCKETING - Notice of Telephonic Hearing and Proof of Service filed
07/08/2020			EFILE DOCKETING - Second Amended Notice of Discovery Deposition filed
07/09/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
07/14/2020		FOLEY, REBECCA	Conference Call Held. Plaintiff by Ginzkey; Advocate by Schoen; Armstrong and MCO by R. Brandt. Plaintiff and MCO confirm proposed trial date; Advocate needs to additional time to confirm with client. Conference call set 7-21-20 at 9:30 a m. Case set for: Conference Call on 7/21/2020 at 09:30 AM with Judge R Foley, Room 5B.
07/21/2020		FOLEY, REBECCA	Conference Call Held. Plaintiff by Ginzkey; Advocate by Schoen; Armstrong and MCO by R. Brandt. Cause set for jury trial 1-11-21. Plaintiff to file motion re: deposition of Advocate nurse by 7-28-20; response due 8-11-20. Hearing set 8-13-20 at 1:30 p.m. via phone. Case set for: Conference Call on 8/13/2020 at 01:30 PM with Judge R Foley, Room 5B. Case set for: Jury Trial on 1/11/2021 at 09:00 AM with Judge R Foley, Room 5B.
07/21/2020			EFILE DOCKETING - Plaintiff's First Motion to Compel Advocate filed
07/21/2020			EFILE DOCKETING - Notice of Telephonic Hearing filed
07/24/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed
08/11/2020		FOLEY, REBECCA	Conference Call Rescheduled. Case set for: Conference Call on 8/13/2020 at 03:00 PM with Judge R Foley, Room 5B.
08/11/2020			EFILE DOCKETING - Notice of Filing filed
08/11/2020			EFILE DOCKETING - Defendant's Response to Motion to Compel filed
08/13/2020			EFILE DOCKETING - Notice of Video Evidence Deposition via Videoconference filed
08/13/2020		FOLEY, REBECCA	Conference Call Held. Plaintiff by Ginzkey; Advocate by Schoen; Armstrong and MCO by R. Brandt. Argument heard on Plaintiff's First Motion to Compel Advocate. Request to depose Nurse Parrish in-person is denied; she may be deposed via Zoom with her counsel present, pursuant and subject to Supreme Court Rule 206(h). Nurse Parrish to be deposed by 9-14-20. Plaintiff withdraws request for attorney's fees.
08/17/2020			EFILE DOCKETING - Cross-Notice of Evidence Deposition filed
08/21/2020			EFILE DOCKETING - Third Amended Notice of Discovery Deposition via Zoom filed
08/28/2020			EFILE DOCKETING - Notice of Filing filed

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
08/28/2020			EFILE DOCKETING - Defendants Advocate Health and Hospitals Corporation DBA Advocate Bromenn Medical Center and Sarah Harden's 213(f)(3) Disclosures filed
08/28/2020			EFILE DOCKETING - Motion for Summary Judgment filed
08/28/2020			EFILE DOCKETING - Defendants' Rule 213(f)(3) Opinion Witness Disclosure filed
09/16/2020			Case Management Conference set 10/02/20 at 11:00 a m. Counsel to Notice.
09/16/2020			Case set for: Status Video Conference on 10/2/2020 at 11:00 AM with Judge PG Lawrence, Room 5D.
09/16/2020			EFILE DOCKETING - Notice of Case Management Conference filed
09/18/2020			EFILE DOCKETING - Plaintiff's First Motion to Compel Armstrong filed
09/18/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed
09/21/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed
09/21/2020			EFILE DOCKETING - Plaintiff's Response to Advocate Motion for Summary Judgment filed
09/23/2020			EFILE DOCKETING - Motion for Extension filed
09/28/2020			Motion for Extension set October 2, 2020 at 11:30 a.m. Counsel to Notice.
09/28/2020			Case set for: Mot/Pet Video Conference on 10/2/2020 at 11:30 AM with Judge R Foley, Room 5B.
09/29/2020			EFILE DOCKETING - Notice of Zoom Hearing filed
10/01/2020		LAWRENCE, PAUL	Status Video Conference Vacated.
10/02/2020			EFILE DOCKETING - Notice of Discovery Deposition filed
10/02/2020		FOLEY, REBECCA	Mot/Pet Video Conference Held. Plaintiff by Ginzkey; Advocate by Schoen; Armstrong and MCO by R. Brandt. Plaintiff's Motion for Extension of Time to disclose rebuttal witness granted over objection. Plaintiff to disclose rebuttal witness opinions by 12-7-20. Advocate to file reply to Motion for Summary Judgment by 10-16-20. Hearing on Motion for Summary Judgment set 10-30-20 at 3:00 p m. via Zoom. Court reporter requested. Case set for: Mot/Pet Video Conference on 10/30/2020 at 03:00 PM with Judge R Foley, Room 5B.
10/05/2020			EFILE DOCKETING - Notice of Zoom Motion Hearing filed
10/09/2020			EFILE DOCKETING - Plaintiff's First Amended Motion to Compel Armstrong filed
10/13/2020			EFILE DOCKETING - Motion for New Trial Date filed.

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William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
10/13/2020			EFILE DOCKETING - Notice of Hearing filed.
10/14/2020			Plaintiff's First Motion to Compel Armstrong set 10/30/20 at 3:00 p.m. Counsel to Notice.
10/14/2020			EFILE DOCKETING - Notice of Zoom Hearing on Plaintiff's First Amended Motion to Compel Armstrong filed
10/15/2020			EFILE DOCKETING - Notice of Filing filed.
10/15/2020			EFILE DOCKETING - Reply to Motion for Summary Judgment filed.
10/21/2020			EFILE DOCKETING - Motion For Leave to File Affirmative Defenses filed
10/26/2020			Motion for Leave to File Affirmative Defenses set October 30, 2020 at 3:00 p m. Counsel to Notice.
10/28/2020			EFILE DOCKETING - Notice of Zoom Hearing filed
10/28/2020			EFILE DOCKETING - Defendants' Response to Plaintiff's Motion to Compel filed
10/29/2020			EFILE DOCKETING - Motion for Leave to File Affirmative Defenses filed
10/29/2020			EFILE DOCKETING - Notice of Hearing filed
10/30/2020	Jennings, Amy	FOLEY, REBECCA	Mot/Pet Video Conference Held. Plaintiff by Ginzkey; Advocate and Harden by Schoen; Armstrong and MCO by P. Brandt. Both Motions for Leave to File Affirmative Defenses granted without objection. Affirmative defenses to be filed within 14 days. Plaintiff to file reply to Motion to Compel within 14 days. Hearing on Motion to Compel continued to 11-23-20 at 2:30 p m. via Zoom. Defendants' Motion to Continue Trial granted. Jury trial set 1-11-21 vacated, and rescheduled for 4-12-21 (5 days). Counsel to prepare revised Case Management Order. Defendant Advocate and Harden's Motion for Summary Judgment argued and granted. Request for Rule 304(a) finding granted. Mr. Schoen to submit written order. Case set for: Pre-Trial / Pet. to Rescind on 11/23/2020 at 02:30 PM with Judge R Foley, Room 5B.
10/30/2020		FOLEY, REBECCA	Jury Trial Rescheduled. Case set for: Jury Trial on 4/12/2021 at 09:00 AM with Judge R Foley, Room 5B.
11/04/2020			EFILE DOCKETING - Notice of Service of Discovery Documents filed
11/04/2020			EFILE DOCKETING - Motion to Reconsider or in the Alternative, Motion to Strike and Stay filed
11/05/2020			Plaintiff's Motion to Reconsider or in the Alternative, Motion to Strike and Stay set 11/23/20 at 2:30 p m. Counsel to Notice.
11/05/2020			Case set for: Mot/Pet Video Conference on 11/23/2020 at 02:30 PM with Judge R Foley, Room 5B.

Case Number: 2018L0000126

2018L0000126

William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
11/05/2020			EFILE DOCKETING - Notice of Hearing on Plaintiff's Motion to Reconsider or in the Alternative to Strike and Stay filed
11/05/2020			EFILE DOCKETING - Plaintiff's Amended Rule 213(f)(1) and (f)(2) Witness Disclosures filed
11/09/2020			EFILE DOCKETING - Affirmative Defenses filed
11/10/2020			EFILE DOCKETING - Reply in Support of Motion to Compel Armstrong filed
11/16/2020			EFILE DOCKETING - Response to Armstrong Affirmative Defenses filed
11/19/2020			EFILE DOCKETING - Notice of Zoom Hearing filed
11/23/2020		FOLEY, REBECCA	Mot/Pet Video Conference Held. Plaintiff by Ginzkey; Advocate by Schoen; Armstrong by Toth. Advocate to file response to Motion to Reconsider by 12-7-20; hearing and status set 12-8-20 at 3:00 p m. via Zoom. Argument heard on Plaintiff's First Amended Motion to Compel Defendant Armstrong. Motion granted as to request paragraphs 1 and 4; denied as to paragraph 2. Defendant to respond within 30 days. Case set for: Mot/Pet Video Conference on 12/8/2020 at 03:00 PM with Judge R Foley, Room 5B.
12/01/2020			EFILE DOCKETING - Defendants' Supplemental Opinion Disclosure filed
12/04/2020			EFILE DOCKETING - Defendants' Supplemental Response to Plaintiff's First Supplemental Discovery Request filed
12/07/2020			EFILE DOCKETING - Notice of Filing filed
12/07/2020			EFILE DOCKETING - Defendants Response to Plaintiff's Motion to Reconsider filed
12/08/2020		FOLEY, REBECCA	Mot/Pet Video Conference Held. Plaintiff by Ginzkey; Advocate and Harden by Schoen; Armstrong does not appear. Motion to Reconsider argued and denied. Cause set for status re: rule 304(a) language and friendly contempt on 12-15-20 at 2:00 p.m. via Zoom. Case set for: Status Video Conference on 12/15/2020 at 02:00 PM with Judge R Foley, Room 5B.

Case Number: 2018L0000126

2018L0000126

William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
12/15/2020		FOLEY, REBECCA	Status Video Conference Held. Plaintiff by Ginzkey; Armstrong and McLean County Orthopedics by Toth; Advocate and Harden by Schoen. Defendant Armstrong found in indirect civil contempt for refusing to produce the items requested in Plaintiff's Supplemental Requests 1 and 3. Defendant Armstrong's oral Motion for Summary Judgment as to Count III (res ipsa loquitur) granted over objection. Pursuant to Supreme Court Rule 304(a), the court finds there is no just reason for delaying appeal as to the res ipsa loquitur counts. Remaining counts of negligence against Defendant Armstrong and McLean County Orthopedics stayed, pending appeal of the res ipsa loquitur and discovery issues. Counsel to submit written orders. Jury trial set 4-12-21 vacated.
12/15/2020		FOLEY, REBECCA	Jury Trial Vacated.
12/21/2020			EFILE DOCKETING - Defendants' Supplemental Rule 213(f)(2) Disclosure filed
12/21/2020			EFILE DOCKETING - Defendants' Supplemental Rule 213(f)(3) Disclosure filed
12/22/2020			Case set for: Unscheduled court appearance on 12/22/2020 at 10:10 AM with Judge R Foley.
12/22/2020		FOLEY, REBECCA	Unscheduled court appearance Held. Order of Indirect Civil Contempt entered. See Order.
12/22/2020			EFILE DOCKETING - Order of Indirect Civil Contempt filed
12/22/2020			Case set for: Unscheduled court appearance on 12/22/2020 at 10:20 AM with Judge R Foley.
12/22/2020		FOLEY, REBECCA	Unscheduled court appearance Held. Order re: Defendant Armstrong?s Motion for Summary Judgment entered. See Order.
12/22/2020			EFILE DOCKETING - Order Granting Motion for Summary Judgment on Count III filed
12/22/2020			EFILE DOCKETING - Plaintiff's Supplemental Supreme Court Rule 213(f)(3) Witness Disclosure of Sonny Bal, MD filed
01/05/2021			Case set for: Unscheduled court appearance on 1/5/2021 at 11:50 AM with Judge R Foley, Room 5B.
01/05/2021		FOLEY, REBECCA	Unscheduled court appearance Held. Order re: Advocate and Harden's Motion for Summary Judgment entered. See Order.
01/05/2021			EFILE DOCKETING - Order filed
01/06/2021			EFILE DOCKETING - Notice of Appeal filed
01/06/2021			Notice of Appeal efiled to the Appellate Court. Copies of NOA sent to Judge Foley

Case Number: 2018L0000126

2018L0000126

William Johnson vs. Lucas Armstrong, et al.

Date	Reporter	Judge	Description
01/06/2021			EFILE DOCKETING - Correspondence from Appellate Court efiled
01/06/2021			EFILE DOCKETING - Notice of Appeal filed
01/07/2021			EFILE DOCKETING - Correspondence from Attorney efiled
01/07/2021			EFILE DOCKETING - Appellate Court docketing statement efiled
01/13/2021			Notice of Appeal efiled to the Appellate Court. Copies of NOA sent to Judge Foley
01/15/2021			EFILE DOCKETING - Correspondence from Appellate Court efiled
01/21/2021			EFILE DOCKETING - Appellate Court docketing statement efiled
01/22/2021			EFILE DOCKETING - Correspondence from Attorney efiled
02/19/2021			Report of proceedings filed (Jennings 10/30/20)
03/01/2021			Filing fees/fines/costs/penalties paid $273.75 on 03/01/2021, receipt # 5538625, balance remaining $.00 - JOHNSON, WILLIAM "WES" - DOB: RACE: Unknown SEX: Unknown .
03/10/2021			Filing fees/fines/costs/penalties paid $273.75 on 03/10/2021, receipt # 5538755, balance remaining $.00 - ARMSTRONG, LUCAS - DOB: RACE: Unknown SEX: Unknown .

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

WILLIAM "WES" JOHNSON,

Plaintiff,

vs.

LUCAS ARMSTRONG, McLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, PAMELA ROLF, and ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER,

Defendants.

and

BRIAN STENGER and JORDAN PROSSER,

Respondents in Discovery.

2018L0000126

FIRST CASE MANAGEMENT CONFERENCE
BEFORE JUDGE LAWRENCE
SET ON 03/07/2019 AT 10:00 AM

COMPLAINT

COUNT I
(Negligence v. Armstrong)

Plaintiff, WES JOHNSON, complains of defendant LUCAS ARMSTRONG, M.D. as follows:

1. At all times alleged herein defendant, LUCAS ARMSTRONG, M.D., (hereinafter, "ARMSTRONG") was a physician licensed in the State of Illinois and practicing in the field of orthopedic surgery in McLean County, Illinois.

2. On or prior to October 6, 2016 ARMSTRONG diagnosed WES JOHNSON with left hip osteoarthritis due to developmental dysplasia of the hip.

3. On October 6, 2016 ARMSTRONG performed a left total hip arthroplasty on WES JOHNSON using a direct anterior approach.

4. Following ARMSTRONG's surgery WES JOHNSON was discharged from the hospital with postoperative femoral nerve palsy.

5. At all times alleged herein ARMSTRONG had a duty to act as a reasonably careful orthopedic surgeon under the circumstances described.

6. In breach of that duty, on October 6, 2016 ARMSTRONG was guilty of the following negligent acts and omissions:

   a. Failing to properly identify, preserve, and protect WES JOHNSON'S femoral nerve;

   b. Improperly retracting WES JOHNSON's femoral nerve or improperly directing the placement of the retractors; or

   c. Directly traumatizing WES JOHNSON's femoral nerve.

7. On both January 11, 2017 and June 1, 2017 ARMSTRONG's partner, Dr. Craig Carmichael, performed an electromyogram on WES JOHNSON.

8. Both studies demonstrated a severe left femoral neuropathy that is specific to the branches to the vastus lateralis and rectus femoris muscles.

9. The lesion appears complete with no evidence of voluntary motor unit potential activation.

10. As a direct and proximate result of ARMSTRONG'S negligence, WES JOHNSON endured and continues to endure significant pain and suffering, incurred medical expenses, sustained permanent disability, and suffered loss of a normal life.

11. Attached hereto and made a part hereof in conformance with 735 ILCS 5/2-622 are both an affidavit of counsel and a physician's report.

Wherefore, plaintiff prays judgment against defendant in an amount in excess of $50,000 plus costs of suit.

COUNT II
(Respondent Superior v. McLean County Orthopedics)

Plaintiff, WES JOHNSON, complains of defendant, McLEAN COUNTY ORTHOPEDICS, LTD., as follows:

1-11. Plaintiff repeats and realleges paragraphs 1 through 11 of Count I as and for paragraphs 1 through 11 of Count II as though fully set forth herein.

12. The action and inactions of LUCAS ARMSTRONG were performed within the scope and authority of his employment by McLEAN COUNTY ORTHOPEDICS, LTD.

Wherefore, plaintiff prays judgment against defendant for an amount in excess of $50,000 plus costs of suit.

COUNT III
(*Res Ipsa loquitur*)

Plaintiff, WES JOHNSON, complains of defendants, LUCAS ARMSTRONG, SARAH HARDEN, AND PAMELA ROLF as follows:

1-9. Plaintiff repeats and realleges paragraphs 1 through 9 of Count I as and for paragraphs 1 through 9 of Count III as though fully set forth herein.

10. During the October 6, 2016 surgery ARMSTRONG was assisted by scrub nurses, SARAH HARDEN and PAMELA ROLF.

11. The injuries to WES JOHNSON's femoral nerve occurred while the retractors, scalpel, electrocautery device and other surgical instruments were under the control of ARMSTRONG, HARDEN, and ROLF.

12. In the ordinary course of events, the injuries sustained by WES JOHNSON would not have occurred if ARMSTRONG, HARDEN, and ROLF had used a reasonable standard of professional care while the retractors, scalpel, electrocautery device and other surgical instruments were under their control.

13. As a direct and proximate result of the negligence of ARMSTRONG, HARDEN, AND ROLF, WES JOHNSON sustained the damages previously described.

14. Attached hereto and made a part hereof in conformance with 735 ILCS 5/2-622 are both an affidavit of counsel and a physician's report

Wherefore, plaintiff prays judgment against defendant for an amount in excess of $50,000 plus costs of suit.

COUNT IV
(*Res ipsa loquitur* v. AHHC)

Plaintiff, WES JOHNSON, complains of defendant, ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER, as follows:

1-13. Plaintiff repeats and realleges paragraphs 1 through 13 of Count III as and for paragraphs 1 through 13 of Count IV as though fully set forth herein.

14. The actions or inactions of SARAH HARDEN and PAMELA ROLF were performed within the scope and authority of their employment by ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER.

15. As a direct and proximate result of the negligence of AAHC, WES JOHNSON sustained the damages previously described.

Wherefore, plaintiff prays judgment against defendant in an amount in excess of $50,000 plus costs of suit.

RESPONDENTS IN DISCOVERY

Pursuant to 735 ILCS 5/2-402, plaintiff hereby names BRIAN STENGER and JORDAN PROSSER as Respondents in Discovery.

WILLIAM "WES" JOHNSON, Plaintiff

By: /s/ James P. Ginzkey
One of his Attorneys

James P. Ginzkey
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K:\Clients\Johnson, W\0 Pleadings\1Complaint.wpd

ATTORNEY'S AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF MCLEAN)

I, JAMES P. GINZKEY, after having been first duly sworn on oath and affirmation and pursuant to 735 ILCS 5/2-622 of the Illinois Code of Civil Procedure state:

1) I have consulted and reviewed the facts of this case with a health care professional who is a physician licensed to practice medicine in all its branches and who I reasonably believe:

   a) is knowledgeable in the relevant issues involved in this particular action;

   b) practices or has practiced with the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in this particular action; and

   c) is qualified by experience or demonstrated competence in the subject of this case.

2) That the reviewing health care professional has determined in a written report, after a review of medical records and other relevant material involved in this particular action, that there is a reasonable and meritorious cause for the filing of this action.

3) That I have concluded on the basis of the reviewing health care professional's review and consultation that there is a reasonable and meritorious cause for filing this action.

FURTHER AFFIANT SAYETH NOT.

Subscribed and sworn to before me this
18th day of September, 2018.

Notary Public

James P. Ginzkey
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OFFICIAL SEAL
SUSAN RASOR
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:03/05/21

James P. Ginzkey 221 E.
Washington Bloomington,
IL 61701

RE: William "Wes" Johnson
d/o/b: 03/21/1962

Dr. Mr. Ginzkey:

At your request, I have now reviewed the records of Wes Johnson from Advocate BroMenn Medical Center in Normal, Illinois and the office charting of McLean County Orthopedics in Bloomington, Illinois. Those records reflect that on October 6, 2016 Wes Johnson underwent a left total hip arthroplasty using a direct anterior approach by Dr. Lucas Armstrong of McLean County Orthopedics. The patient's discharge summary from the following day reflects that he was suffering from postoperative femoral nerve palsy.

The patient was seen by Dr. Armstrong's partner, Dr. Craig Carmichael, on January 11, 2017 and June 1, 2017. On both dates Dr. Carmichael conducted an electromyogram. Both studies demonstrated a severe left femoral neuropathy that is specific to the branches to the vastus lateralis and rectus femoris muscles, but spares the branch to the vastus medialis. The lesion is complete with no evidence of voluntary motor unit potential activation. While temporary injury to the patient's lateral femoral cutaneous nerve is a known risk of the direct anterior approach in total hip arthroplasty, direct trauma or traction injury causing permanent damage to the femoral nerve involved here, is not an expected outcome of anterior approach total hip arthroplasty. This patient's femoral nerve was not properly identified, preserved, and protected at the time of the surgical procedure by Dr. Armstrong, or at his direction. The surgical technique used here fell below the standard of care. This type of permanent injury generally does not occur absent negligence.

I believe that a meritorious cause of action exists against Dr. Armstrong, McLean County Orthopedics, Ltd., scrub nurses, Sarah Hardin and Pamela Rolf, as well as their employer, Advocate Health and Hospitals Corporation d/b/a Advocate BroMenn Medical Center. I am board certified in orthopedic surgery and am familiar with the type of surgery performed here. I am also familiar with the medical sequelae arising from these types of procedures. My opinions are based upon a reasonable degree of medical certainty but I reserve the right to amend my opinions as more information becomes available.

Respectfully,

SUPREME COURT RULE 222(b) AFFIDAVIT

STATE OF ILLINOIS)
) ss
COUNTY OF McLEAN)

I, JAMES P. GINZKEY, after having been first duly sworn, on oath and affirmation state that damages sought in this cause **do** exceed $50,000.

FURTHER AFFIANT SAYETH NOT.

James P. Ginzkey

Subscribed and sworn to before me this

18th day of September,
2018.

Susan Rasor
Notary Public

OFFICIAL SEAL
SUSAN RASOR
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:03/05/21

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Deposition of

Sarah Harden

October 7, 2019

William "Wes" Johnson v. Lucas Armstrong, et al.

P.O. Box 8131 • East Peoria, IL 61611
Phone: (309) 264-0565 • fickrmr@yahoo.com

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF ILLINOIS
MCLEAN COUNTY

WILLIAM "WES" JOHNSON,

Plaintiff,

-vs- No. 2018 L 0000126

LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, PAMELA ROLF, and ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER,

Defendants,

and

BRIAN STENGER and JORDAN PROSSER,

Respondents In Discovery.

THE DISCOVERY DEPOSITION OF SARAH HARDEN, a witness, called by the Plaintiff, for examination pursuant to notice, taken before Gina Fick, Illinois CSR 084-003872, CRR, RMR, on Monday, the 7th day of October, 2019, commencing at the hour of 11:00 a.m., at Advocate Bromenn Medical Center, 1304 Franklin Avenue, ORM CR 82, in the City of Normal, County of McLean, and State of Illinois.

PRESENT:

JAMES P. GINZKEY, ESQ.
221 East Washington Street
Bloomington, Illinois
BY: James P. Ginzkey, Esq.
Chase Molchin, Esq.
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for the Plaintiff;

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for Lucas Armstrong, MD

LANGHENRY, GILLEN, LUNDQUIST & JOHNSON
605 South Main Street
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for Sarah Harden, Pamela Rolf and Advocate Health and Hospitals;

INDEX OF EXAMINATIONS

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EXHIBITS:	
Exhibit Nos. 1 though 4 premarked	

SARAH HARDEN,

having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. GINZKEY:

Q. Will you please state your name for our court reporter, and spell both your first and last name for her.

A. Sarah, S-a-r-a-h, Hardon, H-a-r-d-o-n.

Q. You are an RN?

A. I am a scrub tech.

Q. Scrub tech?

A. Surgical technologist.

Q. How long have you been with Advocate BroMenn?

A. Just over three years.

Q. And where had you practiced prior to coming to Advocate BroMenn?

A. Nowhere.

Q. Okay. When did you obtain your certification as a scrub technician?

A. July of '16.

Q. May I call you Sarah?

A. You may.

EXHIBIT B

Q. Sarah, what we have in front of us are some exhibits that I have marked. Exhibit No. 1 is a copy of certain pages from the Surgical Case Record.

My first question is, with respect to this type of form, you're familiar with this form, are you not?

A. I don't normally see these, no.

Q. Okay. And I understand that.

This happens to be a total hip arthroplasty performed by Dr. Lucas Armstrong. Do you know Dr. Armstrong?

A. I do.

Q. Have you talked to him about this Wes Johnson case at all?

A. No.

Q. Have you talked with Pamela Rolf about this case at all?

A. No.

Q. Or anybody, other than your attorney or hospital staff, such as Janet Sutter?

A. No.

Q. Do you have any independent recollection of

this procedure?

A. No.

Q. Okay. On Page 1 of this Exhibit 1, both you and Pam Rolf are listed as having scrubbed in, correct?

A. Correct.

Q. And scrubbing in means obviously you did scrub, and you were within the surgical field, correct, the sterile field?

A. Correct.

Q. Now, I've got highlighted the circulator, an x-ray tech by the name of Jonathan Simmons --

A. Uh-huh.

Q. -- and then two other individuals who happen to be sales reps from DePuy.

A. Uh-huh.

Q. Would I be correct in assuming that the circulator, the x-ray tech and the two DePuy individuals are not within the surgical field?

A. Correct.

Q. They don't scrub in, and they're not within the sterile field, correct?

A. Correct.

Q. And none of those individuals handle any of the surgical instrumentation or the implants, correct?

A. Correct. After they're opened, correct.

Q. Right.

A. Yes.

Q. And if we can go to what would be Page 4 of that Exhibit 1, I've highlighted the section called Implants.

A. Uh-huh.

Q. Now, we've already deposed Pam Rolf, and she indicated to me that she was not the first assistant, that you were, is that correct, the first scrub?

A. No.

MR. LUNDQUIST: The other way around.

BY MR. GINZKEY:

Q. It's the other way around, yeah.

Looking at my notes, Pam Rolf was what is designated first scrub?

A. Correct.

Q. Do you have a designation? Are you called

second scrub?

A. Second scrub.

Q. Okay. It makes sense to me.

Generally, not specifically with reference to this particular surgery, but generally what does the second scrub do?

A. What the doctor tells her to do.

Q. Okay. Would I be correct in assuming that the first scrub is the individual who is handing the surgical instrumentation to the doctor as he's performing the surgery?

A. Correct.

Q. Would I be correct in assuming that with respect to the implants that I've got highlighted on the fourth page of this Exhibit 1, you would be the one opening the sterile packages?

A. No.

Q. That would still be the first scrub?

A. Opening -- well, they are opened -- the packages are opened to the sterile field in a sterile package, and then those would be opened normally by the first scrub or the doctor.

Q. Okay. And you've said you do whatever the doctor tells you to do. Tell me just generally what a second scrub does.
A. A second scrub will hold a retractor wherever it is placed by the doctor, and that is pretty much it.
Q. So, to the best of your recollection, that would have been your role in this particular surgical procedure, correct?
A. Correct.
Q. All right. So if I understand your testimony correctly, in this particular case with Wes Johnson, you would have been holding retractors that would have been placed by somebody other than yourself, true?
MR. LUNDQUIST: And just let me interject real quick. She doesn't have a memory of that. But I'll let you answer.
A. Okay. He places them. I hold them, yes.
BY MR. GINZKEY:
Q. You wouldn't be placing them, correct?
A. Correct.
Q. You wouldn't be repositioning them, correct?

A. Correct.
Q. Everything that you do with respect to the retractors is at the specific direction of the doctor, correct?
A. Correct.
Q. With respect to the implants that are listed on this Page 4 of Exhibit 1, we've got the acetabular shell, the bone screws, the liners, the femoral stem, femoral head. Would you be placing any of those with respect to the patient himself?
A. No, I would not.
Q. And if custom and habit would obtain in this case, would it be Pam Rolf that would be handing these implants to the doctor as he's about to put them into the patient?
A. Yes.
Q. Exhibit 2 is basically again some of the implants that were used.
A. Uh-huh.
Q. Would you have placed any of those implants into the patient?
A. No.

Q. Then we've got instruments listed on Exhibit 3, starting at the bottom and going through to Page 2 of this Exhibit 3.
A. Uh-huh.
Q. And I need to know if you would have been using any of those instruments that are listed on this preference card, if you would have been using any of those directly on the patient?
MR. LUNDQUIST: Let me just quickly interject. I have an objection to the word "using," because I think it can be interpreted different ways. But you can answer.
A. I don't use anything. I hold things.
BY MR. GINZKEY:
Q. Okay.
A. I hold what I'm told to hold -- whatever the doctor tells me to do, I do.
Q. You would not have been using any of the instruments that we've got listed on this Exhibit 3 and highlighted directly on the patient, correct?
A. Correct.

Q. And then if I can have you, Sarah, look at what I've marked as Exhibit 4, and specifically look at the highlighted areas. Exhibit 4, for the record, is Dr. Armstrong's four-page op note.
A. Uh-huh.
Q. And what I've tried to do is highlight the instruments and the implants that were used. And, again, my question simply is, would you have been inserting those, applying those directly on or into the patient?
A. No.
Q. And go ahead and take a minute and just look through that --
A. Okay.
Q. -- just to make sure your answer is correct.
A. I really wouldn't have to look through it because I don't place anything.
Q. Okay. Is it customary to do a timeout before the procedure actually begins?
A. Correct.
Q. Who calls the timeout and who directs it?
A. Normally the circulator, the RN.
Q. In this case Elizabeth Riddle?

A. Uh-huh.
Q. You'll have to say yes.
A. I'm sorry. Yes.
MR. LUNDQUIST: You caught it before --
THE WITNESS: Yes.
BY MR. GINZKEY:
Q. Tell me what that entails. Based upon your experience, not particularly in this case, because you have no independent recollection, but tell me what occurs in a timeout.
A. Timeout verifies a patient's name, date of birth, operative site, any fire hazards, any allergies, any current medications, the doctor performing the surgery.
Q. And that's done verbally just before the procedure starts, correct?
A. Correct.
Q. Is it before anesthesia is induced, if you know? Is the patient conscious, or is it typically done after the patient is asleep?
A. Typically after the patient is asleep.
Q. Okay. And that's custom and habit here at

Advocate BroMenn, correct?
A. Yes.
MR. LUNDQUIST: I'll just object --
THE WITNESS: I'm sorry.
MR. LUNDQUIST: -- because I don't know if it's broad as to everything, but you can answer, that's fine.
A. Yes, in the cases I've done, as far as I know, every case here has that procedure.
BY MR. GINZKEY:
Q. What type of cases do you actually participate in, Sarah?
A. This would be an ortho case, general cases, gyne, eyes, ENT.
Q. The whole gamut?
A. Yeah. Jack of all trades, I guess.
Q. If there is a standstill -- firstly, if I use that phrase, do you know what that means?
A. No.
Q. Okay. Have you ever been involved in a procedure where there is a concern and everybody stands down just for a minute to

double check what's going on?
A. I --
MR. LUNDQUIST: I'd just object to form, but you can answer.
A. I don't believe so. That's why we have our timeouts. I mean, we stop everything and listen to the timeout. So that would be a standstill to me.
As far as during a procedure?
BY MR. GINZKEY:
Q. During a procedure.
A. Not to my knowledge, no.
Q. Okay. You've never been in a procedure where, for instance, the patient's blood pressure drops to critical levels and everybody stands still? You've never witnessed one of those?
A. Yes.
Q. Okay.
A. Yes.
Q. How is that charted, if you know?
A. I do not know. I don't do any charting.
Q. Okay. Is it charted, if you know?
A. I do not know.

Q. Would you have had any interaction with this patient after the surgery itself?
A. No.
MR. GINZKEY: Those are the only questions I have. Thank you, ma'am.
MR. BRANDT: Thanks, Sarah. I don't have any questions. Thank you.

EXAMINATION BY MR. LUNDQUIST:
Q. I just have a couple questions that might sound somewhat repetitive.
A. Okay.
Q. First of all, Sarah, you've already answered all of Mr. Ginzkey's questions about your role in this procedure, and I know that you have no memory about it at all --
A. Uh-huh.
Q. -- but is it fair to say that as it pertains to you, based on your knowledge of the custom and practice for any surgery like this that you would do, that you would not be in control of any of the instrumentation even if you were asked to hold something, true?

A. Correct. Yes.
Q. The exclusive control of all instrumentation, whether it be clamps, retractors, scalpels, anything at all, is always with the surgeon, correct?
A. Correct.
Q. And even in an instance, hypothetically, where you may be asked to hold something, it's still under the direct control of the surgeon because you only do exactly what he tells you to do?
A. Correct.
Q. And you have no knowledge whatsoever that would indicate that that concept was deviated from in any way in this case, do you?
A. No.
Q. I have asked you to review the operative record that counsel marked as Exhibit 1 and the materials we have here.
A. Uh-huh.
Q. I know you have no memory of this case, but based on your review of everything, and all of that, to the best of your knowledge, was all of your care and conduct and involvement in this

case consistent with the standard of care for a surgical scrub tech? And what I mean by that is, to the best of your knowledge, did you act as a reasonably careful surgical scrub tech at all times?
A. Yes.

MR. LUNDQUIST: Thank you.
MR. GINZKEY: No other questions.
MR. BRANDT: I have no other questions.
MR. GINZKEY: Signature?
MR. LUNDQUIST: Let's show signature reserved, just because I always do it, it's not that we don't trust you. You can handle that through me, and I'll take care of it.

FURTHER DEPONENT SAITH NOT.

STATE OF ILLINOIS)
)
COUNTY OF TAZEWELL)

C E R T I F I C A T E

I, Gina Fick, CRR, RMR, CSR, DO HEREBY CERTIFY that, pursuant to notice, there came before me on the 7th day of October, 2019, at 1304 Franklin Avenue, QRM CR #2, in the City of Normal, County of McLean, and State of Illinois, the following named person, to wit:

SARAH HARDEN,

who was by me first duly sworn to testify to the truth and nothing but the truth of her knowledge touching and concerning the matters in controversy in this cause and that she was thereupon carefully examined upon her oath and her examination immediately reduced to shorthand by means of stenotype by me.

I ALSO CERTIFY that the deposition is a true record of the testimony given by the witness and that the necessity of calling the court reporter at

time of trial for the purpose of authenticating said transcript was also waived.

I FURTHER CERTIFY THAT I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of October, 2019.

GINA FICK, CRR, RMR, CSR

Deposition of

Pamela Rolf

July 22, 2019

William "Wes" Johnson v. Lucas Armstrong, et al.

Gina Fick
RMR, CSR
P.O. Box 8141 • East Peoria, IL 61611
Phone: (309) 264-0565 • fickrmr@yahoo.com

EXHIBIT C

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF ILLINOIS
MCLEAN COUNTY

WILLIAM "WES" JOHNSON,
Plaintiff,
-VS- No. 18-L-126
LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, PAMELA ROLF, and ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER,
Defendants.

THE DISCOVERY DEPOSITION of PAMELA ROLF, a defendant called by the plaintiff for examination pursuant to notice, and pursuant to the provisions of the Code of Civil Procedure, and the Rules of the Supreme Court thereof pertaining to the taking of depositions for the purpose of discovery, taken before me, Cindy M. Scribner, CSR-RPR, License #084-004465, a Notary Public in and

for the County of Peoria and State of Illinois, at 1304 Franklin Avenue, in the City of Normal, County of McLean, and State of Illinois, on the 22nd day of July, A.D., 2019, at the hour of 11:00 a.m.

APPEARANCES:

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For the defendant.

* * * * *

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(Exhibits 1-4 were marked for identification and are attached to the transcript.)

IT IS HEREBY STIPULATED by and between the parties hereto and their respective attorneys that this is a discovery deposition taken pursuant to notice to the attorneys of record and pursuant to the provisions of the Code of Civil Procedure and the Rules of the Supreme Court of Illinois.

That the deposition may be taken before Cindy M. Scribner, CSR-RPR, License #084-004465, a Notary Public of Peoria County, Illinois, on the 22nd day of July, A.D., 2019, at 1304 Franklin Avenue, Normal, Illinois, and reduced to typewritten manuscript.

IT IS FURTHER STIPULATED that the reading and signing of the deposition by the witness is hereby waived and that the transcript may be produced at trial without the necessity of calling the said Cindy M. Scribner to testify as to the authenticity or correctness of said transcript, except the attorneys of record shall have thirty days from receipt of said transcript in which to call to the attention of said reporter any errors or omissions therein.

PAMELA ROLF,
being first duly sworn, deposes and says as follows, in answer to:
EXAMINATION BY MR. GINZKEY:

Q. Will you please state your full name, and for the benefit of our court reporter, spell your last name?

A. Pam Rolf, R-O-L-F.

Q. You're an RN?

A. Surgical tech.

Q. Surgical tech. How long have you been a surgical tech?

A. I've been here for 40 years.

Q. And here meaning at Advocate BroMenn Medical Center?

A. Yes.

Q. May I call you Pam?

A. Yes.

Q. Pam, you walked in on crutches, your attorney has indicated you recently had surgery, I don't mean to pry, but tell us what the surgery was.

A. I just had a hip -- a third hip surgery three weeks ago.

Q. Hip replacement?

A. Yes. It was infected, so I had to have it ripped out and then spacer and now I have a new hip.

Q. So you've had a total revision?

A. Yes.

Q. How ironic that's what we're here to talk about.

A. And I also have footdrop, even more ironic.

MR. LUNDQUIST: And you don't need to get into your own stuff any more than you have. So that's good. Give him a general idea.

BY MR. GINZKEY:

Q. Let me hand you, Pam, and counsel, some documents that I've marked as exhibits. I don't think we'll be here long. But looking at Exhibit 1, I only printed out four pages of what is entitled the surgical case record. You've seen that type of documentation before; have you not?

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A. **Uh-huh.**
Q. You'll have to say yes for our court reporter.
A. **Yes. Sorry.**
Q. That is kept electronically, correct?
A. **Correct.**
Q. And it would be the circulator that is entering data in realtime for lack of a better phrase in the ER at the time of the surgery, correct?
A. **OR.**
Q. Excuse me, OR.
A. **No problem.**
Q. What is the application, the software application that's used for the surgical case record, if you know?
A. **I don't.**
Q. If I use the phrase the Meditech platform, does that ring a bell with you?
A. **Yes. But, like I say, I don't do any of that, the charting at all.**
Q. Understood. But you have access to

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the chart on the laptops or other computers here at the hospital?
A. **I don't.**
Q. Okay. Let me have you look at page one of Exhibit 1. And as we discussed earlier this was a total hip arthroplasty. And one of the questions that I have is, it says severity and then there's an abbreviation, MAJ COMP, and I don't know if that stands for major complication or major component, do you know?
A. **I do not.**
Q. If you wanted to find that out, who would you talk to?
MR. LUNDQUIST: If you know.
THE WITNESS: Just the nurse would maybe know. I don't know.
BY MR. GINZKEY:
Q. When you say the nurse, the circulating nurse?
A. **Correct.**
Q. And in this case the circulator was Elizabeth Rittle?
A. **Correct.**

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Q. You know Elizabeth?
A. **I do.**
Q. This date of operation goes back to October 6th of 2016, do you happen to remember this particular surgery?
A. **No.**
Q. So any recollection you would have would have to come through the records themselves, correct?
A. **Correct.**
Q. Now, the surgeon in this particular case was Dr. Lucas Armstrong. I'm assuming that prior to this surgery of October 6, 2016, you have worked with him before?
A. **Yes.**
Q. Do you tend to be assigned to a particular surgeon? In other words, was your specialty in the fall of 2016 hip replacement surgery?
A. **Yes. Orthopedics in general, but mostly hips and knees.**
Q. All right. And did you tend to work with a particular orthopedic surgeon more

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often than others?
A. **Yes.**
Q. Can I use the word team? Were you part of Dr. Armstrong's team?
MR. LUNDQUIST: I'll just object to the form of that.
But you can answer in your own words.
THE WITNESS: Yes.
BY MR. GINZKEY:
Q. Did you have training with him? In other words, for instance, with respect to the DePuy medical prosthetics, did you have any type of specific training with Dr. Armstrong concerning these procedures?
A. **Not particularly with him, across the board with everybody.**
Q. Was any of that training by DePuy?
A. **Somewhat. I mean, they helped coach us, you know. But we don't sit down, you know. I know how to do it, so I don't need much coaching.**
Q. You've been here at Advocate

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BroMenn for 40 years, has it primarily been with respect to orthopedics?
A. Yes.
Q. Speaking of DePuy reps, we've got down at the bottom of page one of Exhibit 1 the names of Brian Stenger and Jordan Prosser, and they're listed as DePuy, do you happen to know those two gentlemen?
A. Yes.
Q. Do they tend to be present for most of the DePuy hip surgical cases?
A. Yes.
MR. LUNDQUIST: Objection to form.
BY MR. GINZKEY:
Q. If you know, are they both local?
A. Yes.
Q. Tell me generally what those two do. In other words, assume that you've got a case scheduled for tomorrow morning and that Brian Stenger and Jordan Prosser are on the case because it's DePuy prosthetics, what do they typically do?
A. They come in the morning while I'm

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setting up to make sure I've got everything I need, if anything's missing or I'm missing a tray or having problems. But, like I say, I'm very familiar with it, so I don't really have a lot of questions for them. Then once during the procedure if the doctor has any questions, they're there to help. And then they, like I say, once we've sized whatever size we need, they get the prosthesis, show the doctor the prosthesis, make sure we're opening the right thing, then hand it to the circulator who then opens it to me.
Q. Gotcha. Who determines the size?
A. The doctor, but he may, you know, question Brian for, you know, advice, what do you think about this, you know.
Q. Do either Brian or Jordan actually scrub in?
A. No.
Q. But they're present in the OR?
A. Correct.
Q. They stand back from the surgical field?

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A. Yes.
Q. Do they ever get into a hands-on capacity?
A. No.
Q. Do they actually bring in components of the DePuy Pinnacle system with them?
A. We store most of them here at the hospital.
Q. Do they go and pick those from inventory, or is that something you do?
A. That's what they do.
Q. Now, this Exhibit 1, page one, lists the two scrub nurses being you and Sarah Harden. You've worked with Sarah on a number of occasions in the past, correct?
A. Yes.
Q. Same is true with Elizabeth Rittle?
A. Yes.
Q. Is Sarah Harden also a surgical tech as opposed to a nurse?
A. Correct.
Q. Now -- and I know that this is a

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question I'll later be directing to Elizabeth Rittle, but again sticking with page one of Exhibit 1, there is no assistant listed for Dr. Armstrong. That would mean he was the only surgeon involved in this case, correct?
MR. LUNDQUIST: I'll just object on foundation because she doesn't have a memory of it.
But if you can answer, you can.
THE WITNESS: Yeah, I would assume he didn't have anybody helping him.
BY MR. GINZKEY:
Q. Is that unusual for a total hip arthroplasty that there's no assistant?
A. No.
Q. Is that personal preference of the surgeon, if you know?
MR. LUNDQUIST: Again, form and foundation.
Go ahead and answer though.
THE WITNESS: Yes, personal preference.
BY MR. GINZKEY:

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Q. I'm assuming that means there are other orthopedic surgeons that when they're performing a total hip arthroplasty actually have an assistant surgeon with them, correct?
A. Not another surgeon usually, might be their physician's assistant.
Q. Physician's assistant?
A. Yeah.
Q. Very good. Once the size of the components of the Pinnacle system have been selected by the surgeon, in this case Dr. Armstrong, do you actually open the packages?
A. They open the sterile package to me, and then I open another package on my back table. Because it's inside another sterile container. Then I would open that container and put the prosthesis on the inserter.
Q. On the what?
A. The inserter. Put the cup in.
Q. At any point in time, Pam, are you in a hands-on capacity with respect to the patient himself during one of these total hip arthroplasties?

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A. I don't know what you mean.
Q. And that's a bad question. And I've got just pencilled in a number of instruments. As a surgical tech, you scrub in and you're in the sterile field, correct?
A. Correct.
Q. Both you and Sarah are handing components and instruments to Dr. Armstrong, correct?
A. Yes.
Q. Do you ever actually use, for instance, let's start with scalpels, with respect to the initial skin incision, do you handle the scalpel and actually make the incision?
A. No.
Q. Does Sarah Harden do that?
A. No.
Q. Is that exclusively Dr. Armstrong?
A. Yes.
Q. So you or Sarah may hand him the scalpel, but what he does with the scalpel concerning the patient, that's between him and the patient and you're not involved in that at all, correct?
A. Yes.
Q. Is that also true with respect to electrosurgical equipment, the ESI?
A. Yes.
MR. LUNDQUIST: I know you know what he's going to say, let him finish his whole question first.
THE WITNESS: Sorry.
MR. LUNDQUIST: But as soon as he says it all, then you can go ahead and give your answer, so then our court reporter can type everybody one at a time.
BY MR. GINZKEY:
Q. Is that also true with respect to retractors?
A. What's the question?
Q. You may or Sarah may hand a scalpel to Dr. Armstrong, correct?
A. Correct.
Q. But you don't use -- neither of you use the scalpel on the patient, correct?

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A. Correct.
Q. That's also true with respect to the electrocautery devices, correct?
A. Yes.
Q. Is that also true with respect to the retractors?
A. He puts the retractor in and tells me to hold it here.
Q. But he places it?
A. Correct.
MR. LUNDQUIST: And for clarity, not to interrupt, but you may want to ask what position each of them might have been in. If she can tell you. Because she doesn't have a memory of this, but there are differences between the two scrub nurses.
BY MR. GINZKEY:
Q. Understood. Tell me, Pam, what your position is with respect to, for instance, retractors.
A. I'm just passing instruments. So I hand the instruments to him, he would put the retractor in and maybe ask Sarah to hold it.

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Q. Do you ever hold the retractors?
A. Rarely. When I'm passing.
MR. LUNDQUIST: There's two different roles. Not to interrupt, but it might be easier so you don't have to reask things. She can tell by this because she's worked with Sarah before that she's in one role, Sarah's in another. So your questions are fine, but they're broad. They may --
MR. GINZKEY: Understood.
BY MR. GINZKEY:
Q. Tell me what you can tell by looking at this Exhibit 1, Pam, what your role was as opposed to Sarah's role with respect to this patient, Wes Johnson.
A. The paper doesn't really say here who first scrubbed. But I know I first scrubbed because I'm more experienced orthopedic scrub.
Q. So in your capacity as first scrub tell me what you do as opposed to what Sarah Harden does.
A. I set up the case, I pass the

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instruments, Sarah retracts and suctions.
Q. When you talk about Sarah retracting, does that mean she simply holds the retractors once they've been placed by Dr. Armstrong?
A. Correct.
Q. Neither you nor Sarah place retractors, correct?
A. Correct.
Q. And, again, what I have handwritten in are a number of instruments, and we'll get a little bit repetitious here. But that's the nature of what we're doing here today. Do you ever place a tenaculum?
A. No.
Q. Do you ever place any of the hooks?
A. No.
Q. Or a napkin ring?
A. No.
Q. Or a rongeur?
A. No.
Q. Mallet?
A. No.

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Q. Reamer?
A. No.
Q. Drill?
A. No.
Q. Bone screw?
A. No.
Q. Is that also true of Sarah Harden?
A. Yes.
Q. And then I'm assuming that's also true of the other individuals listed here at the bottom of page one of Exhibit 1? And by that I mean you, Sarah Harden, Elizabeth Rittle, Jonathan Simons, and both Brian Stenger and Jordan Prosser, correct?
A. Yes.
Q. And the second page of this Exhibit 1, and we use -- we attorneys use what are called Bates stamps in the lower right-hand corner, do you see an Advocate 165?
A. Yes.
Q. So looking at that page with respect to Exhibit 1, despite the fact that she's the circulator and doesn't scrub in,

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Elizabeth Rittle apparently does some of the prep with respect to the patient, correct?
A. Yes.
Q. Is that done right in the OR?
A. Yes.
Q. Are you present when that's done?
A. Yes.
Q. Do you assist in that?
A. No.
Q. Then going to what is the third page of this Exhibit 1, Bates stamp 167 in the lower right-hand corner, Elizabeth Rittle does the original count with respect to sponges and sharps, correct?
A. With me, yes.
Q. So it's the two of you for both the initial count and then the final count at the end of the case, correct?
A. Yes.
(An off the record discussion was held.)
BY MR. GINZKEY:
Q. With respect to the counts, I've always been curious that the number isn't

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actually listed. It always has struck me as curious if you say the end count is correct but there's not a number, how do you know that it's correct?

MR. LUNDQUIST: I'll just object to form and foundation and incomplete.

But go ahead.

THE WITNESS: When we count to begin with she has a paper that she writes down, 10 sponges, four needles, 10 Ray-Tecs whatever. Then when we count next time she, you know -- we have, you know, make sure that's the same.

BY MR. GINZKEY:

Q. Gotcha. That is the circulator's role in terms of the counts?

A. Yes.

Q. Where is that kept? Because I didn't see that here and in the charting itself. Where is that piece of paper kept, if you know?

MR. LUNDQUIST: I'm just going to intercede because that has nothing to do with

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this case. So objection, incomplete hypothetical.

And if you know, you can answer.

THE WITNESS: I don't think it's part of the record as long as the count is correct.

BY MR. GINZKEY:

Q. Do you know what's done with that piece of paper at the end of the case?

A. I don't.

Q. Then if we go to the next page of this Exhibit 1, Pam, it's entitled implants, and just for the record it's Bates page 169 in the lower right-hand corner. Again, if we look at the components of this artificial hip, if I'm understanding this correctly, you would or Sarah would be handing these components to the surgeon, but the surgeon would actually be placing them with respect to the patient, correct?

A. Yes.

Q. It's your belief that you were -- your role was as first scrub because I'm

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assuming you have more experience than Sarah Harden, correct?

A. Yes.

Q. Are you able to know if it is you handing these components that are listed on this page 169 to the doctor or if it's Sarah?

A. It was me.

Q. So -- and, again, this is going to get a little bit repetitious, and I apologize, but the acetabular shell, the DePuy component that's first listed, you would hand that to the doctor, but it's Dr. Armstrong that's actually placing that with respect to the patient's body, correct?

A. Yes.

Q. And that's true of the bone screw, the acetabular liner, the femoral stem, and femoral head, correct?

A. Yes.

Q. We go to Exhibit 2, there's handwritten entries or names down at the bottom left that I've highlighted, is that your handwriting?

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A. No.

Q. Is that something that Elizabeth Rittle as the circulator signs?

A. Yes.

Q. And the ST before your name I'm assuming is surgical tech?

A. Yes.

Q. Is there any significance to the fact that your name is listed but Sarah Harden's is not?

A. No.

Q. And some of these components are the same that we just went through on the prior exhibit. But with respect to these components, again, it would be your testimony that either you -- well, in this case it would be you handing -- you hand these components to the doctor, he places them with respect to the patient's body, correct?

A. Yes.

Q. Then if I can have you, Pam, look at Exhibit 3, that is Dr. Armstrong's preference card, it's three pages. You've

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seen that type of form before; have you not?
A. Yes.
Q. There is some handwriting on this Exhibit 3 because there sometimes is a difference between what is part of the preference card that's completed in advance versus what was actually used; do you see that?
A. Yes.
Q. Again, with respect to the numbering that's listed on any of the three pages of Exhibit 3, would that be you filling those numbers out, or would it be Elizabeth Rittle?
A. Elizabeth.
Q. And, again, we've got a number of both components and tools or instruments. Your role would be confined to handing those components, tools, or instruments to the doctors and you don't use any of them with respect to placing them on or in the patient, correct?
A. Correct.

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Q. And let's go to Exhibit 4, that is Dr. Armstrong's four page op note. And I really don't have any questions with respect to page one of Exhibit 4. And, again, we're going to get a little bit repetitious. But you know the difference between sharp dissection versus blunt dissection, correct?
A. Yes.
Q. Do you ever do any of the blunt dissecting in these cases?
A. No.
Q. Looking at that second page of Exhibit 4, we've already talked about the scalpels, we don't need to go over that. But there is identified a Kocher, K-O-C-H-E-R, clamp; do you know what that is?
A. Where?
MR. LUNDQUIST: It's right here: (indicating.)
THE WITNESS: Oh, Kocher.
BY MR. GINZKEY:
Q. I mispronounced it. Do you know what a Kocher clamp is?

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A. Yes.
Q. Again, in this case that would have been placed by Dr. Armstrong, correct?
A. Yes.
Q. Is that a type of clamp that you typically hold during one of these arthroplasties?
A. For a short term.
MR. LUNDQUIST: Again, we're mixing and matching what may happen versus what she can deduce, so to speak, from this case. Because she's -- the first scrub would probably not be doing that if it helps. It's possible the other may have.
BY MR. GINZKEY:
Q. Then let's just establish that on the record. It would be the case, would it not, Pam, that the first scrub would be handing components and instruments to the doctor. With respect to holding retractors, that would be the second scrub?
A. Yes.
Q. So in this particular case given

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the fact that you were the first scrub, more likely than not you would not have been holding any of the retractors, correct?
A. Correct.
Q. With respect to holding the retractors, does the second scrub ever reposition those?
A. No.
Q. If those clamps or retractors need to be repositioned, is it the doctor that always does that?
A. Yes.
Q. And we've identified the Kocher clamp, there's an Alexis retractor, a Cobra retractor, a Hibbs retractor. Again, in this case, Sarah Harden might be holding those, it would not be you that was holding them, correct?
A. Yes.
Q. But neither you nor Sarah would be placing the retractor or repositioning them, correct?
A. Correct.

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Q. And if we go to what would be the third page of this Exhibit 4, second full paragraph, there's reference to a femoral broach, B-R-O-A-C-H, what is that?
A. It's what's going to go down the actual stem. It's on a big handle. It goes up graduated sizes. It goes down the stem to make room for the prosthesis.
BY MR. GINZKEY:
Q. Is that anything that you actually use on the patient's femur?
A. Not me, no.
Q. And Sarah doesn't do that either, correct?
A. No.
Q. That's exclusively the surgeon?
A. Yes.
Q. And is the same true with respect to the Morse, M-O-R-S-E, taper?
A. Yes.
Q. Do you have any involvement with the patient after he leaves the OR?
A. No.

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Q. In this case in his discharge summary, which I didn't mark here today, Dr. Armstrong makes reference to a femoral nerve palsy, do you have any knowledge about that in this case?
A. No.
MR. GINZKEY: That was the only questions I have. Thank you, young lady.
THE WITNESS: Certainly.
MR. BRANDT: Thanks, Pam, I don't have any questions.
EXAMINATION BY MR. LUNDQUIST:
Q. I have a few questions, Pam. These will be easy, and they're going to be somewhat repetitive. But to kind of summarize everything, first of all, you have no independent memory whatsoever of this procedure, correct?
A. Correct.
Q. You are able to deduce some things by looking at the records simply by knowing the typical, customary relationship you and Sarah have in a surgery like this, correct?

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A. Yes.
Q. However, after you review all of the records you still don't have an independent memory, you just know certain things because it says so in the records, correct?
A. Correct.
Q. All of the items that are listed on Exhibit 1 for identification, Mr. Ginzkey hand wrote and made some lists of a number of surgical tools I will call them, scalpels, electric cautery, retractors, tenaculum, napkin rings, rongeurs, mallets, reamers, drills, screws, and there were some other items listed in the operative report prepared by Dr. Armstrong.
A. Okay.
Q. I just want to make sure for the record you personally based upon your knowledge of the custom and practice that you had in this type of surgery, you never exercised any independent control whatsoever over any of those items as they contact or

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pertain to the patient, correct?
A. Correct.
Q. And based upon your knowledge of the custom and practice that you would have when working with Sarah Harden, it's also correct to say that Sarah would have similarly exercised no independent control over any of those items with respect to the patient, correct?
A. Correct.
Q. Hypothetically, if Sarah as the second scrub was asked to hold a retractor, it would only be after it was initially placed by the doctor and it would only be according to the doctor's directions, correct?
A. Correct.
Q. And Sarah would not move it or do anything or reposition it at all until the doctor made those changes, if necessary?
A. Correct.
Q. Based upon your review of the materials and knowing what your custom and practice is in your role here handing

instruments and hardware to the surgeon, is it fair to say that to the best of your knowledge all your care and conduct in this case met the applicable standard of care for nursing, correct?

A. Yes.

Q. And same question, you would have acted as a reasonably careful nurse to the best of your knowledge in all respects based on your review of the materials, correct?

A. Yes.

MR. LUNDQUIST: Thank you.

MR. GINZKEY: No other questions. Signature?

MR. LUNDQUIST: Reserved.

(END OF DEPOSITION.)

FURTHER DEPONENT SAYETH NOT;

BY AGREEMENT SIGNATURE RESERVED.

STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

CERTIFICATE

I, Cindy M. Scribner, CSR-RPR, License #084-004465, a Notary Public duly commissioned and qualified in and for the County of Peoria and State of Illinois, DO HEREBY CERTIFY that, pursuant to notice, there came before me on the 22nd day of July, A.D., 2019, at 1304 Franklin Avenue, Normal, Illinois, the following named person, to wit:

PAMELA ROLF,

called by the plaintiff who was by me first duly sworn to testify to the truth and nothing but the truth of her knowledge touching and concerning the matters in controversy in this cause and that she was thereupon carefully examined upon her oath, and her examination immediately reduced to shorthand by means of stenotype by me.

I ALSO CERTIFY that the deposition is a true record of the testimony given by the witness,

that the reading and signing of the deposition by the said witness were expressly reserved, and that the necessity of calling the court reporter at time of trial for the purpose of authenticating said transcript was waived.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand at Peoria, Illinois, this 31st day of July, A.D., 2019.

CSR-RPR

STATE OF ILLINOIS)
)
COUNTY OF PEORIA)

I, Pamela Rolf, do hereby certify that I have read the foregoing transcript, consisting of pages numbered 1 through 41, inclusive, and that the same is true and correct, except as may be noted on the attached sheet(s).

Dated at Normal, Illinois this _____ day of _____, 2019.

_____

STATEMENT OF CORRECTION

Page and Line Number:_____

Reason:_____

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Deposition of

Lucas Armstrong, MD

October 15, 2019

William "Wes" Johnson v. Lucas Armstrong, et al.

Gina Fick RMR, CSR

P.O. Box 8141 • East Peoria, IL 61611
Phone: (309) 264-0565 • fickrmr@yahoo.com

EXHIBIT D

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF ILLINOIS
MCLEAN COUNTY

WILLIAM "WES" JOHNSON,)
)
Plaintiff,)
)
-vs-) No. 2018 L 0000126
)
LUCAS ARMSTRONG, MCLEAN)
COUNTY ORTHOPEDICS, LTD.,)
SARAH HARDEN, PAMELA)
ROLF, and ADVOCATE HEALTH)
AND HOSPITALS CORPORATION)
d/b/a ADVOCATE BROMENN)
MEDICAL CENTER,)
)
Defendants.)
)
and)
)
BRIAN STENGER and JORDAN)
PROSSER,)
Respondents)
In Discovery.)

THE DISCOVERY DEPOSITION OF LUCAS ARMSTRONG, MD, a defendant, called by the Plaintiff, for examination pursuant to notice, taken before Gina Fick, Illinois CSR 084-003872, CRR, RMR, on Tuesday, the 15th day of October, 2019, commencing at the hour of 9:05 a.m., at McLean County Orthopedics, 1111 Trinity Lane, Suite 111, in the City of Bloomington, County of McLean, and State of Illinois.

PRESENT:
JAMES P. GINZKEY, ESQ.
221 East Washington Street
Bloomington, Illinois
BY: James P. Ginzkey, Esq.
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for Sarah Harden, Pamela Rolf and
Advocate Health and Hospitals;

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(Exhibit Nos. 1 though 35 premarked.)

LUCAS ARMSTRONG, MD,
having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. GINZKEY:
Q. Will you please state your name for the record.
A. Lucas Armstrong.
Q. Dr. Armstrong, your counsel handed me a curriculum vitae, which I've marked as Exhibit 36. I just have a couple questions about that. Is it relatively up to date?
A. I would say in the last two years, relatively.
Q. Okay. If I'm following this correctly, you would have served an orthopaedic surgery residency at the University of Kansas-Wichita, correct?
A. Correct.
Q. Were you primarily at one hospital in Wichita?
A. I was primarily at two hospitals in Wichita.
Q. What were those institutions?
A. One was Wesley Medical Center; it's W-e-s-l-e-y.
Q. Got it.

A. The other one was Saint Francis, and that has gone through a couple of different ownerships, and I can't tell you.
Q. Okay. On Page 2 of that curriculum vitae there was a presentation that you gave in connection with peripheral nerve healing and repair.
Would you still have copies of whatever documents were associated with that presentation?
A. I do not.
Q. Okay. Then, Doctor, let me hand you some exhibits that I've marked.
MR. BRANDT: Okay. Thank you.
MR. LUNDQUIST: Thank you, sir.
BY MR. GINZKEY:
Q. And Exhibit 1 is three pages, and they're copies of answers to questions that have been propounded in this case.
And looking at Page 1 of Exhibit 1 there was a suit in Kansas by the name of Balandran versus Armstrong. I'm assuming that that was -- you were a resident at that time?
A. That is correct.

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Q. Do you recall what the allegations in that case were?
A. I do recall the outcome of the case, but I do not recall the direct -- the true allegations --
Q. Okay.
A. -- of it.
Q. And the outcome of the case was it was dismissed, correct?
A. I was dismissed from this case.
Q. Understood.
I was in one of these depositions two weeks ago, and the answer to that question had changed meaning that between the time that the interrogatories were answered by the doctor and the time of the deposition there was another lawsuit that had been filed.
Other than the case of Wes Johnson that we're here to discuss this morning, is this Balandran the only other case filed against you?
A. Yes.
Q. Then if we can go to Page 2 of that Exhibit 1,

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it's Interrogatory 4, which simply asks, "Identify by date, time and source document any and all entries and/or portions of plaintiff's charting," plaintiff being Wes Johnson, "which are inaccurate or incomplete."
And, again, it's been my experience in these depositions that in preparing, the physician goes through the charting and does find one or two typos or misstatements.
And, again, my question to you would be, has your answer to Interrogatory 4 changed? The answer was, "None to my knowledge," meaning you didn't see any inaccuracies in the charting for Wes Johnson. Does that remain the case?
MR. BRANDT: We talked about one yesterday.
A. I did identify one. I cannot identify the date, time and source.
MR. GINZKEY: Okay. We can go off the record.
MR. BRANDT: Yes.
(Discussion off the record.)
MR. GINZKEY: If we can go back on

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the record.
BY MR. GINZKEY:
Q. Doctor, as I understand it, the last office visit with Wes Johnson contains a statement that the EMG was normal, and it should actually read the EMG was abnormal, correct?
A. Correct.
Q. And that's the only typo or other error that you saw in the charting, true?
A. True.
MR. BRANDT: Just, for the record, that's a visit of 6/27/17.
BY MR. GINZKEY:
Q. Then if we can go to what would be Exhibit 2, that is a copy of a portion of the Complaint that's pending in this case, and if we can go to Page 2 of Exhibit 2, Paragraph 4, one of the allegations as stated in Paragraph 4 is, "Following Armstrong's surgery Wes Johnson was discharged from the hospital with postoperative femoral nerve palsy," and that allegation was admitted as true, correct?
A. True.

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Q. It would also be true that it was your left hip arthroplasty that caused the postoperative femoral nerve palsy, true?
MR. BRANDT: Object to the form. You can answer.
A. That depends.
BY MR. GINZKEY:
Q. What does it depend on?
A. It depends on a lot of different things.
Q. Can you tell me what those different things are?
A. Every patient is different. There is a myriad of different reasons.
Q. Let me see if I can approach it in this fashion: Prior to the total left hip arthroplasty that we're here to discuss, did you document any femoral nerve palsy in Wes Johnson concerning his left leg?
A. No, I did not.
Q. Isn't it the case that prior to your surgery Wes Johnson did not have a left femoral nerve palsy?
A. Correct.

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Q. And when you say that the answer to No. 4 depends, are you indicating that there is different portions of the surgery where such a nerve palsy can happen, or are you suggesting that there is some idiosyncratic etiology for Wes Johnson's femoral nerve palsy?
A. I'm saying that a femoral nerve palsy after a total hip replacement can be caused by many different things.
Q. And let me explain where I'm coming from. I'm not suggesting that there aren't different etiologies from a femoral -- or for a femoral nerve palsy following THA, but in this case it appears to me that it was the THA that caused the femoral nerve palsy that the patient has, and wouldn't you agree with that?
A. I would agree before the total hip arthroplasty he did not have a femoral nerve palsy --
Q. Okay.
A. -- and after the total hip arthroplasty he did have a femoral nerve palsy.
Q. If I can have you, Doctor, go to the bottom of this second page of Exhibit 2, Paragraph 9.

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A. Uh-huh.
Q. And Paragraph 9 is an allegation that reads, "The lesion appears complete with no evidence of voluntary motor unit potential activation."
The answer that was filed indicated that there was either no knowledge or insufficient knowledge with respect to that allegation.
And if I can have you go to Exhibit 3, it's four pages down -- five pages down in your documents, this Exhibit 3 is the EMG report of Dr. Carmichael concerning his performance of an EMG on Wes Johnson on January 11 of 2017, correct?
A. Correct.
Q. And this Exhibit 3 would be part of Wes Johnson's chart here at McLean County Orthopedics, correct?
A. Correct.
Q. So you have access to this Exhibit 3 in Wes Johnson's charting here at your office at McLean County Orthopedics, correct?
A. Correct.

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Q. And if we look at the first full paragraph at the top of Page 1 of this Exhibit 3 under Diagnostic Interpretation, about three sentences down it says, "At this time the lesion appears complete with no evidence of voluntary motor unit potential activation." That's what it says, correct?
A. Correct.
Q. What evidence, statements or documents are you aware of, as you sit here today, to suggest that that statement by Dr. Carmichael in this Exhibit 3 is not accurate?
MR. BRANDT: Object to the form, unless we put a time on it, but you can answer it.
A. I would agree on January 11, 2017, that there -- the lesion appears complete per this study.
BY MR. GINZKEY:
Q. Okay. The lesion appears complete, and there is no evidence of voluntary motor unit potential activation, correct?
A. Correct.

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Q. And sticking with that Diagnostic Interpretation paragraph at the top of Page 1 of Exhibit 3, the statement made by Dr. Carmichael is, "There is a severe left femoral neuropathy that is specific to the branches of the vastus lateralis and rectus femoris muscles," correct?
A. Correct.
Q. Those are two of the four muscles in the quadriceps?
A. Correct.
Q. When Dr. Carmichael says that the lesion appears complete with no evidence of voluntary motor unit potential activation, doesn't that mean that both the vastus lateralis and rectus femoris are completely denervated?
MR. BRANDT: Objection with respect to time.
A. That depends on what time you're...
BY MR. GINZKEY:
Q. All right. I understand what you're saying. Let's take January of '17. Based on what's written on Page 1 of this Exhibit 3, isn't it

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true that in January of 2017 Wes Johnson's vastus lateralis and rectus femoris muscles in his left quadriceps were completely denervated?
A. According to the study, yes.
Q. Are you aware of any subsequent studies, any subsequent clinical findings that would suggest that at this point in time, and by that I mean mid October of 2019, that the patient Wes Johnson has recovered any of his motor function for either the vastus lateralis or rectus femoris muscles of his left quadriceps?
A. I have not examined the patient. No, I am not aware of any studies.
Q. Is Dr. Carmichael still with McLean County Orthopedics?
A. As of today, yes.
Q. Is that status going to change?
A. It is going to change.
Q. Do you have any idea where he might be going?
A. He will be practicing in Peoria.
Q. Do you happen to know what group he might be with in Peoria, he might be going to?
A. I believe he is going to Midwest Orthopaedics.

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Q. Okay. Thank you.
Then, Doctor, if we can go back to Exhibit 2 and move to what would be Page 4. I've highlighted Paragraph 12. And I've got some preliminary questions. Would you agree with me that femoral nerve palsy is a known complication of a THA?
A. I would agree it's a known complication.
Q. Would you also agree that in the vast majority of those cases where there is a femoral nerve palsy secondary to THA that that palsy is temporary in nature?
MR. BRANDT: Object to the form.
I'm not sure what you mean by "vast majority," but you can answer.
A. I do agree that the femoral nerve palsy would be transient.
BY MR. GINZKEY:
Q. Wouldn't you agree that it is unusual for a femoral nerve palsy secondary to THA to be permanent?
MR. BRANDT: Object to the form.
I don't know what you mean by "unusual."

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You can answer.
A. It is a possibility that it is permanent.
BY MR. GINZKEY:
Q. But statistically isn't that possibility very slim?
MR. BRANDT: Same objection. I don't know what you mean by "slim."
A. I can't answer the question without a percentage to agree to.
Q. Let's move on from Exhibits 3 and 4 and go to Exhibit 5. Exhibit 5 would be a true and accurate copy of your dictated Discharge Summary in connection with the THA that we're discussing, correct?
A. Correct.
Q. And part of what you dictated I've got highlighted "postoperative femoral nerve palsy." That is what you dictated, correct?
A. Correct.
Q. Then I want to go from there. If I can have you go to Exhibit 8. For the record, Exhibit 8 is an abstract of a peer reviewed medical journal article that begins with the phrase or

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the title "Is the Anterior Approach Safe," and it's coauthored by Drs. Gorab and Matta.
You agree with me that both Drs. Gorab and Matta are recognized as authoritative authors with respect to THAs?
MR. BRANDT: Object to the form.
MR. LUNDQUIST: I'll join.
A. I would agree that Dr. Matta has a lot of publications on total hip replacements.
BY MR. GINZKEY:
Q. Are his publications considered authoritative?
MR. BRANDT: Object to the form.
MR. LUNDQUIST: Same objection.
A. That depends.
Q. Doesn't Dr. Gorab also have quite a number of peer reviewed medical journal articles concerning THAs?
A. I am unaware of Dr. Gorab's CV.
Q. Okay. In any event, and I'm paraphrasing, and I've highlighted what I'm paraphrasing in this Exhibit 8, Drs. Gorab and Matta were two of the coauthors with respect to a study cohort that consisted of 5,090 consecutive primary

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procedures, and we're talking about THAs, and what they documented in their study was that there were only two sciatic nerve palsies and one peroneal nerve palsy. Isn't that what's reflected in Exhibit 8?

MR. BRANDT: Take your time and look through this before you answer, please.

THE WITNESS: Okay.

A. Now, that I've read it, will you please restate the question, because I've kind of forgot.

MR. GINZKEY: Yeah, if you can reread that, Gina.

(Record read.)

A. That is what is documented in the Results section of this paper, of this abstract.

Q. And you would agree with me, would you not, that there are other peer reviewed medical journal articles with reference to this topic, and by that I mean nerve palsies following THA, that document similar percentages?

MR. BRANDT: Object to the form. I'm not sure what you mean.

A. I actually disagree.

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BY MR. GINZKEY:

Q. Okay. Tell me why you disagree.

A. There are multiple studies in peer reviewed journals showing different nerve palsies from different approaches at a much higher rate than 3 per 6,000.

Q. What are those approaches that have a higher incidence of nerve palsy for THA?

A. There are multiple different approaches to the hip, and there are multiple studies stating the incidence of nerve palsy is roughly equivalent.

Q. Regardless of approach?

A. Correct.

Q. If I can have you go back to Exhibit 6, that is a one-page document. And, for the record, that's what we attorneys call a Certificate of Merit, it's appended to the Complaint, and what I've highlighted is the author's statement, "While temporary injury to the patient's lateral femoral cutaneous nerve is a known risk of the direct anterior approach in total hip arthroplasty, direct trauma or traction injury

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causing permanent damage to the femoral nerve involved here is not an expected outcome of anterior approach total hip arthroplasty."

Do you agree or disagree with that statement?

MR. BRANDT: Object to the form. I don't know what he means by "expected outcome." You can answer.

A. I would agree that it is a known complication from a total hip replacement.

BY MR. GINZKEY:

Q. That permanent nerve damage is a known complication is your testimony, correct?

A. Nerve damage, whether it be transient or permanent, from a total hip replacement is a known complication.

Q. Okay. Let me have you look at Exhibit 7. That's a consent form, and specifically what I'm interested in is Paragraph 4, which reads, "My Physician or his/her associates has/have fully explained to me the diagnosis of my condition, the nature of the proposed care and the material risks, complications and adverse

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outcomes potentially associated with the proposed care, including, but not limited to, death."

It's true, is it not, that you never told Wes Johnson that permanent femoral palsy was a risk of the procedure you were about to perform?

A. I would agree that I specifically stated there is a possibility of nerve damage during the procedure.

Q. And I understand that. But the question is, permanent nerve damage, did you ever indicate to Wes Johnson that there is a risk that there is going to be permanent nerve damage to your quadriceps as a result of this procedure?

A. I do not recall specifically stating that, but I definitely said there is a possibility of nerve damage.

Q. When would that statement have taken place? Where were you, where was Wes and where in the scope of the procedure --

A. I can -- may I look back in my records?

Q. Absolutely.

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MR. BRANDT: Hang on. Just so everybody is on the same page, I'm going to hand him, this would be the visit that he had on -- bear with me -- this immediate preop visit, and I'm just looking for the date here, 6/27.

A. My statement is, The risks, comma, benefits, comma, complications and alternatives to total hip arthroplasty were discussed. The risks are including, comma, but not limited to, comma, bleeding, comma, infection, comma, nerve and vessel damage, comma, fracture, comma, need for further surgery, coma, limb length discrepancy, comma, dislocation, and thromboembolic events, such as DVT, comma, PE, comma, stroke, comma, MI and death.

Q. Let me have you move, Doctor, to Exhibit 9. That's, for the record, a part of the charting from Advocate BroMenn Medical Center where the surgery in question took place, and what you would have been using would have been DePuy's Pinnacle System, correct?

A. On the acetabular side, correct.

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Q. If I could have you look at Exhibit 10.

It might be before that. It's this grid.

MR. BRANDT: Yeah, we've got it.

A. Oh, sorry.

MR. BRANDT: Oh, I'm sorry.

BY MR. GINZKEY:

Q. Under that Exhibit 10 marker, there is a legend that says DePuy 000589. I want you to assume that that's what we attorneys call a Bates stamp.

A. Oh, way down here, yeah.

Q. Yes. Just meaning that this was produced by DePuy in this case.

A. Okay.

Q. And what they had been asked to produce was their records of your training with respect to the use of their products, and what they have got listed here are two essentially CME courses, one is for -- the second one is for the Attune Knee System, which is not relevant, so we're going to skip that, but what is reflected here is that on November 13 of 2015

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you did attend in Rosemont, Illinois, CME with respect to the anterior approach for total hip arthroplasty. Do you see that?

A. Yes.

Q. Then if we go to Exhibit 11, that is part of the handouts from that course. If you look at the title at the top of Page 1 of Exhibit 11 and the date and the place, it's Anterior Approach for Total Hip Arthroplasty taught by Dr. Matta at Rosemont, on November 13, 2015. So that would be the course that you attended, correct?

A. I attended this course. I'm pretty certain Dr. Matta was not there.

Q. Okay. If I can have you go to Page 2 of this Exhibit 11, I've got highlighting, and this handout states, "I encourage you to take advantage of the ongoing support available to you. These tools include visitation sites and regionally based, cadaveric SMART labs and 3-D animation."

My question to you would be, you didn't attend any of DePuy's cadaveric training

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labs, did you?

A. I am uncertain whether I -- that day we did a cadaver.

Q. Okay. Were you in a hands-on position that day?

A. Yes.

Q. What about -- let me back up.

If you recall, were there any other cadaveric labs with respect to DePuy's Pinnacle System that you attended?

A. No.

Q. Did you participate in any of the DePuy's 3-D animation training sessions?

MR. BRANDT: I object to the form. I'm not sure what that is. But you can answer, if you know.

A. If the 3-D animation is the chapter video, then yes.

BY MR. GINZKEY:

Q. Okay. Did you assist on any THAs prior to starting to use the DePuy Pinnacle System yourself?

A. Absolutely.

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Q. Okay. How many and where, if you recall?
A. In my fellowship for total hips we used the Pinnacle System from multiple approaches.
Q. So University of Kansas at Wichita?
A. In my fellowship --
Q. Gotcha.
A. -- hip and knee at Virginia Commonwealth.
Q. VCU?
A. Correct.
Q. Okay.
A. Virginia Commonwealth University Medical College of Virginia.
Q. Let me have you flip to Exhibit 12. That, quite frankly, is just a screen shot off a website of the Anterior Hip Foundation. Do you belong to that foundation?
A. I do not.
Q. Have you ever attended any of the training labs promulgated -- or sponsored, I should say, by the Anterior Hip Foundation?
A. I can say that I've never been to a training lab solely sponsored by this foundation.
Q. Let me give a preface for this next question.

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We attorneys have to engage in continuing legal education, CLE as opposed to CME. We also are obligated to file proof of what courses we've attended with the Illinois Supreme Court.
Is there -- and I should back up. So there is essentially a database for Illinois lawyers where you can go and see what courses they have taken through the years.
Is there a similar database for orthopaedic surgeons?
A. I am unaware of any database --
Q. Me too.
A. -- but we do have to perform CMEs.
Q. I understand.
Do those get reported to, for instance, the Illinois Department of Professional and Financial Regulation?
A. This is horrible of me, I do my CMEs, and I give them to my office staff, and they get filed to the authorities.
Q. If you wanted to ask somebody here at MCO to whom or what entity proof of those CME credits are filed with, who would you ask here at MCO?

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We can get that answer from him or her.
A. Angie Yoches, Y-o-c-h-e-s.
Q. Thank you.
If we can go to Exhibit 13. That's just a picture of an anterior approach broach. And my first question would be, it's true, is it not, that that broach is not a part of the total hip arthroplasty box, for lack of a better term, that the reps bring to the surgeries, is it?
A. I do not understand the question.
Q. Okay.
MR. BRANDT: He'll rephrase it.
BY MR. GINZKEY:
Q. With respect to the components of the artificial hip, the acetabulum shell, the liner, those components are actually brought to the operating room by the DePuy reps, correct?
A. Correct.
Q. And it's my understanding that what the reps bring are the components that are going to be used in the artificial hip as opposed to, for instance, Stryker drills; they don't bring the

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Stryker drills, do they?
A. Exhibit 13 is not an implant, and I do not know who brings the instruments. I'm unaware of who owns the instrument sets and who brings them.
Q. Would you have used an anterior approach broach such as depicted in Exhibit 13 for Wes Johnson's THA?
A. Yes.
Q. If we look at Exhibit 14, that is a list -- actually it's your preference card for hip arthroplasty, and I certainly may have missed it, but looking the three pages of Exhibit 14, can you tell me where that anterior broach is listed?
MR. BRANDT: Take your time.
A. I'm unaware of where. I do not see it listed specifically.
BY MR. GINZKEY:
Q. And if we look at Exhibit 15, firstly, my question would be, the four pages comprising Exhibit 15 would be a true and accurate copy of your dictated operative note for the surgery in question, correct?

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A. Correct.
Q. And this might take a minute, but is the anterior approach broach mentioned in your dictated op note?
MR. BRANDT: Take your time.
A. Page 3 of the operative note, there is a large paragraph at the top of the page, about halfway down -- it's a little bit more than halfway down -- "Box osteotome was used to set the appropriate version. The femur was sequentially broached to the appropriate size."
Q. So the word -- well, the verb "broached" refers in essence to what we have depicted in Exhibit 13, correct?
A. Correct, broach refers to using the broach.
Q. I follow.
If we go to Page 1 of this Exhibit 15, this op note, you make reference to developmental dysplasia. What do you mean by that?
A. The simple statement is he had a congenital problem with his hips, and he has a shallow hip socket.

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Q. Is that specifically on the left side, or would it be for both, if you know?
A. He already had a total hip replacement on the right side when I met him. I am unable to describe the preoperative deformity on the right side.
Q. Okay. But on the left side, and I'm a little bit confused here, because 15, the dictation, says developmental dysplasia. You just mentioned congenital. Wouldn't those be two different etiologies?
A. They are one and the same.
Q. Okay. That shallow hip socket, how is that diagnosed? Is it diagnosed clinically, by imaging, both?
A. In this case it was done by imaging.
Q. Would that imaging have been here at MCO?
A. I cannot recall specifics, but there were preoperative radiographs done that I evaluated prior to surgery.
Q. And that was going to be my next question. Did you actually look at the imaging, or did you rely on the radiologist's report?

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A. I viewed the image.
Q. So preop imaging that you reviewed for Wes Johnson's left hip led you to diagnose that he had a shallow hip socket on the left, correct?
A. Correct.
Q. Does preexisting dysplasia of the hip increase the risk of neurological injury in a THA?
A. Yes, it does.
Q. Was that discussed with the patient?
A. I do not recall.
Q. Excluding for the sake of this question whether the neurological injury secondary to THA is transient versus permanent, tell me what your understanding of the percentage risk of neurological injuries secondary to THA is overall.
A. That really depends on the patient.
Q. Have you seen any published statistics similar to one of the prior exhibits we had here today?
MR. BRANDT: Are you talking about a statistic?
MR. GINZKEY: Yes.
MR. BRANDT: Yeah.

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A. I've read multiple studies on total hip replacement giving different numbers.
BY MR. GINZKEY:
Q. Okay. By how much does the risk of neurological injury subsequent to THA increase due to the presence of dysplasia?
A. That really depends on the amount of dysplasia the patient has preoperatively.
Q. Is there an amount of dysplasia, preexisting dysplasia, that contraindicates the performance of the THA?
A. To my knowledge, there is not.
MR. GINZKEY: Off the record for just a second.
(Discussion off the record.)
Q. Doctor, if I can have you go to Exhibit 16, that is the charting of the anesthesiologist in connection with the surgery in question, and my only question is, the surgery start time is charted as 0845 hours and the surgery finish at 1032 hours.
To the best of your recollection, does that seem approximately correct?

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A. I have no true recollection of the timing of the surgery. I would have to trust this document.
Q. Good enough.
Then during your procedure you use a c-arm, correct?
A. Yes, sir.
Q. And Exhibit 17 through 21 would be fluoroscopic images from the c-arm, correct?
A. Correct.
Q. Exhibit 17, tell me what the significance of the two dark lines -- the two dark horizontal lines are. What are those?
A. First off, these are bad copies. And I know what they're picturing, though.
MR. BRANDT: Okay. That's fine. Go ahead. He's just wanting to know what these two lines represent, if you can tell.
A. Yes, I know.
BY MR. GINZKEY:
Q. What are the two horizontal lines?
A. There are pieces of -- they're long straight pieces of metal that the surgeon uses to judge

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leg length.
Q. The top horizontal line on Exhibit 17, is that the intertrochanteric line?
A. I cannot confidently say yes or no because of the poor quality of these images. I think it is through the center of the femoral head, the top one.
Q. Okay. Is the bottom one then from one greater trochanter to the other?
A. Again, I am assuming so.
Q. Okay. Let me hand you --
MR. GINZKEY: Let's go off the record.
(Discussion off the record.)
MR. BRANDT: We can go back on the record.
We have a glossy of 17 that I don't know if it's better or not, you can answer that question. And then you're going to explain what that shows compared to the copy you looked at.
THE WITNESS: Okay.
MR. BRANDT: Is that fair?

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THE WITNESS: Fair.
MR. BRANDT: Okay.
THE WITNESS: So Exhibit 17 is an intraoperative fluoroscopic image, and the top line is the intertrochanteric line before I started the surgery.
BY MR. GINZKEY:
Q. Okay. What would the bottom horizontal line then be, or is the top the femoral neck?
A. The bottom is something in the picture that -- it's probably the Bovie cord. It's nothing.
Q. Gotcha.
MR. BRANDT: Would that be artifact?
THE WITNESS: Yeah, artifact.
Q. I follow.
A. I took this to demonstrate a previous leg length discrepancy.
Q. That was my next question. So you've already answered that.
Is that something you attempt to correct during your surgery, the leg length discrepancy?

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MR. BRANDT: Go back to your report, please. It's Exhibit 15. You can use that.
I think I can find it for you, if you want. Take your time and read that through before you answer.
A. So speaking with the patient preoperatively, if they have a leg length discrepancy which bothers them, it can be corrected with a total hip replacement within reason.
BY MR. GINZKEY:
Q. Was that attempted with respect to Wes Johnson?
A. Yes.
Q. Those are my only questions on that Exhibit 17.
If we can go to 18, and, again, it's poor quality. I can hand you mine. All that I want to know is, what is depicted in Exhibit 18?
A. Exhibit 18 is insertion of the acetabular shell into the pelvis.
Q. What are the instruments that are depicted?
A. There is an insertion handle and a retractor.
Q. And then Exhibit 19. And just, for the record,

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these fluoroscopic images are in chronological order. So Exhibit 19 is a subsequent. Does that show just the retractor?
A. And the implanted acetabular component.
Q. Okay. Sure.
20 shows the implant, correct?
MR. BRANDT: This is much better.
If you don't understand the question, you can ask him to rephrase it.
THE WITNESS: No.
Due to the quality, I am uncertain if it's the broach or the implant and actually what time in the surgery this x-ray was taken.
BY MR. GINZKEY:
Q. There is a time; I don't know if it will help you out.
A. No. I mean, I don't know the -- I don't know.
Q. Okay.
A. I cannot say if it is the broach -- it is either the broach, the trial or the implant.
Q. Okay.
A. I think it is the implant.
MR. BRANDT: Well, if you don't

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know --
THE WITNESS: I don't know for certain.
MR. BRANDT: That's the best answer.
BY MR. GINZKEY:
Q. Okay. 21 is a similar photo, but if I'm understanding your earlier testimony correctly, we've got that straight piece of metal again to show the intertrochanteric line, correct?
A. This is the -- these both are the implants --
MR. BRANDT: So when you say "both," you mean Exhibits 20 and 21?
THE WITNESS: Excuse me. 20 and 21.
MR. BRANDT: It's okay.
THE WITNESS: These are both the implants, and I am evaluating the line across the bottom of the ischiums versus the intertrochanteric line and the --
BY MR. GINZKEY:
Q. And what's the purpose of making that determination?

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A. To evaluate for leg length discrepancy.
Q. Okay. Exhibit 22 is not a fluoroscopic image; it's a portable x-ray postop. And looking at that, Doctor, it appears to me that your acetabular shell and liner are larger than what had been implanted on the patient's right side. Would my conclusion be correct?
A. On this radiograph it does appear larger.
Q. I want you to assume that the patient's right hip implant had been performed by Dr. Chris Dangles. Do you know Dr. Dangles?
A. Yes, I do know him.
Q. Would you have reviewed any of his records concerning his right hip implant prior to your surgery?
A. I do not specifically recall. I do try and get sizes from previous surgery.
Q. Okay. If you know, does Dr. Dangles do most of his work at Gibson Area Community Hospital?
A. Yes, he does.
Q. Is there a staff member here at MCO that tries to acquire that information; in other words, again, a legal analogy would be I try to get

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similar lawsuits, but I have a paralegal or some staff member do it. Is there somebody here that tries to obtain that for you?
A. No specific person.
Q. If you obtain that information, is it kept in the patient's chart?
A. That depends.
Q. Did you, in reviewing for this deposition and going through your charting, see any of Dr. Dangles' information concerning sizing and implants that he used?
A. No, I did not.
Q. And looking at Exhibit 23 -- and let me hand you the glossy because that's the best image -- I want you to assume that this is a postop office visit here at MCO, and I believe the legend means it's from October 24 of 2016 at 11:33 in the morning, that's my understanding. In any event, so it's after that.
If you can take a look at that. Does there appear to be a difference in orientation with respect to the implants, right versus left?

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A. Yes.
Q. Why would that be?
A. There are multiple reasons why it could be.
Q. In this case what would some of those reasons be?
A. Well, the right femoral stem has subsided and it's shorter. The main reason the orientation is most likely different is intraoperative assessment and stability.
Q. Okay. Meaning as you're doing the implant you're making those assessments and trying to achieve the most stable implant, correct?
A. Correct.
Q. Okay. Moving to Exhibit 24, the acronym ASIS would refer to the anterior superior iliac spine, correct?
A. Correct.
Q. And 24 is simply a diagram of the ASIS, true?
A. It's a hemipelvis and a femur with the ASIS being the only thing labeled.
Q. Going to Exhibit 25, again, that's just a stock image of a screen shot off the internet. I've encircled in black magic marker what would be

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the greater trochanter, correct?
A. Along with the femoral neck and the lesser trochanter.
Q. Okay. I follow.
And ASIS, is that labeled appropriately with respect to the anterior superior iliac spine?
A. No, it is not.
Q. Okay. Tell me what is inaccurate.
A. The ASIS is right next to the pelvic rim -- the label is right next to the pelvic rim, and the ASIS is about halfway between the pelvic rim and the top of the acetabulum.
Q. Okay. So on this Exhibit 25, the acronym ASIS is a little bit too high?
A. I agree with that.
Q. Okay. 26 is --
THE WITNESS: Real quick, can we take a break so I can use the rest room?
MR. GINZKEY: Absolutely.
THE WITNESS: Thanks.
(Recess taken.)
BY MR. GINZKEY:

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Q. Doctor, if I can have you look at Exhibit 26. That's two pages from a DePuy brochure, and actually my only questions are with respect to the second page of this Exhibit 26, because the top photo on the second page of that exhibit shows preparation for a left hip arthroplasty, correct?
A. Correct.
Q. Now, there are marks in that top photo. Do you actually draw markings in your surgery?
MR. BRANDT: On the patient's skin you're talking about?
MR. GINZKEY: Actually there is a wrap --
MR. BRANDT: I'm sorry.
MR. GINZKEY: -- a plastic wrap --
MR. BRANDT: You're right.
MR. GINZKEY: -- an adhesive, but yes.
BY MR. GINZKEY:
Q. Did you draw on Wes Johnson's left hip where the greater trochanter was and where the ASIS was?

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A. No, I did not. I did identify them prior to the surgery, but I did not specifically mark them.
Q. And what this says, this Exhibit 26, that second page, top photo, it says, "Start the incision approximately 3 centimeters lateral and 1 centimeter distal to the ASIS, and continue in a posterior and distal direction toward the anterior border of the femur."
Do you see that?
A. I do see that.
Q. And it says, "The incision will be 8 to 9 centimeters and parallel with the fibres of the tensor fascia lata muscle." Do you see that, that statement?
A. I do check.
Q. And then the bottom picture shows the tensor fibres with respect to that fascia, correct?
A. That is what the caption says. This is a bad copy. I will assume it is correct.
Q. Yeah. I'm going to try to get a better picture.
Well, briefly look at Exhibit 27, and

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obviously this is a right leg as opposed to a left leg, but as we've talked before, as depicted in this Exhibit 27, the rectus femoris and the vastus lateralis are two of the four quadriceps muscles, true?

A. True.

Q. Then if you look at Exhibit 28, again it's a generic screen shot off the internet, but I am primarily interested in the anatomical drawing in the upper right-hand corner. There is a label for IT band, that stands for the iliotibial band, correct?

A. Correct.

Q. And the TFL stands for the tensor fascia lata, correct?

A. Correct.

Q. Does the depiction of the TFL in this Exhibit 28 accurately depict where anatomically the tensor fascia lata is?

A. Yes.

Q. And then if we look at Exhibit 29, again taken off the internet, but what I'm interested in are the photos, and that happens to be a

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depiction of a left hip, correct?

A. You can just transpose the picture, but this is depicting a left leg.

Q. Okay. And Exhibit C does show the tensor fascia, true? Actually, that's the right hip.

MR. BRANDT: It says right, yes.

BY MR. GINZKEY:

Q. Yeah, it's the right hip in Exhibit C. A is left hip, C is right hip.

A. That makes more sense.

I will say, again, poor quality. I have -- I cannot anatomically identify anything but fascia and muscle, not the exact muscle; I cannot identify that muscle --

Q. Okay.

A. -- due to the quality of the --

MR. BRANDT: Exhibit?

THE WITNESS: Yeah.

BY MR. GINZKEY:

Q. The legend under the photos for C, it says, A right hip incision is shown with -- and they misspelled the word "the" -- the fascia over the tensor split.

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Do you see that statement?

A. Yes, I do.

Q. The tensor fascia lata muscle, is it actually split during an anterior -- direct anterior approach?

A. No, it is not.

Q. Okay. Just retracted, true?

A. Correct.

Q. And in this Exhibit 29, again Photo C, which happens to be the left hip, does it appear that there are drawings marking the patient's -- excuse me. C is right hip, not left hip. C is right hip.

In that C, Photo C on Exhibit 29, does it appear as if landmarks of the femur and the ASIS are drawn?

MR. BRANDT: Object to the form. You can answer.

A. There are drawings on the patient or on the drape.

BY MR. GINZKEY:

Q. Okay.

A. I --

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MR. BRANDT: It's okay. You've answered.

BY MR. GINZKEY:

Q. The top drawing would be the ASIS, would it not?

MR. BRANDT: I'm sorry, on C you're talking about?

MR. GINZKEY: Yes.

MR. BRANDT: Okay.

A. There is a drawing, and I cannot identify -- I was not there. I didn't draw it. I'm not going to identify it.

MR. BRANDT: All right.

THE WITNESS: I'm not going to identify it.

MR. BRANDT: Thank you.

Q. All right. With reference to the top drawing, just above the retractor shown --

A. Are we still talking about C?

Q. C, yes -- if it's not the ASIS, what would it be?

MR. BRANDT: I object to form. You're asking him to guess. But you can go

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ahead.
A. Again, I mean, I would -- it is labeled as the -- I would assume it is the ASIS.
BY MR. GINZKEY:
Q. And is the drawing immediately under the retractor the femur or the greater trochanter?
A. Again, I would assume that is what they are depicting.
Q. Looking at Exhibit 30, I want you to assume that this is a photo of Wes Johnson, and that's the surgical incision that you made. That incision is much too medial, isn't it?
MR. BRANDT: Object to the form. I'm not sure what you mean. But you can answer.
A. Do you have a better quality? Because I cannot even identify the incision on my copy.
Now that I can identify the incision, could you please restate the question.
Q. Isn't the incision depicted on that Exhibit 30 much too medial?
MR. BRANDT: Same objection. I'm not sure what you mean.

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A. That depends on where his anatomy actually is.
BY MR. GINZKEY:
Q. If we compare the surgical scar that's reflected in that Exhibit 30 with Exhibit 26, the publication from DePuy, where they talk about starting the incision 3 centimeters lateral and 1 centimeter distal to the ASIS, that's not where that incision begins, is it?
A. I don't know where the ASIS is in this picture.
Q. Well, in the picture I want you to assume we had Wes put his two fingers on his hipbone, the pelvis. If that's true, that will give you some type of landmark, correct?
A. No, because it could be anywhere on the pelvic rim.
Q. Would you agree with me that what's depicted in that Exhibit 30, that incision, does not comport with the second page of Exhibit 26, the DePuy publication?
MR. BRANDT: Object to the form.
A. I do not agree, because there is no references in this Exhibit 30.
Q. Okay. Would you agree with me that in order to

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avoid neurological injury with a direct anterior approach to a THA, that the surgeon has to be in the appropriate plane?
MR. BRANDT: Object to the form. I'm not sure what you mean.
A. Plane of what?
BY MR. GINZKEY:
Q. Muscle plane.
A. That depends on what approach you're using.
Q. Well, direct anterior. I mean, regardless of what approach you're using, you're going to have to get into the right muscle plane in order to avoid injury, neurological injury, correct?
A. I would agree that staying in the intramuscular plane decreases the risk of injury.
Q. Looking at Exhibit 32, I'll hand you my copy because it's a better copy, I want you to assume that this is again the patient, Wes Johnson, and this is his right hip incision.
MR. BRANDT: This is --
MR. GINZKEY: Dr. Dangles.
THE WITNESS: 32.

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MR. BRANDT: Thank you.
BY MR. GINZKEY:
Q. You would agree with me that the incision as reflected on 32 is in a completely different position than the incision on Exhibit 30; you would agree with that, wouldn't you?
A. I would disagree that you could state that, because, again, there is no references as to where it actually is.
Q. Would you at least agree with me that the incision in Exhibit 32 is much more lateral than the incision in Exhibit 30?
A. I would disagree on the same grounds. There is no reference.
Q. You can look, Doctor, at Exhibit 31. That's it. That is an anatomical diagram of the femoral nerve, and, again, this would be in the right leg as opposed to the left, but I want you to look at the encircled muscles, the rectus femoris and the vastus lateralis. Firstly, those two encircled muscles on Exhibit 31 are the two muscles that were -- that had no motor unit activation on either of Dr.

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Carmichael's EMGs, correct?
A. Correct.
Q. And I want you to assume that the X on the nerves running to the rectus femoris and vastus lateralis, those X's were placed by Dr. Carmichael in his deposition.
Making that assumption, wouldn't those two X's lie directly under the incision that's reflected in Exhibit 30 if we superimposed those two?
A. I disagree.
Q. In this case do you have an opinion as to whether or not the nerves running to Wes Johnson's rectus femoris and vastus lateralis were transected?
A. Yes.
Q. What's your opinion?
A. They were not.
Q. Do you have an opinion in this case as to whether or not the nerves running to Wes Johnson's rectus femoris and vastus lateralis muscles were stretched by retraction?
A. I do not.

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Q. So no opinion, correct?
A. No opinion.
Q. Do you have an opinion as to whether or not those same two muscles were damaged by an electrocautery device?
A. Yes.
Q. What's your opinion?
A. They were not.
Q. Then, Doctor, if we go to Exhibit 33. That, for the record, is a report from a physical therapist, and I want you to assume that the individual authoring this Exhibit 33 is certified in vestibular rehab and certified as a brain injury specialist. Are you certified in either of these disciplines?
A. No, I'm not.
Q. On a regular basis do you treat postconcussive syndrome?
A. No, I do not.
Q. On the second page of this Exhibit 33, the author makes reference to some of the clinical findings. The first entry is smooth pursuits degraded in all planes. Do you know what that

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means?
A. I believe I do.
Q. Okay. What does that mean?
A. Your eyes can't follow a moving target without moving your head.
Q. And is that similar to the end gaze nystagmus where the finding was that he had nystagmus in the left upper quadrant?
A. Nystagmus is when you get to the end of looking in one direction and then your eye bounces.
Q. Okay. What does "Saccades: Hypometric in all planes" mean?
A. I do not know.
Q. And the only reason that I'm asking those questions is, would you have, as you sit here today, any reason to disagree with the findings reflected in Exhibit 33?
MR. BRANDT: I'll object to the form and foundation.
MR. LUNDQUIST: I'll join.
A. I have not examined the patient, so I cannot agree or disagree with these findings.
BY MR. GINZKEY:

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Q. Generally speaking, does nerve damage lead to weakness in the leg?
MR. BRANDT: Object to the form. Vague. You can answer.
A. That depends.
BY MR. GINZKEY:
Q. In this particular case if, in fact, Wes Johnson's -- two of Wes Johnson's four muscles in his left quadriceps are denervated, that would make his left leg weaker, would it not?
A. That depends.
Q. What does it depend on?
A. It depends on the severity of the neurapraxia, the palsy, as well as the compensatory muscles, how strong his compensatory muscles would be.
Q. When is the last time that you saw Wes Johnson in a clinical setting?
A. It's in my records. May I look?
Q. Sure.
MR. BRANDT: If you've got it, that's fine.
MR. GINZKEY: I don't have it.
MR. BRANDT: We've got it. Give

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us a second here.
A. That would be -- my last visit was 06/27/2017.
BY MR. GINZKEY:
Q. Would you have performed any type of neurological exam on Wes's left extremity?
A. Yes.
Q. What did it reflect?
A. Decreased strength of left knee flexion and extension.
Q. Would deep tendon reflexes have been measured on the left lower extremity?
A. Yes.
Q. What did that reflect?
A. Both lower extremities were normal.
Q. On that last office visit would you have done any clinical exam with reference to cranial nerves?
A. No.
Q. At any point during your treatment of Wes Johnson would you have tried to make a clinical determination with respect to his cranial nerves?
MR. BRANDT: Don't guess.

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A. No, I did not.
BY MR. GINZKEY:
Q. Do you agree with the statement that the femoral nerve is at risk with distal extension of an incision for a direct anterior approach?
MR. BRANDT: Object to the form.
You can answer.
A. That depends.
Q. On what?
A. On multiple different things, mainly the depth of the dissection at the time.
Q. Okay. Do you agree that with respect to direct anterior approach incising the fascia over the tensor fascia lata and staying within the TFL sheath offers the best protection for the femoral nerve?
MR. BRANDT: Object to the form.
You can answer.
A. I don't understand the question.
Q. Let's break it down and make it two questions. Firstly, do you agree that incising the fascia -- and, again, we're talking about a direct anterior approach for a THA. Do you

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agree that incising the fascia over the tensor fascia lata offers the best protection for the femoral nerve?
MR. BRANDT: Same objections.
A. I still do not understand the question due to there are multiple --
MR. BRANDT: That's all right. He's going to re-ask the question. If you don't understand it, don't answer it.
BY MR. GINZKEY:
Q. Again, with respect to a direct anterior approach for a THA, do you agree that staying within the TFL sheath and outside of the sartorial sheath offers the best protection for the femoral nerve?
MR. BRANDT: Object to the form.
You can answer.
A. I would agree.
Q. Do you ever perform a THA using a lateral subvastus approach?
A. I do not.
Q. Do any of your partners use that approach for THA?

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A. You called it anterior subvastus?
Q. A lateral subvastus approach.
A. No, they do not.
Q. If you know, does that approach offer greater protection for the femoral nerve?
MR. BRANDT: Object to the form.
A. I do not have an opinion on that.
MR. GINZKEY: I think I'm finished. Let me go through my notes.
I think Troy has some questions.

EXAMINATION BY MR. LUNDQUIST:
Q. Good morning, Doctor.
A. Good morning, Doctor.
Q. I'm no doctor.
Do you want to take a break or are you good --
MR. GINZKEY: Doctor of Juris Prudence.
THE WITNESS: Yeah, you all are.
MR. LUNDQUIST: Supposedly, but I don't count that. Not like you guys do. You studied way longer than we have.

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Do you need a break or anything? I won't be too long.
THE WITNESS: No.
MR. BRANDT: Are you okay?
THE WITNESS: Yeah, I'm good.

BY MR. LUNDQUIST:
Q. All right. Doctor, I represent the hospital and a couple -- one nurse and one surgical tech who have been also added to this.
I've got a few questions. If anything I say doesn't make sense, please tell me, and I'll rephrase, okay.
As I understand it, the concept of a known risk in medicine means that even though the caregivers act in a reasonably careful manner and consistent with the standard of care and do everything right, there can still be certain complications that occur, correct?
A. I agree with that.
Q. In this particular case the records indicate that there were -- there were several people who assisted in the operating room in your

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procedure in various ways.
There has been depositions taken of Pam Rolf and Sarah Harden. Do you know Pam and Sarah?
A. Yes, I do.
Q. Okay. Sarah and Pam, the surgical tech and the nurse, have both described that they are there to assist you as a surgeon in any way you need.
Pam was in the role of passing you instruments, and she indicated that she was not the one that was in the surgical field for this particular procedure. Do you recall that to be true?
A. I do not recall who was helping me. In a vast majority of cases that is her role.
Q. Okay. Fair enough. And I understand some of the details like that you would defer to the records on as far as --
A. Correct.
Q. -- who was in what role, correct?
A. Correct.
Q. Fair enough.
And along those same lines, in this

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particular case Sarah Harden has described that she was the assistant who was scrubbed in, was in the surgical field and was there to assist you. Do you have any reason to disagree with that?
A. I have no reason to disagree.
Q. Okay. Both Sarah and Pam described that in general -- and I will tell you neither of them had a recollection of this procedure, okay, so they were telling us what they could based on custom and practice for a total hip like this one, okay. So that is the setup for my next questions, and I can tell you that's what they said.
Both of them testified that as a custom and practice all of the incisions would be made by the surgeon. Is that a correct statement of how the procedures would work in a total hip?
A. Correct.
Q. So, as best we can tell, any incision made in this case with respect to Mr. Johnson would have been made by you as opposed to anybody

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else in the room; is that fair?
A. Correct.
Q. After the incision is made, your operative report, which is No. 15 -- we had that earlier, I've got an extra copy, if you need it -- it refers to basically everything that -- or I shouldn't say everything, but it refers to your procedure and the steps you took, right, in a general sense? Yes?
A. Correct.
Q. Throughout Exhibit 15, your operative report, there are a number of steps referred to, some of which refer to specific instrumentation, whether it be reamers, scalpels, retractors, all things like that, right?
A. Correct.
Q. The nurses testified that, again, by way of custom and practice for a surgery like this, it would be typical for the surgeon to place an instrument where he or she wants it, and then there may be times where you as a surgeon may ask the surgical tech or the nurse to hold it there; is that how it works?

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A. Sometimes, yes, that is how it works.
Q. Okay. I guess when needed, I should say. You maybe don't always need to do that.
A. I would agree with that.
Q. Okay. So is it a fair statement that, as best you recall, with respect to Mr. Johnson's case that any placement of instruments would have initially been made by you, and then if you needed help holding something or, you know, keeping it in place, then you would ask the nurse or the surgical tech for help thereafter?
A. I would agree that is usually how it happens.
Q. Okay. Any reason to believe that that's not how it happened in this particular case?
A. No.
Q. As I said at the beginning, I talked about known risks. I guess to say this a different way, is the mere fact that a patient complains or alleges that there was an outcome that was unfortunate or unexpected, that does not mean in and of itself that anybody did anything wrong, does it?
A. I agree with that.

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Q. Okay. And I'm assuming that, to the best of your knowledge, in this particular case the procedure went as expected, and you were able to achieve all of the goals and in the fashion that you wanted them to be achieved with respect to Mr. Johnson; is that a correct statement?
A. I agree with that statement.
Q. And I've reviewed Exhibit 15, your operative report. I don't see any reference to a nurse doing something or a surgical tech doing something that was unexpected or doing something you did not want them to do.
Am I reading it correctly that there is no such reference in the operative report?
A. I agree there is no reference to something of that nature.
Q. And am I correct that if something like that had occurred, that would be something that, based on your custom and practice, you would chart in your operative report if there had been something done by somebody else that was unexpected or not what you wanted, something

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like that, you would make note of it, right?
A. I would.
Q. So, I guess, to connect those two dots then, the fact that we do not see anything like that in your operative report, is it fair to say that, to the best of your knowledge, the surgical tech, the nurses, did not do anything that was unexpected or anything other than what you wanted them to do or directed them to do; is that fair?
A. I agree with that statement.
MR. LUNDQUIST: Do I need to ask about agency?
MR. GINZKEY: It's up to you. Well, I haven't alleged agency.
MR. LUNDQUIST: You haven't alleged but --
MR. GINZKEY: And I'm not going to.
MR. LUNDQUIST: Okay. If we stipulate it's not going to be raised. I mean, I can ask.
BY MR. LUNDQUIST:

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Q. Doctor, you're not employed by the hospital, are you, Advocate BroMenn?
MR. BRANDT: At the time?
MR. LUNDQUIST: At the time.
A. No, sir.
BY MR. LUNDQUIST:
Q. And am I correct that your employer or employment status would be with McLean County Orthopedics at the time of this procedure?
A. Correct.
Q. And all of your care decisions with regard to Mr. Johnson would have been the result of your own independent and clinical judgment; is that correct?
A. Correct.
Q. And we haven't talked a lot about your records, but there was reference, I believe, to one at least preoperative visit that you had with Mr. Johnson before the day of the surgery, I think that was June 27.
MR. BRANDT: Yes.
Q. Would that have been here at the building we're sitting at now, McLean County Orthopedics?

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A. June of 2016?
MR. BRANDT: He's talking about this preop visit.
BY MR. LUNDQUIST:
Q. The preoperative visit. I'm on to something else now.
MR. BRANDT: So his question is, did the visit take place here or someplace else?
Q. Yeah, that's what I'm asking.
A. Well, it took place within McLean County Orthopedics, whether that be in this building or 2502; I have forgotten when we moved.
Q. Okay. Fair enough. But it would have been at the McLean County Orthopedics office?
A. Correct.
Q. Okay. As opposed to Advocate BroMenn Hospital here in town?
A. It was not at BroMenn Hospital.
Q. And, Doctor, are you on staff -- you're obviously on staff at BroMenn. Were you on staff at any other hospitals here in town back in '16?

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A. Yes.
Q. And would you do surgery at any of the other hospitals, other than BroMenn, on occasion?
A. Yes, I do.
Q. Okay. In this particular case with Mr. Johnson, did you opt -- you made the decision and opted to do this procedure, recommended it be done at BroMenn; is that correct?
A. I do not recall if it was my preference, the patient preference or both.
MR. LUNDQUIST: Okay. Fair enough.
All right. Thank you, Doctor. That's all the questions I have.
MR. GINZKEY: Nothing further.
MR. BRANDT: Let me take a break here, and we'll be back. I may have a couple questions.
(Recess taken.)

EXAMINATION BY MR. BRANDT:
Q. I think some of this may have been covered, but

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to that extent, I apologize to you, Doctor. Your care in this case, having reviewed the records from your surgery in the preop and postop, was it appropriate, did it meet the standards of care, and did you act as a careful orthopaedic surgeon in performing Mr. Johnson's surgery?
A. Yes.
Q. Okay. You were asked regarding whether Mr. Johnson's lower extremity muscles were --
MR. GINZKEY: Denervated.
MR. BRANDT: Denervated, thank you.
Q. -- denervated. The last time you saw him was two years ago; is that right?
A. Yes. I think it was June --
Q. I think it was June of 2017.
A. June 27, I think, specifically.
Q. Okay.
A. 6/27/2017, 10:00 a.m.
Q. Okay. And so regarding his condition today, you don't have a basis for an opinion because you haven't seen him and you haven't looked at

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records from June 27 of 2017; am I correct about that?
A. Correct.
Q. Okay. The literature that you were shown, Exhibit 8, this was an abstract of an article by Dr. Gorab, G-o-r-a-b, and Dr. Matta. Would you agree with me that whether that article, since you don't have it in its entirety, whether it's reasonably reliable or not, you don't have an opinion; would that be a fair statement?
A. I do not have an opinion, because I have not read the entirety of the article.
Q. Okay. Regardless of whether Dr. Matta has written a lot of publications regarding the anterior approach to total hip replacement, would it be a fair statement that you may or may not agree with everything he's written or said?
A. Correct.
Q. Okay. In other words, there may be some things that he's written that you agree with, and there may be some things that he's written that

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you disagree with; would that be true?
A. True.
Q. How many total hip replacement procedures have you performed in your career, using the anterior approach?
A. I do not know that data exactly.
Q. How many total hip replacement procedures have you performed regardless of the approach?
A. Again, I do not know. I can estimate.
Q. What would be your best estimate?
A. Approximately 400.
Q. Okay. You were asked -- let me just ask one more question about that. Do you perform the total hip procedure using an approach other than the direct anterior approach that you used with Mr. Johnson?
A. Yes.
Q. Was the approach that you used for Mr. Johnson appropriate as opposed to a different approach?
A. Yes.
Q. Okay. You were asked about whether you discussed with Mr. Johnson the proposition of permanent nerve damage as a part of the

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consent. Do you remember those questions?
A. Yes, I do.
Q. When you had the discussion with Mr. Johnson about the risk of nerve injury during this procedure on January -- I'm sorry -- on June 27, 2016, were you aware at that time with -- or apprized that the patient had dysplasia of the left hip?
A. Let me just look at my note.
Q. Sure.
A. Yes, I was.
Q. Okay. You were asked questions about Exhibit 9, which was the -- let me refer to it as the Advocate BroMenn stock or appliance/prosthetic list, okay, and then you were also asked about Exhibit 10 -- pardon me -- about Exhibit 14, which was your preference card, okay?
A. Yes, I was.
Q. Your preference card made no mention of the anterior approach broach, which was a -- a photograph of which was Exhibit 13. Why? Why was that broach not mentioned, if you know, in your preference card?

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A. The preference card does not need to state everything.
Q. Okay.
A. It's understood that that needs to be there.
Q. Is the preference card -- strike that.
Is the purpose of the preference card to list those things that you prefer to have present at surgery that are not otherwise there or provided?
A. That is correct.
Q. You were asked questions about the Anterior Hip Foundation. An orthopaedic surgeon who preforms anterior hip surgery, is there a requirement that you be a member of that foundation to perform anterior hip surgery?
A. No.
Q. Okay. You were asked questions about Dr. Dangles' records. I think you indicated that you try and get those or obtain those prior surgery records before you proceed with surgery.
My question is, does the standard of care require that you obtain in this case Dr.

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Dangles' records from the right hip surgery that he performed before you perform surgery on the left?
A. No.
Q. What is the purpose then -- what would then be the purpose for obtaining Dr. Dangles' records? Is there anything you're going to learn?
A. Strictly for preoperative planning.
Q. Okay. There was a -- Exhibit 23 was a postop plain film, 10/24/16 was the film. There is a difference in the orientation of the right and the left. My question is, is that concerning to you?
A. No.
Q. Why not?
A. There is a range of orientation that are acceptable, and they are both within that range.
Q. Exhibit 26 was the DePuy brochure. It talks about the proposition or makes reference to the proposition of drawing on either the skin or the film that's covering the skin at the time of the preop prep for the patient.

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Did the standard of care require such a drawing on the patient's skin or the film covering the skin?
A. No.
Q. What does the standard of care require with respect to identifying the anatomy, you know, I guess, without drawing on the patient's skin or the covering? In other words -- it was a poor question.
Does the standard of care require that you identify the various anatomy prior to doing surgery; is that required?
A. I am unaware of any requirement. I always do that.
Q. Okay. And can it be done without actually drawing on the patient's skin or a film covering the skin within the standard of care?
A. Yes.
Q. You were asked questions about the location of Mr. Johnson's incisions, and you were shown Exhibit 30, which is a photograph, an actual photograph, I'm not sure when it was taken, but it was a photograph of his left hip and his

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right hip; I think it was 32 or 33.
The location of the incision in this case, did it increase his risk of injury to the femoral nerve branches in your opinion?
A. No.
Q. Okay. When you made the incision and began the surgery, did you make an incision and proceed within the appropriate muscle planes in your opinion?
A. Yes.
Q. Do you have an opinion, to a reasonable degree of medical certainty, whether the incision that you made caused injury to the branches of the femoral nerve for this patient?
A. Yes, I do not agree the incision caused the damage to the branches.
Q. Okay. From your education, training, experience and knowledge, can femoral neuropathy or neurapraxia occur during the procedure that you performed for Mr. Johnson even when the care is appropriate and meets the standard of care?
A. Yes, it can.

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Q. And when it does, can the cause of the neurapraxia or injury to the branches of the femoral nerve be brought about in several different fashions or modalities?
A. Yes, it can.
Q. Okay. And does your knowledge of the literature support the proposition that there is a list of different mechanisms by which femoral neuropathy or injury to the branches of the femoral nerve can occur even when the procedure is performed appropriately, using the anterior approach?
A. Yes.
Q. Okay.
A. Yes. Excuse me.
Q. You were asked questions about whether the retractor -- a retractor caused injury to the branches of the femoral nerve.
When you looked at the report and reviewed what you had dictated in terms of your performance of this procedure, was there a retractor placed in proximity to the femoral nerve branches that we've been talking about

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here today so as to cause injury?
A. No.
MR. BRANDT: Okay.
MR. GINZKEY: My only statement on the record, I mislabeled Dr. Armstrong's CV as Exhibit 36. It should be Exhibit 34 so that it is in sequence.
MR. BRANDT: Okay. He's going to review and sign.
(Discussion off the record.)
(Exhibit No. 35 marked.)
FURTHER DEPONENT SAITH NOT.

STATE OF ILLINOIS)
)
COUNTY OF TAZEWELL)

CERTIFICATE

I, Gina Fick, CRR, RMR, CSR, DO HEREBY CERTIFY that, pursuant to notice, there came before me on the 15th day of October, 2019, at McLean County Orthopedics, 1111 Trinity Lane, Suite 111, in the City of Bloomington, County of McLean, and State of Illinois, the following named person, to wit:

LUCAS ARMSTRONG, MD,

who was by me first duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause and that he was thereupon carefully examined upon his oath and his examination immediately reduced to shorthand by means of stenotype by me.

I ALSO CERTIFY that the deposition is a true record of the testimony given by the witness and that the necessity of calling the court reporter at

time of trial for the purpose of authenticating said transcript was also waived.

I FURTHER CERTIFY THAT I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of October, 2019.

GINA FICK, CRR, CSR, RMR

STATE OF ILLINOIS)
)
COUNTY OF TAZEWELL)
IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT OF ILLINOIS, MCLEAN COUNTY

WILLIAM "WES" JOHNSON v. LUCAS ARMSTRONG, et al.
ILLINOIS RULE 207 (a) STATEMENT BY WITNESS:
SIGNATURE PAGE

I hereby state that I have read the foregoing transcript of my deposition given at the time and place aforesaid and I do again subscribe and make oath that the same is a true, correct, and complete transcript of my deposition given as aforesaid, with corrections based on the reporter's errors in reporting or transcribing the answer or answers involved, if any, as they appear on the attached, signed correction sheet.

_____ Correction sheet(s) attached.

Dated this _____ day of _____, A.D., 2019.

SIGNED _____
LUCAS ARMSTRONG

CORRECTION SHEET
WILLIAM "WES" JOHNSON v. LUCAS ARMSTRONG, et al.

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

WILLIAM "WES" JOHNSON,	)	
	)	
Plaintiff,	)	
vs.	)	2018 L 0000126
	)	
LUCAS ARMSTRONG, McLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, and ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER,	)	
	)	
Defendants.	)	

PLAINTIFFS' SUPREME COURT RULE 213(f)(3) WITNESS DISCLOSURE OF SONNY BAL, M.D.

Pursuant to Supreme Court Rule 213(f)(3) plaintiff discloses the following "controlled expert witness" and (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefore; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case:

B. Sonny Bal, M.D.
2000 E. Broadway, #251
Columbia, MO 65201

(i) Dr. Bal will testify to the standard of care applicable to a total hip arthroplasty using an anterior approach, whether there were any deviations from that standard in the present case, and what injuries were proximately caused by any such deviations.

(ii) Dr. Bal's opinions and conclusions, and the bases therefore are as follows:

(a) **In his left total hip arthroplasty of 10/6/2016 Lucas Armstrong deviated from the required standard of care in the following respects:**

1) **making his initial incision much too medially;**

2) **failing to properly identify the patient's femoral nerve;**

3) **failing to adequately protect the patient's femoral nerve; and**

4) **causing injury to the patient's left femoral nerve resulting in permanent denervation of the branches to 2 of the patient's 4 quadriceps muscles, the vastus lateralis and rectus femoris.**

(b) **The surgical instruments injuring the patient's femoral nerve were under the control of Lucas Armstrong and his scrub nurse, Sarah Harden, who was acting at his direction.**

(c) **In the normal course of a total hip arthroplasty, complete denervation of 2 of a patient's 4 quadriceps muscles does not happen in the absence of negligence.**

(d) **Complete denervation of 2 of the patient's 4 quadriceps muscles has caused loss of strength in the patient's left leg resulting in multiple falls and head trauma.**

(iii) **Dr. Bal's opinions are based upon his education, training and experience as set forth in the attached curriculum vitae, as well as his review of the following materials:**

(a) **Medical:**

1) **Chronology with 8 supporting records;**
2) **Advocate BroMenn Medical Center charting from 9/13/16 through 11/4/16 (including OP Note of 10/6/16 and Discharge Summary of 10/7/16);**
3) **Washington Univ. Physicians records (including nerve transplant consult of 7/16/18);**
4) **EMG/NCVs of 1/11/2017 and 6/14/17;**
5) **3T MARS MRI of 9/30/2019**

(b) Depositions with exhibits:

1) **Lucas Armstrong, M.D.;**
2) **Sarah Harden;**
3) **Pamela Rolf;**
4) **William "Wes" Johnson;**
5) **Craig Carmichael, M.D.;**
6) **Thomas Tung, M.D.;**

(c) Other documents:

1) **Exhibit 13 to deposition of Craig Carmichael, M.D.**
2) **Photograph of incision taken 4/16/19**
3) **DePuy Synthes brochure "The Anterior Approach"**

(iv) Dr. Bal prepared no reports.

Plaintiff reserves the right to call as a witness any person disclosed or identified as a trial witness pursuant to Supreme Court Rule 213(f)(3) by any other party to this litigation, regardless of whether that person is, in fact, actually called as a witness by the disclosing party, either in their case in chief or in rebuttal.

William "Wes" Johnson, Plaintiff

By: /s/James P. Ginzkey
One of his attorneys

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B Sonny Bal MD MBA JD PhD 6/29/2020

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN

WILLIAM "WES" JOHNSON,)
)
Plaintiff,)
)
vs.) Case No. 2018L0000126
)
)
LUCAS ARMSTRONG, McLEAN)
COUNTY ORTHOPEDICS, LTD,)
SARAH HARDEN,)
PAMELA ROLF, AND)
ADVOCATE HEALTH AND)
HOSPITALS CORPORATION)
d/b/a ADVOCATE BROMENN)
MEDICAL CENTER,)
)
Defendants.)

VIDEOCONFERENCE DEPOSITION OF
SONNY BAL, MD, MBA, JD, PHD
TAKEN ON BEHALF OF THE DEFENDANTS
JUNE 29th, 2020

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Reporter's Note: The original exhibits were attached to the original transcript.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN
WILLIAM "WES" JOHNSON,)
)
Plaintiff,)
)
vs.) Case No. 2018L0000126
)
)
LUCAS ARMSTRONG, McLEAN)
COUNTY ORTHOPEDICS, LTD,)
SARAH HARDEN,)
PAMELA ROLF, AND)
ADVOCATE HEALTH AND)
HOSPITALS CORPORATION)
d/b/a ADVOCATE BROMENN)
MEDICAL CENTER,)
)
Defendants.)

VIDEOCONFERENCE DEPOSITION OF SONNY BAL, MD, MBA, JD, PHD, produced, sworn, and examined on the 29th day of June, 2020, between the hours of nine o'clock in the morning and eleven o'clock in the morning of that date at the offices of ALARIS LITIGATION SERVICES, 2511 Broadway Bluffs, Suite 201, Columbia, Missouri, before LISA BALLALATAK, a Certified Court Reporter within and for the State of Missouri, in a certain cause now pending STATE OF ILLINOIS, IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, COUNTY OF MCLEAN, wherein WILLIAM "WES" JOHNSON is the Plaintiff and LUCAS ARMSTRONG, et al., are the Defendants.

APPEARANCES

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For the Defendants Dr. Armstrong and McLean County Orthopedics, LTD:

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(Appearing Telephonically/Zoom)
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LANGHENRY, GILLEN
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tlundquist@lglfirm.com

Also present:

Dr. Lucas Armstrong (Telephonically)

The Court Reporter:

MS. LISA BALLALATAK, CCR
Kansas CSR No. 1670
Missouri CCR No. 1336
ALARIS LITIGATION SERVICES
2511 Broadway Bluffs, Suite 201
Columbia, Missouri 65201

EXHIBIT F

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(The deposition commenced at 9:04 a.m.)
SONNY BAL, MD, MBA, JD, PHD,
of lawful age, being produced, sworn, and examined on behalf of the defendants, deposes and says:
EXAMINATION
BY MR. BRANDT:
Q. Dr. Bal, good morning.
A. Good morning.
Q. My name is Peter Brandt. I represent the defendant, Dr. Armstrong and McLean County Orthopedics, LTD. We're here to take your deposition in Columbia, Missouri. This is taken pursuant to notice under the applicable Illinois Supreme Court Rules.
You've given a deposition before?
A. Yes.
Q. One or two. And so I'll dispense with going through the rules. We have here marked as Exhibit 2 a notice of the deposition, and it directed that you bring certain items to the deposition.
A. Right.
Q. Take a look at that. Did you bring your file with you?
A. Yes.

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Q. Okay. Is it on that thumb drive?
A. It's on the thumb drive.
Q. Is that a thumb drive I can have?
A. Yeah, you can have it.
Q. Let me ask you, did you prepare any notes with respect to the case?
A. No.
Q. Okay. Did you write on any of the deposition transcripts?
A. No.
Q. Okay. Did you write any letters to Mr. Ginzkey with your thoughts or opinions?
A. No.
Q. Okay. Do you know any of the parties in the case? In other words, do you know Dr. Armstrong?
A. No.
Q. Okay. Look over the exhibit and see if there is anything in that list that's not on the thumb drive.
A. Number 6, list of publications.
Q. Okay. Is that in your CV?
A. That will be in the CV, though.
Q. Okay.
A. And I can get you a recent copy.

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Q. Okay.
A. I don't know if I copied it.
Q. Did you make a copy of the thumb drive for Mr. Ginzkey? I just need to know so I can make a copy for him, if I need to.
A. No, I haven't made it, so ...
Q. Okay. All right. Let me just take this now so I don't forget it, because I could easily walk out of here without it.
We've marked as Exhibit 3 what we call 213(f)(3) disclosures, which is basically a listing of your opinions in the case, and then attached to it is a CV dated February 10, 2019. Let me hand you that.
With respect to -- we'll go the CV, since you brought that up. Is that CV relatively current?
A. Yes.
Q. Is there a more current version?
A. Yes.
Q. Okay. Can you send me or Mr. Ginzkey a current version?
A. Yes.
Q. Okay. And what's changed, just generally? I know that you've retired from the practice, but that was 2017.

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A. Yeah. More publications.
Q. Okay.
A. That's it.
Q. And have -- if you know, do any of the publications deal with total hip replacement?
A. No, they don't.
Q. What have you written on since February?
A. Mostly on the biochemistry of silicon nitride ceramics.
Q. Okay. All right. I want to give you my card, and then if you can send me a copy of the CV --
A. Sure.
Q. -- and you can send one to Mr. Ginzkey, that'd be great.
A. Okay.
Q. This -- while we're on Exhibit 2 there, it has what Mr. Ginzkey prepared as your opinions in the case. Take a look at that and see if it's accurate.
A. Exhibit 3?
Q. Exhibit 3. Sorry.
A. Okay.
Q. All right. Have you seen that document?
A. Yes.

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Q. All right. Did you prepare any drafts of that document for Mr. Ginzkey?
A. I don't remember. No, I don't think so.
Q. Okay. Do you know if he sent you a draft that you've edited?
A. I don't remember that, either.
Q. Okay. If you had such a document, would it be on the thumb drive?
A. Yes.
Q. Okay. Are the correspondence that you exchanged with Mr. Ginzkey or his office, the email, are those on the thumb drive, also?
A. They are.
Q. Okay. Did you send any literature or reference any literature to Mr. Ginzkey or his office?
A. No, I don't think I sent him anything.
Q. Okay.
A. But there's literature on the thumb drive.
Q. Okay. And the literature that you cited, do you have any recollection of what you cited to him?
A. Yes.
Q. Can you tell me?
A. There's an article from Missouri Medicine

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by a surgeon in St. Louis from 2008 that generally described the surgical technique of anterior hip replacement that is relevant to this case. There is one case report of a late onset of a femoral nerve palsy from a small bleed in the psoas muscle, and there are two general review articles dealing with femoral nerve palsy and anterior hip replacement; one from Japan and the other, I believe, is a United States series.
Q. Okay. Does any of the literature that you get – is that comprehensive, what you just gave me?
A. Yeah.
Q. Does any of the literature that you gave Mr. Ginzkey suggest or make any reference to the location of the incision as a cause of femoral nerve injury or neuropathy?
A. One – the Missouri Medicine article describes a proper placement of the incision, but it doesn't say that more medial placement would put the femoral nerve at risk.
Q. Okay. Would it be a true statement that you don't know of any literature that suggests that the location of the incision – the skin incision – is a cause or increases the risk of femoral nerve

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injury?
A. No. That would not be true, because based on my own experience and – well –
Q. And my question was literature – whether you could point to any literature that supports the proposition that the location of the incision would put the patient at risk for a femoral nerve injury.
A. No. Sitting here, I cannot, but in fairness, I haven't looked for that literature.
Q. Okay. Your bills for the services that you've rendered in this case, they're on the thumb drive, also?
A. They are.
Q. Okay. And what's – do you have an understanding of what your rate is for review, deposition, and trial testimony?
A. Yes. $660 per hour, and for trial, it's $6,000 per day.
Q. Okay. Do you know how much you've billed Mr. Ginzkey up until this morning?
A. 1,500.
Q. Okay. Do you have on this thumb drive the documents that you reviewed? In other words, the discovery that you looked at in this case?
A. Yes.

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Q. If you look at the exhibit in front of you, Exhibit 3. I think on the third page there's a listing of the documents that were sent to you – maybe 2 – maybe page 2.
A. Yes.
Q. Okay. Is that a complete list of everything that you've looked at?
MR. GINZKEY: Other than the literature?
Q. (By Mr. Brandt) I'm sorry. Other – and I'm just limiting my question to discovery in the case.
A. Yes, that's what I've looked at.
Q. Okay. Did you look at any images?
A. Yes. He sent me a CD with imaging that's also on the drive.
Q. Okay. And do you remember what images you looked at?
A. The MARS MRI of 9/30/2019.
Q. Okay. Anything else? Any other imaging?
A. No.
Q. Okay. You've retired from practice – active practice as of November 2017?
A. Correct.
Q. And do you hold any positions with the university?

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A. No.
Q. Okay. How do you spend your days now, now that you've retired from practice?
A. I run a company calls SINTX, S-I-N-T-X, Technologies out of Salt Lake City. It's a full-line manufacturing of silicon nitride ceramics that are used in industry and also used to manufacture spine implants.
Q. Okay. And do you spend time in Salt Lake City?
A. Yes.
Q. How many days a year might you be in Salt Lake City?
A. Oh, I might make five or six trips in a year, but a lot more Zoom conferences and telephone calls.
Q. Okay. You were associated with a law firm in South Carolina at one point in time; is that right?
A. Yes.
Q. That association has dissolved?
A. Yes.
Q. Okay. Do you practice law?
A. No.
Q. Okay. Have you ever practiced law?

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A. No.
Q. Okay. Do you -- when you were associated with the firm in South Carolina -- South Carolina; right?
A. Yes.
Q. Did you practice law through that firm at all?
A. Never.
Q. In other words, did you see clients?
A. No.
Q. Okay. Do you advertise your services as an expert?
A. No.
Q. Are you associated with any services?
A. Not voluntarily, no.
Q. Okay. To the extent that you're not voluntarily associated, what services might have your name, if you know?
A. One comes to mind called AMFS. I don't know where they got my name.
Q. Okay. Did they send you cases to review?
A. They have one or two times.
Q. Okay. How many depositions did you give last year in medical/legal matters?
A. Oh -- I don't remember. I have -- and I

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can forward you the four-year records for trial and deposition testimony.
Q. Okay. Give me your best estimate. Did you give one deposition a year -- I'm sorry -- a month last year or ...
A. Last year, maybe seven.
Q. How many files in your file drawer?
A. At this time, maybe six.
Q. Okay. So to speak. I understand it's electronic, but ...
A. Right.
Q. So are you doing more expert work now that you have retired from the active practice or less?
A. Less.
Q. Okay. Any other groups that you're associated with, even involuntarily, that send -- basically put lawyers together with expert witnesses?
A. No.
Q. Okay. What was your income from expert witness work last year?
A. I don't even know.
Q. Can you give me your best estimate?
A. No. I wouldn't know. I don't draw an income, I -- well, I do draw an income through an

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entity called Bal Consulting, but it's mixed in with income from royalties on some products and clinical advisory roles for a spine implant company.
Q. Okay. And so if you had six cases last year, what would be the average that you would -- you might bill in a particular case through deposition? Six-, 7,000 bucks?
A. 3,500 bucks.
Q. $3,500? Okay. Bal Consulting is still an active corporation?
A. Yes.
Q. And it's incorporated in Missouri?
A. Yes.
Q. Okay. Do you -- let me ask it this way:
The fees that you receive for expert witness work, do they go to Bal Consulting?
A. Yes.
Q. At one time they went to a foundation for a seat at the university. That foundation has dissolved; is that right?
A. No. It's still there.
Q. Oh, okay. Do you still fund it?
A. Yes.
Q. Okay. And do you fund it from fees on your expert witness work?

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A. Yes.
Q. So approximately how much have you contributed, let's say, last year in the foundation?
A. Last year I gave $10,000.
Q. Okay. And is that the Bal chair? Is that what they call it?
A. No. It's just an orthopedic endowment.
Q. Do you remember the name of it?
A. It's Dana and Sonny Bal Orthopedic Endowment.
Q. Dana is your wife?
A. Yes.
Q. Do you do any teaching currently?
A. No.
Q. Do you have privileges anywhere?
A. No.
Q. You've been sued before as an orthopedic surgeon?
A. Yes.
Q. How many times?
A. Four.
Q. Okay. Any of those involve total hip?
A. Yes.
Q. Okay. How many?
A. Two.

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Q. Okay. Those cases go to trial?
A. No. They both got dismissed.
Q. Okay. Have you paid any settlements in any cases where you've been named a defendant?
A. The first two, some 25 years ago. The insurance company went bankrupt, and there was some state fund that wanted to settle them.
Q. Okay. So two of them got settled?
A. Yeah.
Q. Okay. Before you retired, is it accurate you were doing about 100 to 200 hips a year?
A. Yes.
Q. And by that I mean THAs.
A. Yes.
Q. Okay. And those were all at the University Hospital?
A. All at the university.
Q. What's the name of the University Hospital that you worked at? I just don't know it.
A. The -- it's called the Missouri Orthopaedic Institute.
Q. Okay. And did you do those -- you did your surgeries at the hospital or a surgery center or both?
A. The Missouri Orthopaedic Institute is the

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surgery center for orthopedic procedures.
Q. Okay.
A. It belongs to the university.
Q. Okay. The Bal Research Foundation, that's the one I was thinking of earlier. Has that been closed?
A. Yes.
Q. Okay. I think I know the answer to this, but have you ever been disciplined by any state in which you hold a license?
A. No. I still have an active license.
Q. Okay. Never been suspended?
A. Never been suspended.
Q. Privileges ever revoked or diminished?
A. No.
Q. Okay. It looked to me that about at least 70 percent of the time when you're asked to look at cases, you're testifying on behalf of the plaintiff.
A. Yes.
Q. Does that sound right?
A. Correct.
Q. We have a -- marked as Exhibit 1, this is a four-year record of trial testimony. Is this what you were referring to earlier?
A. Yes.

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Q. Okay. I'm going to hand you that, and I'm just going to ask you if that's complete.
A. Yes, it's complete.
Q. Okay. Looking at that list, are there any cases where you believe you testified about a femoral nerve injury?
A. No.
Q. Okay. You have testified in cases where there was a femoral nerve injury as part of the complaint; true?
A. Yes.
Q. All right. And give me your best estimate as to the approximate number of times. I mean, I can find out, but I just want to get your thoughts about that.
A. Two, maybe three.
Q. Okay. Do you think it's more than that?
A. Don't know.
Q. Okay. Have you testified in other cases where you've had some criticism of the location of the incision or that the testimony amounted to a statement that the incision was too medial?
A. I don't remember.
Q. Okay. Do you think you may have?
A. I may have.

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Q. Okay. In those cases where you may have testified where you believe the incision was too medial, do you know if those cases ever went to trial?
A. No. I don't know.
Q. Okay. You were barred from testifying in the federal courts on two occasions, 2014 and 2017?
A. One, to my knowledge.
Q. Just one, to your knowledge?
A. Yes.
Q. And this was the Nexium product liability case?
A. Correct. Correct.
Q. And in that case, you were contacted by the defense attorneys or the plaintiff's attorneys? Do you remember?
A. Plaintiffs.
Q. Okay. And, clearly, you were barred because you were giving testimony that was outside of your specialty; true?
A. No.
Q. Okay. Did you testify in that case?
A. In a deposition, yes.
Q. Okay. Your trial testimony was later barred; is that right?

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A. We never went to trial.
Q. Okay. Have you testified in other cases that your testimony was barred?
A. Not to my knowledge.
Q. Okay. Do you know if it was barred? In other words, if there was an order entered?
A. No. I don't know.
Q. Okay. If there was an order entered barring your testimony, you'd have no disagreement with that, if those are the facts; true?
A. If those are the facts, then I wouldn't disagree with them.
Q. The case involved epidemiology and gastroenterology?
A. The Nexium, yes.
Q. And those aren't areas of your expertise; true?
A. Correct.
Q. You don't have any expertise in bone biology?
A. I do have expertise in bone biology, because that's part of what orthopedic surgeons study.
Q. Have you ever testified that you have no experience in bone biology?

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A. Don't know.
Q. You don't have any experience in vitamin or mineral metabolism; true?
A. To the extent that orthopedic surgeons know about vitamin D and vitamin A and the pathways and we're tested on that, I have that expertise, but not to the extent that an epidemiologist may have.
Q. Okay. Have you ever seen the opinion from the district court disqualifying you as a witness in the case?
A. No.
Q. Have you ever testified that you're not an expert in vitamin or mineral metabolism?
A. Don't know.
Q. Okay. The reason that you were asked to look at the Nexium cases is because of a problem with bone breakdown fractures?
A. Yes.
Q. Okay. Is it important as an expert witness to be experienced in the science in which you have practice before rendering an opinion?
A. Yes.
Q. Okay. Is there a standard by the American College of Orthopedic Surgery on expert testimony?
A. Yes.

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Q. Are you -- do you follow those standards?
A. Yes.
Q. Okay. Is it important to give unbiased opinion testimony?
A. It is.
Q. You've spoken with Mr. Ginzkey this morning?
A. Yes.
Q. And I assume you've spoken to him on the phone; is that right?
A. That is correct.
Q. Can you give me the gist of your conversations with him?
A. Oh, just -- we went over the files and my USB drive and the documents that you see in front of us.
Q. Okay. Have you worked on any other cases for Mr. Ginzkey?
A. I don't think so.
Q. How did he find you?
A. I do not know.
Q. Okay. Did he reference a colleague or another lawyer that had retained you?
A. No.
Q. Okay. Do you have any other cases that

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you're looking at for Mr. Ginzkey?
A. No.
Q. Okay. Is it – Dr. Bal, is it an accurate statement that nerve palsies are a recognized complication of hip replacement surgery?
A. As a general proposition, yes.
Q. Did you see the consent reference that Dr. Armstrong made in his clinic note before the surgery?
A. Yes.
Q. And you saw that he advised Mr. Johnson that the – that nerve injury was one of the risks of the procedures; right?
A. Right.
Q. And that would be appropriate for him to make that statement and advise Dr. -- or Mr. Johnson that femoral nerve injuries are a risk of this procedure; true?
A. True.
Q. Okay. You saw Mr. Johnson's deposition testimony; right?
A. Yeah.
Q. You read that; true?
A. Correct.
Q. All right. And Mr. Johnson, I think,

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testified, if can I paraphrase him, that he had already had one hip replacement surgery and that he already knew about the risks, generally, going into this surgery. Is that how you read it?
A. Yes.
Q. Okay. The plaintiff in this case signed a consent indicating that he had been given an informed consent; true?
A. Correct.
Q. Is that right?
A. Yes.
Q. Okay. The approach that Dr. Armstrong used, which is an anterior femoral approach – I'm sorry – it's an anterior approach – let me start over.
The approach that he used – that Dr. Armstrong used is an anterior approach; true?
A. Yes.
Q. Is that an approach that you use?
A. Yes.
Q. You've actually written on that topic; true?
A. Yes.
Q. Is it the preferred approach today?
A. Some surgeons prefer it; some don't.

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Q. Okay. All right. There's a lateral approach, also; is that right?
A. Yes.
Q. Is that – is the anterior approach preferred over the lateral approach?
A. Both have advantages and disadvantages.
Q. And some use a posterior approach; is that right?
A. Yes.
Q. Have you used all three?
A. Yes.
Q. Most commonly when you were doing 200-plus hips a year, would you most commonly do an anterior approach?
A. Yes.
Q. Okay. Let me just make sure I'm clear up front. You're not here to give an opinion that because a femoral nerve injury occurs, that it's a breach in the standard of care; true?
A. As a general proposition, true. I would need more data.
Q. Okay. And a femoral nerve injury with the approach used by Dr. Armstrong here does not automatically equal negligence or breach in the standard of care; true?

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A. Correct.
Q. You've had patients that have developed a femoral nerve palsy or injury; true?
A. Yes.
Q. And was that with the anterior approach?
A. With the anterior approach, yes.
Q. Okay. Tell me, if you know, what you believe caused the femoral nerve injury in the two patients that you had – two or three.
A. One was a bleed –
Q. Okay.
A. – right after surgery. The other one, I never knew.
Q. Okay. Did you have a suspicion one way or the other?
A. No.
Q. And so that would be consistent with a lot of femoral nerve injuries, and that is that the actual cause of the femoral nerve injury is unknown; true?
A. Correct.
Q. Okay. And in this case, there's no evidence -- you can't point to any evidence or anything that you saw that would indicate the actual cause of a femoral nerve injury in this case; true?

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A. I have an opinion, but I didn't see anything in the factual data, aside from the medial incision, which, in my opinion, will increase a risk of a femoral nerve palsy.

Q. Okay. The median -- the incision that Dr. Armstrong made, in your opinion, will increase the risk. I understand that's your opinion, but there isn't evidence in this case that you found that would support an opinion as to the actual cause; true?

A. True.

Q. Okay. So the literature that I've looked at, and certainly, I think, you've testified in the past and in your own circumstance, many times the actual cause is unknown; true?

A. Correct.

Q. Okay. We know, because you have had femoral nerve injury as a result of total hip surgery and total hip arthroplasty, that it can occur without negligence; true?

A. True.

Q. In other words, in the circumstance that you had a patient with a total hip arthroplasty where they develop postoperative femoral neuropathy, and you couldn't identify the cause, you'd agree

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with me that your care was not negligent; true?

A. Yes.

Q. Okay. You mentioned a moment ago when we started the deposition that you -- in the thumb drive that you gave me, you were kind enough to bring here today, that you made reference to a -- I think it was a case report where there was a femoral nerve due to a psoas bleed.

A. Correct.

Q. Do you remember that?

A. Yes.

Q. Do you believe a psoas bleed or a bleed was the cause of the femoral nerve injury in this case?

A. No.

Q. Okay. A femoral nerve palsy can occur from a competently performed hip replacement surgery. I think that's what you're saying; true?

A. Right.

Q. You looked at Dr. Armstrong's operative note?

A. Yes.

Q. And would you agree with me that from the operate note, it appeared that he competently performed the hip replacement surgery for

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Mr. Johnson?

A. Yes.

Q. Okay. You're not here to offer an opinion that surgery itself or the placement of the prosthesis itself in this case was done below the standard of care? Is that true?

A. Yes.

Q. Okay. Would you agree with me that there's nothing in this case that would indicate that but for the negligence of the surgeon, the injury would not have happened?

MR. GINZKEY: I'm going to object. That's a very vague and ambiguous question.

MR. BRANDT: Okay. I'll rephrase it.

Q. (By Mr. Brandt) You have a law degree; right?

A. Yes.

Q. Okay. You understand the concept of res ipsa loquitur?

A. Correct.

Q. Right? You studied it; right?

A. Right.

Q. You've testified about it; right?

A. Yes.

Q. You understand the concept of but for,

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right, in the concept of res ipsa loquitur; true?

A. True.

Q. Okay. And you would agree with me that there's nothing in this case that would support the proposition that but for the negligence of Dr. Armstrong, the injury would have occurred; right?

A. I'm still not clear what you're --

Q. Okay. That's my fault, then. I'll ask a better question.

There's an allegation in the complaint, and the allegation -- let me just read it to you.

The allegation -- well, the concept of res ipsa loquitur, would, you'd agree with me, is that this injury that this patient had could not have occurred without negligence; true?

A. True.

Q. And we haven't identified anything -- you haven't identified anything -- you haven't identified anything that you think is the actual cause or mechanism of injury; true?

A. Not true. My opinion is that this injury was most likely caused by a retractor.

Q. And that's not contained in anything that you have disclosed to Mr. Ginzkey or in any of the

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documents we've looked at; true?
A. True.
Q. Okay.
MR. GINZKEY: Let me pose an objection. The disclosure does specifically mention the instrumentation, generically; so I think that's a complete mischaracterization of the disclosure, and I object on that basis.
Q. (By Mr. Brandt) There's no evidence from what you've looked at, however, as to how a retractor came in contact with these two branches of the femoral nerve; true?
A. I'm not sure I understand the question.
Q. Well, I guess my question, Dr. Bal, is this: There's no evidence in this case -- and I think you've told me that you can't point to anything in particular that you believe or that there is evidence of direct injury to the femoral nerve; true?
A. No, that's not true. There's evidence of direct injury to the nerve based on the EMG findings.
Q. I understand. But in terms of the actual performance of the surgery, you can't point to anything, by way of evidence in this case, that

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supports that a retractor or any other instrumentation came in contact with the nerve; true?
MR. GINZKEY: So is the question Dr. Armstrong didn't put that in his op note? Is that the question?
MR. BRANDT: I'm just asking him -- he --
Q. (By Mr. Brandt) Can you point to any evidence in this case -- looking at the discovery in case, the medical records, is there any evidence that a retractor caused this injury, based upon the documents that you've reviewed?
A. Yes. The documents I reviewed show misplacement too far medial of the incision, and then twice in the operative record, the doctor documents the placement of the anterior retractor. While documentation does not say that the retractor was up against the femoral nerve, that is my opinion, based on my reading of the records.
Q. Is that your opinion, based upon the fact that postoperatively, the patient had a femoral neuropathy?
A. In part, and in part on the EMG findings.
Q. Okay. Anything else?
A. No.

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Q. Okay. There's nothing in his operative note that he placed a retractor in proximity to the rectus femoris or the -- the branches -- the two branches of the femoral nerve that we've been talking about -- that are talked about in this case; right?
A. Well, that's not right. He does mention placing the retractor up against the rectus femoris muscle, which is where it should be placed, and then moving it to an intracapsular location when he repositioned it once during the operation.
Q. Okay. Nothing inappropriate about that; true?
A. As it's stated, no, nothing inappropriate about that.
Q. All right. And, in fact, if we look at the entirety of the medical record -- and I'm talking about his operative note -- I'll be happy to mark this. Now, this has my highlighting on it, so you don't have to necessarily pay attention to that -- you can look at anything you want to look at -- but take a look at that, and I want you to tell me if there's anything that operative note that you find to be inappropriate in the way in which he approached the surgery.

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A. No.
(Deposition Exhibit No. 4 was marked for identification.)
Q. (By Mr. Brandt) Okay. The -- I want to talk to you a little bit about this incision.
The -- I believe your opinion is, is that the incision is too medial, and I want to make sure I understand what is it about the incision that you believe is inappropriate, just so I understand. And I think I have a photograph here -- bear with me, because I'm not -- I was digging through this stuff yesterday, and I think this is Mr. Johnson.
(Deposition Exhibit No. 5 was marked for identification.)
MR. GINZKEY: I can't identify that.
MR. BRANDT: I can't tell you, either. Let me hand it to the witness and see if --
Q. (By Mr. Brandt) Is that the incision or is that a photograph of the incision that brought you to the conclusion that the incision was too medial, if you know?
A. No. I haven't seen this before.
Q. Okay. Why don't you give me this back. I'll make it part of the record, but we'll establish that we not -- or I'll state for the record that we

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haven't established that this is Mr. Johnson. Okay?
A. Okay.
Q. So I won't hit you with that later. All right?
A. Uh-huh.
Q. So maybe the easiest thing for you to do is maybe you can draw for me, if you're willing to do it, how the incision went and how you think it should go.
A. The photographs in the record of his left thigh – of Mr. Johnson's left thigh versus right thigh.
Q. Okay.
A. And the right thigh incision is appropriately placed.
Q. Okay.
MR. GINZKEY: Yeah. And I don't have a problem with disassembling this and making these as exhibits, simply because I know these are Wes Johnson. I've never seen Exhibit 5. There are two consecutive photographs.
MR. BRANDT: Let's just take a break, and we'll have those – as long as we're on this, and we'll cover it.
(A recess was taken.)

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(Deposition Exhibit No. 6 and 7 was marked for identification.)
Q. (By Mr. Brandt) Doctor, thanks for the break. I'm going to hand you what's marked as 6 and 7. And those are different photographs, but if you can tell me what 6 shows and what 7 shows, that would be great.
A. Six shows the incision from the right hip replacement done two to three years before the left one by a different physician.
Q. Right. And 7?
A. And 7 shows the incision on the left hip replacement done by the defendant physician in this case.
Q. Okay. And so your position is that Exhibit 7 shows an incision that is too medial. If you would – I'll hand you a pen, and maybe you can draw on there where you think it ought to be.
A. (Witness complies.)
Q. Okay. And so – thank you, sir. And let the record reflect that Dr. Bal has done with a dotted line – written with a dotted line on Exhibit 7 the location where you think the incision should have been; is that right?
A. Right.

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Q. And the incision location in No. 7 – not the one that you drew, but the one that is showed by the image, is that, nonetheless, within the standard of care?
A. The location of the incision?
Q. Yeah.
A. Yeah.
Q. Okay. The – I want to ask you about the branches of the femoral nerve that were part of the injury; right?
A. Right.
Q. You read the EMG; right?
A. Correct.
Q. And the EMG talked about two branches of the femoral nerve; is that right?
A. Yes.
Q. And their course, if you will – they branch off the femoral nerve at a location that is distal to where this incision is in Exhibit 7? Is that right?
A. It's highly variable how the femoral nerve branches out in the proximal thigh.
Q. But you know fairly typically that's going to be – those two branches, the rectus femoris and the vastus lateralis branch off in a location distal

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to that incision; true?
MR. GINZKEY: Which incision?
Q. (By Mr. Brandt) The incision that Dr. Armstrong made. I'm sorry.
A. No, not necessarily, but, yes, they can.
Q. Okay. And so I'm going to show you what I've marked as Exhibit 8.
(Deposition Exhibit No. 8 was marked for identification.)
Q. (By Mr. Brandt) So this is a drawing of the femoral nerve that I pulled off. It does show the rectus femoris and the vastus lateralis, they are both marked. Okay?
A. Uh-huh.
Q. So, first off, would this – Exhibit No. 8 show fairly typical anatomy?
A. Yes.
Q. Okay. And it – would the location that they've marked there as the branch of the vastus lateralis and the rectus femoris, would those be fairly typical?
A. Yes.
Q. And would you agree with me that if we look at this Exhibit 8, that the location of the incision by Dr. Armstrong would be proximal to the

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branches of those nerves?
A. Yes and no. The incision location would be proximal, but these -- this is a -- this is a drawing, not an accurate cadaveric dissection specimen. And point of fact, these branches run in a sheath in the nerve bundle, and in many cases, the arborization -- the branching off of the various branches -- is at the level of the hip itself, and then the branches run in a sheath and penetrate or innervate each muscle at a variable level.
Q. Okay. And I understand what you're saying. I'm just saying that the actual branches themselves, though, are distal to where the incision was made; true?
A. Yeah. The branches representing innervation of the muscles are distal to where the incision is.
Q. Okay. Right. No one has reexplored this nerve?
A. Correct.
Q. Okay. So would you -- we know there's EMGs, but no one has reoperated on this individual to see where the location -- the actual location of the neuroma or injury might have occurred; true?
A. True.

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Q. Okay. Have you any experience with the bikini incision?
A. Yes.
Q. Okay. And what is the bikini incision?
A. Kind of follows a contour that's compatible with wearing a bikini, I guess.
Q. Okay. Have you done it?
A. No.
Q. Okay. Do you -- is it substandard care to do it?
A. No.
Q. Okay. Would you agree with me that the bikini incision would be even more medial than Dr. Johnson's -- I'm sorry -- Dr. Armstrong in the Johnson case?
A. One limb of it goes more medial, but the incision itself starts lateral.
Q. Okay. And any of your colleagues at the university perform a bikini incision?
A. No.
Q. Is there a reason why you didn't do it?
A. Yes. Higher incidence of thigh numbness and a more difficult exposure.
Q. Okay. Was there a higher incidence of femoral neuropathies arising out of bikini

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incisions?
A. I'm not aware of literature to that effect.
Q. Yeah, I -- the literature that I looked at said that there was no increased risk of femoral neuropathy with the bikini incision. Would you have any reason to disagree with that?
A. No.
Q. Okay. So the reason to perform a bikini incision is -- would that be more on a thinner patient, presumably, a female?
A. Yes.
Q. Okay. The -- if we look at the operative note of Dr. Armstrong -- so Dr. Armstrong made an initial -- I'm going to call it a skin incision. Do you see that?
A. Yes.
Q. Okay. I've highlighted it there.
A. Yeah.
Q. So you're looking at page 2 of his operative note, and he talks about the -- using a No. 20 blade. Do you see that?
A. Right.
Q. That's a blade that is typically used to make a skin incision; is that right?

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A. That's right.
Q. Do you use a 20 -- have you used a 20 blade?
A. Yes.
Q. Okay. And would you agree with me that the femoral nerve is much deeper than the depth, if you will, of the initial skin incision?
A. Yes.
Q. Okay. In other words, the branches that we've been talking about of the femoral nerve and the femoral nerve itself are well below the fascia; true?
A. True.
Q. Okay. And these branches are also distal from the location of the incision; true?
A. True.
(Deposition Exhibit No. 9 was marked for identification.)
Q. (By Mr. Brandt) Okay. So if you look at Dr. Armstrong's operative note at the location that I just pointed you to -- and I'm looking at now an article that you wrote, and I'll mark it -- it's entitled -- we'll mark this as Exhibit No. 9. It's entitled "Total Hip Replacement With Use of Direct Anterior Approach." You wrote this with

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Dr. Crist, C-r-i-s-t, and Dr. Ivie, I-v-i-e.
A. Okay.
Q. You're familiar with this, I'm sure. Is that right?
A. I'll have to look at it.
Q. Okay.
(Deposition Exhibit No. 9 was marked for identification.)
A. Okay.
Q. (By Mr. Brandt) Okay. Do you remember this article?
A. Yes.
Q. I realize it was 2014, is that right –
A. Right.
Q. – that you wrote it?
A. Right.
Q. And so this would have been published at the time of this surgery, which took place in 2016; true?
A. True.
Q. All right. If you look at the second page, the middle column – and I'll just read it into the record so Jim and I know where this is later. It says – and Troy – sorry, Troy. It says this – and you're talking about, actually

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performing this procedure within an anterior approach; right?
A. Right.
Q. And it says this is, or you wrote this:
"The skin is incised 2 to 3 centimeters posterior and 1 centimeter distal to the anterior superior iliac spine over the tensor fasciae muscle belt."
I'm going to stop right there. Okay?
A. Okay.
Q. If you look at Dr. Armstrong's operative note, he says this on page 2:
"The fascia incision was made with a No. 10 blade scalpel over the belly of the tensor fasciae."
So he made his incision that he – that you are referred – or that he refers to in the exact location that you said it should be in this article; true?
A. Well, semantics-wise, yes, but if you look the illustration, he made it more medial. The tensor muscle goes lateral, and that's why the incision on the right hip is appropriate, because that follows a tensor valley.
He made the incision medial, but the

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incision is mobile so he can identify the tensor muscle belly through it. My point is the incision is medial and puts the femoral nerve at risk.
Q. But the incision that you described in your article is essentially the same incision that he describes in his operative note; true?
A. The description is the same, yes.
Q. Okay. All right. And I assume the way in which you described it in your article is standard of care; true?
A. Correct.
Q. Okay. Have you performed total hip arthroplasty and made an incision like the one that Dr. Armstrong made? Have you done that?
A. Not that I recall, no.
Q. You may have, you just don't recall; is that right?
MR. GINZKEY: I think that mischaracterizes the witness's testimony.
A. No, I don't – I don't – no, I haven't made incisions like that.
Q. (By Mr. Brandt) Do you have any opinions about the patient's current condition? I mean, in fairness to you, I don't think – and Jim will correct me if I'm wrong, but I don't think he's had

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treatment for the femoral neuropathy since 2018, but if that's the case, do you have any opinions about his current condition?
A. No. I haven't examined him as yet, and the last entry in the records I saw was, I believe, September 2019, when he had an EMG.
Q. Okay. I apologize.
Do you plan on examining him? If asked, I assume you would?
A. If asked, I will.
Q. Has he had any falls, from your understanding of the record –
A. Yes.
Q. I'm sorry. Let me just finish.
Has he had any falls, from your review of the record, since 2018?
A. I don't know.
Q. Okay. He had, prior to surgery, hip dysplasia?
A. Yes.
Q. Okay. What is hip dysplasia?
A. It's an anatomic abnormality of the hip joint.
Q. Okay.
A. In various grades of severity.

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Q. Does that put a patient at greater risk for femoral neuropathy?
A. It can -- potentially can, yes.
Q. Okay. All right. I read some literature that it can increase the risk of femoral neuropathy sevenfold. Would that be something you would agree with or disagree with?
A. Depending on the X-ray, depending on the severity of it, yes, I would agree with it.
Q. Did you have an understanding of the severity of Mr. Johnson's hip dysplasia?
A. No.
Q. Okay. He had some back and spine issues?
A. Correct.
Q. Would you agree with me that that also places patients at a higher risk for femoral neuropathy?
A. As a general proposition, yes, but in a specific case, you'd have to look at the MRI of the lumbar spine. You'd have to look at a number of factors.
Q. The things that -- I understand that, but as a general proposition, spine issues can cause a problem with knee strength, tingling in the thigh, numbness, a problem with the iliotibial band; true?

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A. True.
Q. Just having surgery -- this type of surgery, the THA, can also cause numbness related to the iliotibial band; true?
A. Numbness related -- numbness localized around the iliotibial band, yes.
Q. Right. You've had patients that have had postoperatively complained about that, I assume, is that right?
A. Yes. Yeah.
Q. Pretty - I won't say it's a common complaint, but it's a complaint that you see; right?
A. Yes.
Q. And does that manifest itself in numbness in the thigh?
A. Numbness over a patch of skin just lateral to the thigh.
Q. Okay. Do you -- in those patients, have you performed an iliotibial band release --
A. No.
Q. -- as a subsequent surgery?
A. No, I have not.
Q. Okay. How do you treat that?
A. The lateral thigh numbness is transient. You just wait it out, and it disappears.

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Q. Okay. At least in all of your patients, huh?
A. Yes.
Q. Okay. He had, preop, both -- "he," being Mr. Johnson, had both left groin and buttock pain; is that right?
A. Yes.
Q. He also had an antalgic gait?
A. Yeah.
Q. Okay. What is an antalgic gait?
A. An antalgic gait is a gait against pain. So the patient lurches and walks against the pain.
Q. Okay. Did he have that postoperatively, do you know?
A. No. I think his hip pain disappeared.
Q. Okay. You read his deposition, and he continues to play golf?
A. Yes.
Q. Okay. No reason he can't do that?
A. Correct.
Q. And I just want to make sure that I leave here and understand. You don't have any opinions about any restrictions he has; true? I mean today -- his restrictions today.
A. No, not -- I haven't examined him, so I

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don't know about restrictions today.
Q. Okay. Same answer -- or same question, I'm sorry, with respect to ADLs. You don't have any opinions about any deficits he may have with his ADLs?
A. Correct.
Q. He's not taking any medication, I don't think, at least as of the last chart that I looked at. Is that your understanding?
A. Yes.
Q. And he hasn't had any -- well, let me ask you: Do you have any opinions about whether he'll need any injections in the future?
A. In which location?
Q. Relative to these two branches of the femoral nerve.
A. No.
Q. Okay. In terms of his current functional abilities, you don't have any understanding to form an opinion. Would that be true?
A. Well, he's got permanent injury and atrophy of his muscles, so I do have an opinion, in terms of his quadriceps weakness and his flat-footed gait, which is in the record. Those are deficiencies that he has to live with.

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Q. Okay. But to the extent that he may or may not have compensated for those, do you have any opinions?
A. No.
Q. Okay. And so my question is really his functional abilities. You don't really have any opinions about that; true?
A. Well, I do have an opinion, because based on the literature and my understanding of a femoral nerve palsy after a hip replacement, the dysfunction and limitations of the patient are permanent and they are significant.
Q. Okay. I get that. My question, though, really, is focused on Mr. Johnson. Okay?
A. Correct.
Q. And your understanding of his current abilities or disabilities. You really don't have an opinion about him personally, do you?
A. No. I would have to examine him.
Q. And whether he's going to need – what future care he might need, I assume you don't have any opinion about that?
A. No, I do have an opinion about that. With quadriceps weakness, altered gait, and given his young age, his knee will get arthritic, particularly

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of a flat-footed gait and the need to lock the knee in extension. That's the only way people with a quadriceps deficiency can walk, and that puts excessive stress on the knee, leading it to arthritis and treatments for that.
Q. Okay.
A. And people with an altered gait, like Mr. Johnson, will also stress their back, and so he can expect back pain and knee pain on the same side as the femoral palsy.
Q. And, again, you're basing this on a general proposition of patients with femoral neuropathy, but whether Mr. Johnson has manifestations of knee arthritis or the back issues that you talked about, you really don't know, do you?
A. Not without examining him and questioning him specifically.
Q. Okay. And whether or not he's going to need a nerve block or an EMG, NCV, or even surgery in the future, you can't say without examining him, can you?
A. That is correct.
Q. Okay. This is an article that was referenced in a deposition that you gave involving a

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femoral neuropathy, and I think this was the Cohen case, and this marked as Bal Exhibit No. 2. I'm going to mark it in this deposition as Bal Exhibit 10. I'm going to put that right next to the previous sticker.
(Deposition Exhibit No. 10 was marked for identification.)
Q. (By Mr. Brandt) And so in the Cohen case, in that deposition, you offered – you came to the deposition with this article, and you answered some questions about it. I want to ask you some questions about it.
This article deals with research by 18 fellowship-trained arthroplasty surgeons – hip surgeons; right?
Take your time. I'm sorry.
A. Yeah, that's what it says.
Q. And they assessed post-op patients with femoral neuropathies or neuritis; true?
A. Correct.
Q. They included the anterior approach that we've been talking about here today; true?
A. Right.
Q. And they concluded that – if you look at the first paragraph, it says this – I'll read it

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into the record.
"The etiology is often unknown, with causes including compression from retractor placement or hematoma formation, traction laceration, ischemia, or thermal damage."
Did I read that correctly?
A. Yes.
Q. Okay. And so the statement about the etiology is often unknown is a true statement; correct?
A. True.
Q. Okay. If you look under the "Discussion" section, which is page 1197 –
A. Okay.
Q. – they talk about – at the bottom of the page, the sentence begins – I'll read it into the record.
"Based on our study, it appears that FNP, femoral nerve palsy, has a better prognosis for recovery than other major nerve palsies around the hip, with the majority of patients regaining motor function in the quadriceps muscle."
Did I read that correctly?
A. Yes.
Q. Okay. And then in the next paragraph a

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little bit lower, it says this:
"Based on the results of this study" --
their study -- "motor weakness had resolved in 75 percent of the patients at a mean of 33.3 months. Those remaining patients had only mild residual weakness that typically did not require the use of a cane or a knee brace. No patient suffered major persistent motor deficits."
Did I read that correctly?
A. Yes.
Q. You know from reading Mr. Johnson's deposition that he has eschewed the use of a brace or any appliances like a walker or a cane; true?
A. True.
Q. And would you agree with me that his femoral neuropathy has basically presented in the same fashion, that he has a mild residual weakness?
MR. GINZKEY: I'm going to object that that mischaracterizes the medical chart, but the witness may answer.
A. No, I've never seen mild residual weakness. He's got a permanent palsy of the EMG. He's got clear evidence of muscle atrophy. That's what the records from Dr. Tung also document, so this description of a femoral palsy is very

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different than what the plaintiff in this case has.
Q. (By Mr. Brandt) Okay. The -- I think I asked this earlier, but this is a little broader question.
From your review of the records, including those people who have performed EMGs, NCV studies, no one who has provided care to this patient has indicated in a medical record or deposition testimony the exact etiology of his femoral nerve palsy. Is that a true statement?
MR. GINZKEY: Again, I'm going to object about mischaracterization, specifically with respect to the MARS MRI, but I'm not instructing the witness not to the answer.
A. Say that again, the question, please.
Q. (By Mr. Brandt) No one who has provided care to this patient, including everybody, has indicated in a medical record or deposition testimony the exact etiology of the femoral nerve palsy; true?
A. Correct.
Q. All right. You've testified before that a femoral nerve injury can occur in the absence of negligence in a THA; true?
A. True.

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Q. Okay. Nothing in this article that we've marked as Exhibit No. 10 but was No. 2 to the Cohen deposition indicate that the occurrence of a femoral neuropathy as an outcome of surgery equals breach in the standard of care; true?
A. Correct.
Q. You've indicated that you believe a retractor may have caused the injury in this case, but you'd agree with me that, in part, that's based on speculation, simply because the patient had an outcome that included a femoral neuropathy; true?
A. I didn't understand the question. Sorry.
Q. Okay. So I think you indicated earlier in the deposition that you believe -- it's your opinion that a retractor caused the femoral nerve injury in this case?
A. Yes.
Q. But you'd agree with me that based upon your review of the case, there's really no evidence that a retractor actually caused injury to the femoral nerve; true? Outside of the fact that the patient came out of surgery with a femoral neuropathy, there's no evidence that a retractor came in contact with his femoral nerve; true?
A. No. That's not quite true. The medial

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placement of the incision; the fact the retractor was moved during surgery; the fact that the two branches that suffered complete injury are to the vastus lateralis and the intermedius, and those would be closer to the retractor than the branch to the medialis, which is further medial; and the fact that the article -- or Exhibit 2 that's in my hand from another case clearly states a retractor tip is strikingly close to the femoral nerve when placed near the anterior rim of acetabulum, and one study demonstrated alarmingly high pressures around the nerve during retractor placement.
Q. But you'd agree with me, Dr. Bal, that what you're talking about there is the increased risk of injury to the femoral nerve; right?
A. True.
Q. All right. And that's really the basis of your opinion that the retractor placement in this case was -- put the patient at increased risk of femoral nerve injury; true?
A. True.
Q. But whether, in fact, that's the cause, you don't have an opinion, because there's no evidence as to actually what caused any femoral neuropathy in this case; true? Because we can't say

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that the retractor caused it. There's no evidence of that in any of the things that you've looked at; true?
A. The EMGs strongly suggest it because of the proximity of the branches that were injured to the retractor and the relative lack of proximity to the retractor of the one branch that was spared.
Q. But there -- aside from the EMG findings that were -- how many months later? Months later?
A. About three months later.
Q. All right. There's no other evidence that you can point to that the retractor caused the femoral neuropathy or the problems that the patient discussed after he got out of surgery -- actually, the day after surgery; true?
A. I'm sorry. What was that about the day after surgery?
Q. I'm sorry. It's my fault.
So aside from the EMG that you just referenced, there's no other evidence that you're pointing to that supports the proposition that a retractor caused the injury to the femoral nerve in this case; true?
MR. GINZKEY: Let me just interpose an objection about the EMG. There are two EMGs that

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are consistent -- the findings are consistent with each other; there's a MARS MRI. The question completely excludes that evidence.
MR. BRANDT: Okay. Well --
MR. GINZKEY: The witness can certainly answer the question as posed.
Q. (By Mr. Brandt) We can include that evidence in your answer, but that's -- what we've just described, the imaging and the two EMG studies, that's the basis of your opinion in this case that a retractor caused injury to the patient?
A. And the immediate onset of the nerve injury right after surgery.
Q. And we know that any femoral neuropathy -- well, we know -- I think you've agreed with me that femoral neuropathies can occur without negligence; true?
A. True.
Q. And so it's important --
A. Let me backtrack on that answer a little bit, because I think I'm not giving a complete answer.
There are two distinct types of femoral neuropathies, and I want to make sure we're clear on the distinction.

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Transient femoral neuropathy injury, neuropraxia palsy, as referenced in this paper by Andrew Fleshman that I have in my hand --
A. Right.
Q. -- occurs in the absence of negligence. It is transient; it has a good prognosis; strength returns, and the patient goes on with a temporary time period during which there is a deficit that improves rapidly, and those are what I've encountered in my practice. That palsy can occur and does occur in the absence of negligence from a variety of factors.
My testimony here is a complete injury to the femoral nerve, as occurred here, verified by repeat EMG and by subsequent treatment by a nerve specialist like Dr. Tung, does not occur absent negligence.
Q. Well, there's nothing in the article that we've been talking about, which is No. 10 to your deposition, that distinguishes between temporary nerve palsy and permanent femoral neuropathy; true?
MR. GINZKEY: But that doesn't have anything to do with his opinion. Again, I'm not instructing the witness not to answer.
A. Well, if you go to the abstract and read

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it, it'll say "femoral nerve palsy" under "Conclusion," page 1. "After hip surgery remains relatively uncommon but may increase with a growing interest in anterior total hip arthroplasty exposures."
All they saw in their series was a subset of femoral neuropathy that can occur and does occur, absent negligence, such that -- and they write "a near complete recovery, with only mild motor deficits can be expected."
Q. (By Mr. Brandt) So I just want to make sure that we're talking about the same thing.
A. Yeah.
Q. So there are femoral neuropathies that can occur without negligence?
A. Yes.
Q. With a THA?
A. Correct.
Q. That don't resolve completely, that aren't temporary in nature; true?
A. No, that's not true.
Q. It's certainly what the article talks about; right?
MR. GINZKEY: Well, now, wait a minute.
MR. BRANDT: Hang on.

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MR. GINZKEY: The article speaks for itself. We're not going to get into a semantic argument over the article. The article speaks for itself.

A. I –

Q. (By Mr. Brandt) Go ahead.

A. I disagree. The article speaks of complete recovery within two years with no deficits, and those deficits were sensory phenomena, even in the subset – the last sentence of the article is:

"Patients must be counseled of the significant challenges of recovering from femoral nerve palsy."

But the article found, in a retrospective review, a small incidence of femoral nerve palsy that spontaneously recovered. It never makes a distinction between permanent motor nerve palsy.

Q. Right. And I think that's my point. I'm not trying to fence with you, okay?

A. Sure.

Q. So in the part I read, it said – on page 197 – "Those remaining patients had only mild residual weakness that typically did not require the use of a cane or a brace" – I'm sorry – "cane or knee brace."

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And so my point is only that it appears from the study that some patients didn't have a complete resolution of signs and symptoms; true? Based upon that statement.

MR. GINZKEY: Again, that's your interpretation of what's written down.

MR. BRANDT: Well, I'm just asking him, Jim. He can agree or disagree.

A. No, I disagree, and I will tell you why. Because the article in the last – second-to-last paragraph acknowledges that they just don't know. In other words, it is possible that some patients not returning for objective testing may have had more severe residual deficits. The articles – we just don't know. These patients may have gone on and had permanent palsies, but we don't know that.

Q. (By Mr. Brandt) Okay.

A. The ones they saw all recovered.

Q. It's not part of the allegations, but I want to just cover it, just so I can leave here and know I've done it.

No issue with respect to leg length discrepancy in this case?

A. No.

Q. Is that true?

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A. While the patient has a leg length discrepancy, I'm not criticizing that.

Q. Okay. It's true in the operative note of Dr. Armstrong that there's no evidence of excessive traction; true?

A. True.

Q. There's no evidence of difficulty with retraction; true?

A. That is true.

Q. Okay. There's no evidence in his operative note or in his deposition that he operated in an inappropriate muscular plane; true?

A. No evidence.

Q. Okay. There's no evidence in Dr. Armstrong's operative note or his deposition that he didn't make sure sufficient releases were done; true?

A. True.

Q. And there's no evidence in Dr. Armstrong's note that he was unaware of the location of the nerves; true?

A. That is true.

Q. Okay. Is there an obligation to directly visualize the femoral nerve?

A. No.

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Q. Okay. And I mean that during the procedure.

A. Correct. There's no reason to visualize it.

Q. Okay. So Dr. Armstrong diagnosed the patient as having a femoral neuropathy, I think, either on the day of or the day after surgery; is that right?

A. Right.

Q. One of the problems with a femoral neuropathy diagnosis is that it's sometimes a delayed diagnosis; true? You've testified in a delayed diagnosis case; correct?

A. Not that I recall. I may have.

Q. Okay. But in this case, there's no issue with respect to any delay in diagnosing of the problem; true?

A. No. No.

Q. Is that right?

A. That is right.

Q. Okay. The hardware, if you will, in this case, is DePuy –

A. Yes.

Q. – is the manufacturer. Did you use DePuy?

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A. Yes.
Q. Okay. Any criticism of the use of DePuy – the exact hardware in this case?
A. No.
Q. I don't know if you saw this -- you may have; if you didn't, that's fine. There's a discussion about a nerve transfer at St. Louis.
A. Yes.
Q. Is that a procedure you've performed?
A. No. I've assisted, but not directly performed it.
Q. Okay. Would there be a benefit to a patient like Johnson with that procedure – if you have an opinion? If you don't, that's fine.
A. At this point, no.
Q. Okay. All right. So he also – you read Dr. Tung's deposition and his records?
A. Yes.
Q. He also talked about a muscle transfer; right?
A. Correct.
Q. Is that something you've performed?
A. Yes, I have.
Q. Okay. And would that assist the patient?
A. It can. It's a – there's no guarantees

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that it would help, as Dr. Tung testified.
Q. Okay. What's your experience? I mean, is it like –
A. It's a long rehabilitation. The patient's muscles have to be reeducated, and there's some partial return of function with it.
Q. Okay. So from your perspective, not a great procedure?
A. No.
Q. In other words, the success rate of that procedure is not high?
A. Correct.
Q. Okay. I just want to make sure I understand this.
There's no evidence in this case that the rectus femoris or the vastus lateralis branches of the femoral nerve were transected by a scalpel or damaged by electrocautery; true?
A. True.
Q. Okay. And Dr. Armstrong's operative note describes – well, strike that. I think we've already covered that.
Is there an obligation on the part of the surgeon to draw on the skin of the patient on the lower extremity before doing that procedure?

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A. No.
Q. Okay. He did not – Dr. Armstrong didn't obtain the records of Dr. Dangles, who was your orthopedic surgeon who performed the total hip on the right. Okay?
A. Right.
Q. Does he have an obligation under the standard of care – "he" being Dr. Armstrong – to obtain those records?
A. No.
MR. BRANDT: Okay. If we can take a few minutes, I'm going to go through my notes.
THE WITNESS: Okay.
MR. BRANDT: And we'll be pretty close to done.
THE WITNESS: Okay.
MR. BRANDT: Thank you.
(A recess was taken.)
Q. (By Mr. Brandt) Doctor, thanks. You've been kind to give me your time here today. I just have a couple other questions that I want to ask you.
One is – this patient was a tobacco user?
A. Right.
Q. Does that increase his risk of femoral

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neuropathy?
A. As a general proposition, it does.
Q. What is it about the smoking that causes – is it just ischemia?
A. Ischemia.
Q. Okay. And the last area I want to ask you about is, we – I read to you a portion of Dr. Armstrong's operative note about – and I'll share it with you again, if you want. Just to put it in context, I guess I should.
So if we put aside, just for the sake of this question, the medial aspect of the skin incision, it appeared to me that when he describes "the fascial incision was made with a No. 10 blade scalpel over the belly of the tensor fasciae," that that is exactly how you described it in this article, No. 9. Is that right?
A. Right.
Q. Okay.
MR. BRANDT: Okay. I don't have any other questions. Jim might; I don't know if Troy does.
MR. GINZKEY: Go ahead, Troy.
MR. LUNDQUIST: Thank you, Jim.

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CROSS-EXAMINATION
BY MR. LUNDQUIST:
Q. Good morning, Doctor. My name is Troy Lundquist, and I apologize I'm only here by phone, but can you hear me okay?
A. Yes.
Q. Okay. I don't have many questions. I might jump around just a bit, but if you have handy Exhibit 3, which were your opinions in the case.
A. Yes.
Q. Can I have you pull that – all right.
Let me first ask, taking into account Exhibit 3, which were the opinions disclosed to us, and then, obviously, including the discussion that has been had this morning, does that encompass all of your opinions in this case – those two things collectively, our discussion and the disclosure in Exhibit 3?
A. No. I have additional opinions.
Q. Okay. What I want to work off of here is just what's been disclosed to us. So as I look at Exhibit 3, I see on page 2 there is – subparagraph B, do you see that, where it talks about – it makes reference to a nurse Sarah Harden?
A. Okay. Yes.

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Q. Okay. Doctor, I represent the hospital and the nurses in this case, so my interest is understanding any and all opinions that you may have that in any way relate to them.
So as I read Exhibit 3, the only place I see any reference to any of the nursing staff is Sarah Harden there in subparagraph B. Am I correct?
A. Correct.
Q. Okay. Now, you made some discussion earlier about the incision that was made in this case. The incision was made by Dr. Armstrong; correct?
A. Correct.
Q. Nurse Harden, nor any other nurse had any involvement whatsoever in the incision. True statement?
A. True.
Q. Now, there was also some discussion about the use of retractors. In general, for a total hip, what is the purpose of using retractors in this surgery?
A. To push tissues away so the surgeon can see.
Q. Okay. So retractors are a necessary part of a total hip replacement surgery like Mr. Johnson

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had; correct?
A. Right.
Q. They're utilized to provide visualization and access, as well as for to minimize risk to injury to adjacent structures; correct?
A. Correct.
Q. Now, based on the depositions we've taken, it's my understanding that the retractors in the case – in this case, with Mr. Johnson's surgery, that the retractors were initially placed by Dr. Armstrong where he wanted them, and then as needed, they would be held in that particular location by Nurse Harden. Is that your understanding of what occurred, based on your read of everything?
A. Yes.
Q. And am I correct that that is the typical approach, that the surgeon is the one who makes the independent judgment of where the retractors will be placed; he or she places them in that location where they want; and then they, as needed, will ask a nurse or scrub tech to hold them there in that location. Is that the normal procedure?
A. Yes.
Q. And that's – based on your read of

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everything in this case, that's what occurred here with Mr. Johnson's surgery?
A. Yes.
Q. Doctor, from your review of anything in this case, all the depositions and the records, did you find any indication that Nurse Harden did anything other than exactly what Dr. Armstrong wanted her to do?
A. No.
Q. So to place that – to put that another way, Nurse Harden, from your review of the records – or scrub tech Harden, I guess, actually – from your review of the records, there's no indication that she exercised any independent judgment or did anything surprising or unexpected or anything along those lines, is there?
A. No, there's no indication.
Q. The – hold on one second.
Now – and this is going to sound like a dumb question, but, Doctor, have you ever practiced as a nurse or a surgical technician?
A. No.
Q. Technologist?
A. No.
Q. Okay. You're not intending to offer

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standard of care for nursing practice, are you?
A. No.
Q. Now, as the surgeon, understanding that you cannot testify to the standard of care of a nurse, you do have certain expectations as a physician of the nurses that are in the surgical suite with you; true?
A. True.
Q. And among those expectations would be that the scrub nurse or surgical tech does exactly what you want them to do as the surgeon; correct?
A. Correct.
Q. Based on your review of all of the materials in this case, the depositions, Dr. Armstrong's deposition, the other people involved in the surgery, is it your understanding that Nurse Harden, and any other of the nursing staff, did exactly what Dr. Armstrong wanted them to do?
A. Yeah. That's what I gathered from the depositions.
Q. And in that sense, Nurse Harden and the others would have met the expectations from the standard of the surgeon, meaning they did exactly what the surgeon wanted them to do and nothing else;

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true?
A. True.
MR. LUNDQUIST: Okay, Doctor. Thank you, sir. That's all of the questions I have.
THE WITNESS: Thank you.
MR. GINZKEY: Doctor, I do have questions.
CROSS-EXAMINATION
BY MR. GINZKEY:
Q. One of the items of evidence in this case is a MARS MRI of the patient in question from September of 2019, so September of last year. One of the findings is an interstitial tear of the left vastus intermedius/lateralis myotendinous junction. What's the significance of that, or what does that suggest to you?
A. It could be a number of things. It definitely tells you that the muscle is atrophied and injured at the location where the muscle becomes a tendon and inserts into the bone, and it's consistent with the abnormal gait and abnormal loading that I referred to earlier.
Q. That same MARS MRI finding goes on to describe an asymmetrical muscle atrophy and edema within the left rectus femoris and vastus intermedius/lateralis muscles. What does that mean

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and what does it suggest?
A. Well, it's suggests and it means that three out of the four quadriceps muscles, the lateralis, the intermedius, the rectus femoris are out. And this far out, 2019, when the surgery was 2016, there is clear-cut evidence on an MRI scan that those muscles are damaged permanently.
Q. There was also discussion about the fact that with respect to this patient's left hip preoperatively, Dr. Armstrong diagnosed him with dysplasia, and you've identified what that is, but you also went on to describe the fact that there are degrees of severity of the dysplasia; correct?
A. Correct.
Q. The more severe the dysplasia is, the greater the risk of a femoral nerve injury with respect to a THA with an anterior approach?
A. Correct.
Q. Now, did you see anywhere in the records that preoperatively, Dr. Armstrong did any imaging in an attempt to quantify the severity of this patient's hip dysplasia?
A. No.
Q. Wouldn't a reasonably careful orthopedic surgeon do that in order to come to a decision as to

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the degree of severity?
MR. BRANDT: Let me just object. This is an opinion that was never disclosed, and I'm not prepared to address it at this point, so ...
MR. GINZKEY: The question stands as posed.
A. If the surgeon recognized hip dysplasia and was concerned about it being a factor in the patient's risk of a femoral nerve palsy, then, yes, additional studies, such as a CAT scan, such as specialized X-ray views were available options.
Q. (By Mr. Ginzkey) And that would comply with the standard of care; correct?
A. Yes, that would comply with the standard of care.
Q. And there were a lot of questions about whether this patient's motor function was transient or permanent. What's your opinion on that?
A. Oh, it's definitely permanent, based on two EMGs. Even the very first one shows, essentially, that the lights were out, as far as the muscle innervation was concerned, and that was an EMG done only at three months from the surgery.
Q. Now, if I understand your testimony correctly, you're saying that the first EMG of

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January 11th, 2017 -- so approximately three months post-op -- showed relatively significant motor dysfunction; correct?
A. Correct.
Q. Does a reasonably careful orthopedic surgeon with that finding refer the patient to a neurosurgeon at that time?
MR. BRANDT: Same objection.
A. Yes. And here is why: The patient had an immediate femoral nerve palsy. While the etiology of that in this case cannot be determined definitively, I have talked about the medial placement of the incision, the fact that the patient had hip dysplasia, such that retractor placement, more likely than not, was a causative factor in the injury, particularly in light of which branches got injured.
Now, in the postoperative period, when this patient was seen as early as five days after the surgery and then subsequent intervals, what's interesting is -- or noteworthy is that the progression of the injury is more consistent with that article from -- that counsel showed me. It appears to be transient. In fact, the doctor comments that the patient is improving. He can feel

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muscle contractions, and the palsy is getting better every visit. Then he gets his EMG -- let me back up.
The assessment by Dr. Carmichael is contrary. He says this is a severe palsy, a severe weakness, and let's get the EMG, and that's a December note of 2016. In January, they get the EMG, which calls out a severe left femoral neuropathy. The lesion appears complete with no evidence of voluntary motor unit potential activation.
My concern is that this EMG and objective finding does not square with what the doctor has been documenting all along, which is that of an improving quadriceps policy. And to reconcile that discrepancy, yes, timely referral to a neurosurgeon or a nerve repair surgeon was required by the standard of care, because a nerve could have been repaired or transplanted, and the situation would have been salvaged.
MR. BRANDT: No other questions.
REDIRECT EXAMINATION
BY MR. BRANDT:
Q. So let me just ask you -- you prepared -- or Mr. Ginzkey prepared this exhibit that contained

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your opinions that we've marked as -- I don't know which exhibit it is -- Exhibit 3; right?
A. Right.
Q. He did that in consultation with you, I take it; is that right?
A. Right.
Q. And there's nothing in there regarding a referral to a neurosurgeon that that document; true?
A. That's true.
Q. Okay. And you'd agree with me that there's nothing in there -- in that document that makes any reference to the proposition that additional studies were an option for the patient preoperatively; true?
A. Correct.
Q. All right. And let me just take care of these one at a time. The standard of care didn't require, in this case, preoperative imaging, did it? You said it was an option, but the standard of care didn't really require it, did it?
MR. GINZKEY: I think that misstates the doctor's testimony.
A. If the hip dysplasia seen by Dr. Armstrong in the preoperative X-rays was concerning, then the standard of care required further workup and

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imaging.
Q. (By Mr. Brandt) If the hip dysplasia did not appear to Dr. Armstrong to be concerning, then the standard of care would not require preop imaging; true?
A. True.
Q. (By Mr. Brandt) And I think you've indicated to us today that you're not really sure how much hip dysplasia the patient had; true?
A. Correct.
Q. All right. With respect to the neurosurgery referral, let me just say one thing. Dr. Carmichael didn't refer the patient to a neurosurgeon; true?
A. True.
Q. You don't know what the window of time period is for any reoperation on the nerve; true?
A. Yes. The earlier, the better. And the -- we know that by July of 2018, according to Dr. Thomas Tung, it was way too late. The window had long since closed. The three-month interval is still sufficiently within the window in which a nerve repair can be attempted, and if the nerve ends have retracted, a nerve transplant can be done.
Q. Okay. We don't know if the nerve ends

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retracted at that point in time; true?
A. No. He never got the benefit of exploration of the injury.
Q. Right. And Dr. Carmichael saw the patient within that time window; true?
A. Correct.
Q. Dr. Carmichael's specialty or his area of expertise has to do with EMG and NCV studies; true?
A. True.
Q. That's what he did for McLean County Orthopedics; true?
A. Right.
Q. And he didn't find that there was a reason to send the patient to a neurosurgery – for a neurosurgery consult; true?
MR. GINZKEY: Well, that depends on whether or not Dr. Carmichael –
MR. BRANDT: Hang on.
MR. GINZKEY: – was in the position to make that and whether it was his obligation.
MR. BRANDT: Okay. I'm going to object to the speaking objection.
Q. (By Mr. Brandt) And my question is factual in nature, Doctor.
Dr. Carmichael didn't make a referral to

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neurosurgery for this patient within the time window that you've talked about; true?
A. That is true.
Q. And Dr. Carmichael is seeing the patient for a nerve injury; true? I mean, that's the purpose for which he's seeing the patient; true?
A. Yes.
Q. Okay. And he didn't make a referral – he didn't make a statement to Dr. Armstrong that Dr. Armstrong should consider sending the patient to neurosurgery for consult?
MR. GINZKEY: I'm sorry. I have to completely object. That misstates the record. If you look at Dr. Carmichael's concluding statement, he states, "Consideration might be given for consultation at a tertiary care center, such as at Susan McKenna and at Barnes."
Do you see that, Doctor?
THE WITNESS: Yeah, I remember seeing it.
Q. (By Mr. Brandt) All right. And so the window of opportunity for – well, first off – let me back up here.
The time period for which a nerve repair can take place is what? What's that window?
MR. GINZKEY: Objection. Ambiguous,

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vague.
MR. BRANDT: He made reference to it, Jim.
A. Three to six months following – immediately following the injury is best.
Q. (By Mr. Brandt) Okay.
A. But –
Q. Up to a year, usually, is what the literature talks about?
A. Usually, yes.
Q. And in this case, we have no evidence that the two branches of the nerve affected were actually transected; true?
A. Correct.
Q. And so a neurosurgeon could easily, like Dr. McKenna, examine the patient and determine that there is no surgical treatment; true? Within that one-year window.
A. No. That's not true. With a nerve injury, the nerve transplants are well established as a treatment. So whether there's a crush injury in a neuroma or whether it's a frank laceration, there are conduit nerve graphs that can be done.
Q. One of the treatments that Dr. McKenna might suggest or recommend for the patient is nonoperative care; true?

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A. It's an option, yes.
Q. All right.
MR. BRANDT: Okay. I mean, for the record, I'm going to preserve my right to come back, to the extent that I need to, because you've offered up opinions here that were never disclosed, so I'm going put that on the record.
I don't have anything else at this point in time, but I reserve the right to ask more questions about it. Okay?
MR. GINZKEY: That's understood.
RECROSS-EXAMINATION
BY MR. GINZKEY:
Q. Doctor, do you have any other opinions you want to express here today while we've got this opportunity.
MR. BRANDT: Same objection.
A. No. But as I testified, the patient doesn't live that far away, and if you want me to examine him, I'd be happy to do it and give you any supplementary opinions, prior to trial.
MR. GINZKEY: In all likelihood, we'll have that done prior to trial.
MR. BRANDT: Okay.
MR. GINZKEY: We'd like to do that

probably in time for you to take a supplemental deposition.

MR. BRANDT: Yeah. We'll need that. Okay.

Thank you, sir.

THE WITNESS: Thanks, guys.

MR. BRANDT: What do you want to do about signature?

MR. GINZKEY: Do you want to read and make corrections?

THE WITNESS: Whatever you recommend.

MR. GINZKEY: Let's go ahead and read it.

(The deposition concluded at 11:02 a.m.)

CERTIFICATE OF REPORTER

I, Lisa Ballalatak, a Certified Court Reporter for the State of Missouri, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

_____

Lisa Ballalatak
Missouri Supreme Court
Certified Court Reporter

ALARIS LITIGATION SERVICES
1608 Locust Street
Kansas City, Missouri 64108
Phone: (816) 221-1160

July 13th, 2020
MR. JAMES GINZKEY
GINZKEY LAW OFFICE
221 East Washington Street
Bloomington, Illinois 61701

WILLIAM "WES" JOHNSON v. LUCAS ARMSTRONG, McLEAN COUNTY ORTHOPEDICS, LTD, SARAH HARDEN, PAMELA ROLF, AND ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER

Dear Mr. Ginzkey:

Please find enclosed your copy of the deposition of Sonny Bal, MD, MBA, JD, PhD, taken on June 29th, 2020, in the above-referenced case. Also enclosed is the original signature page and errata sheet.

Please have the witness read your copy of the transcript, indicate any changes and/or corrections desired on the errata sheet, and sign the signature page before a notary public.

Please return the executed signature page and errata sheet to the Alaris Litigation production department within 30 days after receiving the transcript.

Thank you for your attention to this matter.

Sincerely,

Lisa Ballalatak

cc: Mr. Brandt

ERRATA SHEET

Witness: Sonny Bal, MD, MBA, JD, PhD

WILLIAM "WES" JOHNSON v. LUCAS ARMSTRONG, McLEAN COUNTY ORTHOPEDICS, LTD, et al.

Date Taken: June 29th, 2020

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Page #____ Line #____
Should read: _____
Reason for change: _____

Witness Signature: _____

STATE OF)
)
COUNTY OF)

I, Sonny Bal, MD, MBA, JD, PhD, do hereby certify:

That I have read the foregoing deposition;

That I have made such changes in form and/or substance to the within deposition as might be necessary to render the same true and correct;

That having made such changes thereon, I hereby subscribe my name to the deposition.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this ____ day of _____, 20___, at _____.

_____
Notary Public

My commission expires: _____

_____
Sonny Bal, MD, MBA, JD, PhD

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

WILLIAM "WES" JOHNSON,	)	
	)	
Plaintiff,	)	
vs.	)	2018 L 0000126
	)	
LUCAS ARMSTRONG, McLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, and ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER,	)	
	)	
Defendants.	)	

ORDER

It having come on for hearing upon the oral motion of defendant Lucas Armstrong, and over objection of plaintiff, ~~the Court finds that the retractors in question can no longer be demonstrated to be within the exclusive control of defendant, Lucas Armstrong~~; rsf 12-22-20

It is hereby ordered, adjudged, and decreed that:

1. Defendant, Lucas Armstrong's, motion for summary judgment on Count III *(res ipsa loquitur)* is hereby granted and judgment is entered in favor of defendant, Lucas Armstrong, and against plaintiff, William "Wes" Johnson;

2. This Court further finds that there is no just reason for delaying enforcement or appeal of this judgment order pursuant to Illinois Supreme Court Rule 304a;

3. All remaining litigation between plaintiff and defendants, Lucas Armstrong and McLean County Orthopedics, Ltd., is hereby stayed pending resolution of the issues going up on

appeal.

Entered this 22nd day of December, 2020.

Judge Presiding

James P. Ginzkey
GINZKEY LAW OFFICE
221 E. Washington St.
Bloomington, IL 61701
(309)821-9707 fax: (309)821-9708
ARDC #3124355
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Secondary email: jim@ginzkeylaw.com

18934/Order re MSJ

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF ILLINOS
MCLEAN COUNTY

William "Wes" Johnson,
Plaintiff,

v.

Lucas Armstrong, McLean County Orthopedics, Ltd., Sarah Harden, and Advocate Health and Hospitals Corporation, d/b/a Advocate BroMenn Medical Center,
Defendants.

Case No. 2018 L 126

ORDER

This matter having come to be heard on Defendants, SARAH HARDEN and ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER, Motion for Summary Judgment, the issues being fully briefed herein, evidence presented, and arguments of counsel having been heard, due notice having been given, and with the Court being fully advised:

IT IS HEREBY ORDERED:

1) Defendants Motion for Summary Judgment is GRANTED, and judgment is hereby entered in favor of SARAH HARDEN and ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE BROMENN MEDICAL CENTER and against Plaintiff, WILLIAM "WES" JOHNSON.

2) The Court further specifically finds that there is no just reason for delaying enforcement or appeal of this judgment order pursuant to Illinois Supreme Court Rule 304.

ENTERED:

Judge

1/5/2021
Date

E-FILED
Transaction ID: 4-21-0038
File Date: 3/10/2021 9:41 AM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

WILLIAM "WES" JOHNSON
Plaintiff/Petitioner

Reviewing Court No: 4-21-0038
Circuit Court/Agency No: 2018L000126
Trial Judge/Hearing Officer: REBECCA FOLEY

v.

LUCAS ARMSTRONG, ET AL.
Defendant/Respondent

REPORT OF PROCEEDINGS - TABLE OF CONTENTS

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10/30/2020	HEARING ON PLAINTIFF'S MOTION TO COMPEL, HEARING ON DEFENDANT ADVOCATE'S MOTION FOR SUMMARY JUDGMENT, HEARING ON DEFENDANTS' MOTION FOR LEAVE TO FILE AFFIRMATIVE DEFENSES	R 2-R 20

IN THE CIRCUIT COURT

FOR THE ELEVENTH JUDICIAL CIRCUIT

McLEAN COUNTY, BLOOMINGTON, ILLINOIS

WILLIAM JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 18 L 126
	)	
LUCAS ARMSTRONG, et al.,	)	
	)	
Defendants.	)	

HEARING ON PLAINTIFF'S MOTION TO COMPEL, HEARING ON DEFENDANT ADVOCATE'S MOTION FOR SUMMARY JUDGMENT, HEARING ON DEFENDANTS' MOTION FOR LEAVE TO FILE AFFIRMATIVE DEFENSES

TRANSCRIPT OF VIDEO CONFERENCE PROCEEDINGS

BE IT REMEMBERED and CERTIFIED that on, to wit: the 30th day of October, 2020, the following proceedings were held in the aforesaid cause before The Honorable REBECCA S. FOLEY, Circuit Judge.

APPEARANCES (via ZOOM):

MR. JAMES P. GINZKEY
Attorney at Law
On behalf of the Plaintiff

MR. SCOTT A. SCHOEN
Attorney at Law
On behalf of Sarah Harden and Advocate Health & Hospitals

MR. PETER W. BRANDT
Attorney at Law
On behalf of Lucas Armstrong and McLean County Orthopedics

Amy J. Jennings, RPR, CRR
Official Court Reporter
Bloomington, IL 61701
IL CSR No. 084-004135

THE COURT: This is 18 L 126, *Johnson versus Armstrong, et. al.*

The plaintiff appearing by counsel, Jim Ginzkey; the defendants, Armstrong and McLean County Orthopedics, appearing by counsel, Peter Brandt; the defendants, Harden, H-a-r-d-e-n, and Advocate Health and Hospitals, appearing by counsel, Scott Schoen.

Counsel, we've got, I think, three motions set this afternoon, and I think you each have a motion up. Plaintiff has a Motion to Compel; Advocate has a Motion for Summary Judgment; and Mr. Brandt has a Motion for Leave to File Affirmative Defenses.

Is that correct?

MR. GINZKEY: Yes, Judge.

MR. BRANDT: I think that's right, your Honor.

MR. SCHOEN: Yes. And we also filed a similar Motion for Leave to File Affirmative Defenses.

THE COURT: Okay. I didn't catch that. I'm sorry. Do we want to address those first?

MR. GINZKEY: Plaintiff has no objection to the Motions to File Affirmative Defenses by either defendant.

THE COURT: Okay. Then I'll show the Motions for Leave to File Affirmative Defenses granted. They'll have to be independently filed so they can become part of the record

with their own file stamp.

Seven or 14 days sufficient?

MR. BRANDT: Yes.

MR. SCHOEN: Yes, ma'am.

THE COURT: I'll just show 14 days just to be on the safe side.

All right. I have no preference as to what we tackle next.

MR. GINZKEY: Your Honor, with respect to Plaintiff's Motion to Compel, I didn't get Mr. Brandt's response until Wednesday afternoon, so I haven't had a chance to prepare a written reply. I'd like to be able to do that. I can do it within the same 14 days.

THE COURT: Okay. Any objection, Mr. Brandt?

MR. BRANDT: No, your Honor. That's fine.

THE COURT: Okay. All right, then we'll pick a date for that here at the conclusion of the hearing.

Then that leaves us with Mr. Schoen's Motion for Summary Judgment. And I have had an opportunity to review the motion, response and reply along with the exhibits.

So, Mr. Schoen, keeping that voice up, I'll turn it over to you whenever you're ready.

MR. SCHOEN: I'll try to, your Honor, and I'll also try and be as brief as possible. I know that you

always give due consideration to all the motions and briefs, so I'll just try to reiterate a few of the high points.

This is a case involving an alleged negligence during a surgery that was not conducted by Nurse Harden or an Advocate employee. And all the evidence in the case indicates that Nurse Harden had no control over the tools or placement of the retractors that were allegedly the cause of Plaintiff's nerve injury. To date, plaintiff has -- or I guess a deadline for plaintiff to file or disclose expert witnesses has passed. The only expert disclosed was Dr. Sonny Bal, who is an orthopedic surgeon. Plaintiff filed or disclosed no experts with regard to Nurse Harden or nursing standard of care; therefore, hasn't made a prima facie case against Nurse Harden.

Interestingly, the requirement for expert testimony is equally applicable in a basic negligence case as well as one where res ipsa loquitur is invoked. The plaintiffs still have to provide or present some expert evidence for each defendant establishing a standard of care they are alleged to have breached. Because Dr. Bal is an orthopedic surgeon, has never practiced as a nurse, he can't offer opinions as to Nurse Harden, and he admitted that in his deposition.

So, without any expert testimony with regard to

the standard of care applicable to Nurse Harden, Plaintiff, again, has failed to establish a prima facie case.

The second issue -- or second primary issue here is plaintiff is asserting res ipsa as a basis for their claim. Res ipsa -- determination of whether res ipsa applies is appropriate at a pretrial stage, and the burden is on the plaintiff to establish that res ipsa applies. The Court can make the determination here where res ipsa applies to Nurse Harden and Advocate without reaching whether that might be applicable to other defendants or present a question of fact for a jury down the road. The application here is pretty straightforward.

In essence, if you're on an airplane and the airplane crashes, you don't bring a res ipsa claim against the flight attendant. She wasn't the pilot, she wasn't in control of the airplane, which is essentially what plaintiff has done here. They've asserted a res ipsa claim against a nurse who had no control over the placement of any of the allegedly injurious instruments and made no decisions with regard to those instruments and no decisions with regard to how the procedure of the surgery would go forward and proceed. Without that, there's no basis for Plaintiff to meet the burden of establishing res ipsa would apply.

So, with that, I think it's fairly well briefed

and understood by the Court. If you have any questions, I would turn it over to the Court for questions with regard to the brief and the application.

THE COURT: All right, thank you. I have no questions. And, for my reporter, Bal is B-a-l.

Mr. Ginzkey, a response.

MR. GINZKEY: Yes, your Honor.

You may recall that -- I think it's been a couple of years ago at least -- I tried a res ipsa medical malpractice case in front of you. My client was Kristen Nesvacil who developed a rather serious spinal abscess following an epidural injection during the course of labor at Advocate Bromenn Hospital. Mike Kehart was defending the anesthesiologist. Mike Kehart out of Decatur. And, in that particular case, there was the doctor giving the injection and then the nurse assisting him. We didn't feel the nurse was part of the action, but your ruling was well, no, she was part of the procedure in which you alleged the damage occurred, and, by letting her out, you've essentially gotten rid of your res ipsa loquitur count. So you granted summary judgment on that basis with respect to the res ipsa count in that case.

So, we're frankly following the ruling that you made in the *Nesvacil* case, that because the nurse was

involved in the procedure, that if res ipsa was going to go forward, then as a player she had to be included in that count. So, we're just trying to be consistent with prior rulings of this Court on that issue.

With reference to the fact that we don't have a nursing expert, that's absolutely correct, but that's because a nursing expert cannot render an opinion on what is or is not appropriate with respect to an orthopedic surgical procedure. There is no nurse that's qualified to come in and say this part of the procedure was correct or this part of the procedure was wrong. That cannot be nursing testimony. As a matter of law, it has to be testimony from an orthopedic surgeon, and we have that here. Dr. Bal has stated unequivocally that, in his opinion, the damage do this femoral nerve was the result of the retractors. Nurse Harden was the one holding the retractors.

I think the evidence at trial will be that she held the retractors only after they were placed or moved by Dr. Armstrong, but that doesn't affect the fact that she's the one holding the retractors and that's when the damage occurred.

Based upon the testimony of Dr. Bal, when asked are the disclosures -- your 213 written disclosures, are those your opinions, he said unequivocally under oath, yes,

and those disclosed opinions specifically state the surgical instruments injuring the patients femoral nerve were under the control of Lucas Armstrong and Scrub Nurse Sarah Harden who was acting at his direction.

Secondly, in the normal course of a total hip arthroplasty, complete denervation of two of a patient's four quadriceps muscle does not happen in the absence of negligence. And he confirmed that opinion under oath at his deposition.

So, I think that under the IPI Instruction 22.01, for res ipsa loquitur, Plaintiff has evidence establishing a prima facie case and a Motion for Summary Judgment should be denied.

THE COURT: Thank you. Any reply, Mr. Schoen?

MR. SCHOEN: Yes, your Honor.

I'd first, Plaintiff's note to previous cases decided by the Court has no presidential -- or precedential value here. It's completely different factual circumstances, or may be, because I have no idea what case is. So the fact that the Court may have ruled one way in another case has no bearing here.

Second, with respect to Dr. Bal's opinion, it doesn't apply to Nurse Harden, and the fact that she was holding the retractors does not indicate that there was some

negligent act by her. Regardless of whether there was or was not negligence in the case, there has to be some evidence of a negligent act by the defendant that you're seeking to assert res ipsa against. Simply standing there and holding retractors where they were placed by the surgeon who was controlling the procedure isn't a negligent act. Even Plaintiff's own expert says she acted exactly how he would have expected a surgical nurse to act.

Doctor Armstrong, same testimony. She acted as expected and followed his directions. All the testimony says that she did exactly what was expected. So, to hold somebody negli -- or liable for the negative outcome of the procedure simply because they were there and acted as appropriate doesn't warrant -- isn't warranted, especially if they were following all the instructions and there's no evidence they had any part or conducted -- strike that -- that they performed any negligent act. So res ipsa isn't applicable. And, again, the Court is able to determine whether res ipsa is applicable to one party without determining if it's applicable to all parties. So, the Court can determine Plaintiff hasn't met its burden with regard to res ipsa as it applies to Nurse Harden and Advocate without reaching the -- without broaching the issue whether it later applies to Dr. Armstrong or some other

party. So, with that, I think the Court is in a position to make a ruling on whether res ipsa applies in the case. Clearly, it doesn't.

THE COURT: All right, thank you.

As I noted at the outset, I have considered the motion, the response, the reply, the exhibits that were attached thereto as well as the argument presented here today.

Defendants Advocate and Harden seek summary judgment as to counts three and four, which allege the theory of res ipsa loquitur. In order to take advantage of the theory of res ipsa loquitur, a plaintiff must establish he was injured; one, in an occurrence which would not ordinarily occur absent some negligence; two, by an instrumentality within the management or control of the defendants; three, under circumstances indicating the injury was not due to any voluntary act on the part of a plaintiff. The Court will cite the case of *Lynch versus Precision Machine Shop*, 93 Illinois 2d 266. And no one here has raised the issue of the third element. No one here is arguing or alleging that the injury was due to any voluntary act on the part of the plaintiff, so I'm not going to address that factor.

Prior to analyzing these elements, however, the

Court must determine if the doctrine applies as a matter of law. Pleading counts under a theory of res ipsa loquitur does not excuse establishing both duty of care, both by a defendant to plaintiff, and breach of that duty by failure to meet the applicable standard, citing the case of *Taylor v. City of Beardstown*, 142 Ill. App. 3d at 584. Plaintiffs must establish duty and breach of duty by a qualified competent witness. The injury alleged here is too complex to excuse the need for expert testimony. In other words, it is beyond the kin of an average juror.

Here, Plaintiff has disclosed only one expert, Dr. Sonny Bal. Dr. Bal acknowledged in his deposition testimony that he is not offering any opinions relative to the nursing standard of care. Even if he were, he is not qualified to do so, as, even though he possesses four degrees, he does not practice within the same school of medicine as Nurse Harden, namely nursing.

Furthermore, based upon the materials provided, there is no evidence in this record of any negligent act or omission on the part of Nurse Harden.

Plaintiff argues that case law supports the theory that a theory of res ipsa may apply to more than one defendant while there's -- where there is evidence that defendants exercise concurrent or consecutive management or

control over the instrumentality that caused the injury. Plaintiff further references the testimony of Dr. Bal that the injury was caused by a retractor, noting that both Dr. Armstrong and Nurse Harden handled that retractor.

While the proposition of law is correct, it is not applicable in this case. All witnesses testified that Defendant Armstrong, as the surgeon, placed the retractor. While Defendant Harden may have physically held the retractor upon placement, it was only at the direction of Defendant Armstrong. She did not exercise any independent control over any surgical tools, according to the testimony.

Furthermore, the witnesses agree she only acted as directed, and she did not take any actions other than those directed by Dr. Armstrong. Accordingly, the retractor was never under the exclusive control of Nurse Harden.

For all these reasons, the Motion for Summary Judgment as to count three against Nurse Harden is granted. Summary judgment will also be granted in Advocate's favor as to count four. Although count four is styled as a res ipsa loquitur count, it really alleges respondeat superior. With no liability running from Nurse Harden to Plaintiff, there can likewise be no liability running from Nurse Harden's employer, Advocate, to Plaintiff.

I have some -- I have a recollection, generally,

of the case referenced by Mr. Ginzkey. I have no independent recollection of the facts of my ruling or the res ipsa count. Whether or not if they are the same or distinguishable, I really can't say.

The basis of the Court's ruling today is upon the record in front of me, the arguments made by counsel appearing in this case. And so, for those reasons, the motion will be granted.

MR. GINZKEY: Judge, Plaintiff would ask for 304(a) language.

THE COURT: I think that was requested in Advocate's.

MR. SCHOEN: We would. And I guess, just for the record, that language would include a finding that there's no just reason for delaying the enforcement of appeal of the Court's ruling today. And we would request that we be able to submit a written order to the Court reflecting your ruling today.

MR. GINZKEY: I didn't quite hear that, Scott. You say you do want to submit a ruling? An order?

THE COURT: He does.

MR. SCHOEN: Yes.

MR. GINZKEY: That's fine. No objection.

THE COURT: Okay. Then I'll let you do that,

Mr. Schoen. I'll put you in charge of that, if you could get -- run that by Mr. Ginzkey for his approval as to form before you submit it to me.

And then anything else we need to put on the record before we look for a date on the Motion to Compel?

MR. GINZKEY: Yes, Judge. Mr. Brandt filed a Motion to Continue the trial. I think we need to address that.

THE COURT: Okay. Is there an objection?

MR. GINZKEY: Well, let me ask.

THE COURT: Well, let me ask you, are you going to take this ruling up on appeal? Because, if you do, we're not having a trial in January.

MR. GINZKEY: Well, but that would only be the appeal on the res ipsa loquitur with respect to the hospital. That wouldn't affect the causes of action against Dr. Armstrong and MCO.

THE COURT: True. Judicial economy would say they should all be tried together, but we're not talking about that right now.

Go ahead and ask your question.

MR. GINZKEY: Earlier, the disclosure date for the defense experts, the 213(f)(3) experts, was extended from July 15 to August 28. Those disclosures were made in

writing on September 1. Plaintiff had asked for deposition dates of those three experts; one on behalf of the hospital, two on behalf of Dr. Armstrong. The most critical of those witnesses is Dr. Armstrong's 213(f)(3) orthopedic expert physician by the name of Doctor -- I'm going to mispronounce it -- Domb, D-o-m-b. We haven't been given a date. So we've been asking for dates since September 1. We've got a tentative date of November 20, but the doctor is saying there's nobody allowed in the hospital or his clinical practice. Plaintiff must depose him live, because he's such a critical witness, and you can't get a sense for how the deponent is reacting through Zoom. So, we've offered to find a conference room or law firm up there or go to a conference room at the court reporter's office, but that hasn't been accommodated. And the problem that we are running into is we're now essentially into November. Plaintiff's disclosure date for rebuttals is December 7th, Pearl Harbor Day. So we are running into all kinds of problems.

I'm taking too long to ask. Is there any chance that the week of April 12, 2021, which had been scheduled for the *Lorch* trial, which just settled, any chance that that is still an open week?

THE COURT: Yes. And I don't know if you have all

noticed, when we publish the 2021 jury calendar, we have made a change or a deviation from what we've done in year's past. In prior years, we've had two week jury calendars, and the criminal division and the civil division were simultaneously conducted trials during those two weeks. Due to COVID and the fact that right now we only have two available courtrooms at any given time, what we've done is split those up so the criminal division is guaranteed a week in those two courtrooms and then the civil division is guaranteed, in theory, a week in -- for those COVID jury courtrooms. And so most of my trials scheduled for 2021, by chance, have fallen within the weeks allotted to me, so that's good news. But April 12 is a civil week under the 2021 calendar, so from both of those perspectives, that would be a positive thing if you're asking to move the trial to that date.

MR. GINZKEY: If we can move it to April 12, the week of April 12, then plaintiff does not object to Mr. Brandt's Motion to Continue.

MR. BRANDT: Judge, this is Pete Brandt. Can you hear me?

THE COURT: I can.

MR. BRANDT: Okay. That's fine. Obviously, I filed a motion. The only thing -- the only caveat -- or I

guess have one question. That April 12 date, is that one you have to share with, like, Judge Lawrence or the other judges handling civil cases? Or is that your week?

THE COURT: It would be -- we have two courtrooms, and it would be he and I.

MR. BRANDT: Okay.

THE COURT: So the likelihood of the two of us trying a case in any given month is super slim. I mean, very rarely do we have two civil cases going at once. I suppose one of us could get bumped for a criminal case with a speedy trial issue or something if we are still down to two courtrooms, but the fact that the two of us rarely try things together gives me some encouragement that we'd be okay.

MR. BRANDT: The only -- April 12 is fine for my calendar, and I'm going to put it on there. The only caveat would be if I run into a problem with getting an expert there. Or, obviously, if Mr. Ginzkey has the same problem, that would be the only caveat. That far out, I don't anticipate that being a problem.

THE COURT: Okay. Then, I will show the Motion to Continue Trial granted without objection, and we will move it to April 12. And I will vacate January 11.

MR. GINZKEY: I think that takes care of

everything today other than rescheduling another CMC.

THE COURT: Okay.

MR. BRANDT: And a hearing on the pending Motion to Compel.

MR. GINZKEY: That's true.

THE COURT: Okay. Anything else you want to put on the record? Or can I excuse Amy?

MR. GINZKEY: Excuse Amy.

THE COURT: Okay.

MR. BRANDT: Yeah. Nothing from me, your Honor. Thank you.

THE COURT: Okay.

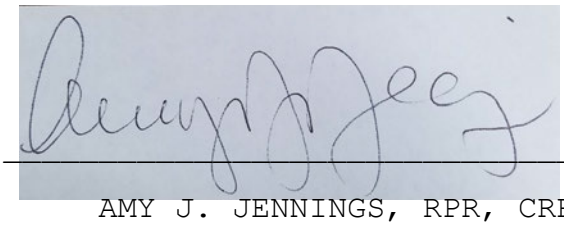
WHICH WERE ALL THE PROCEEDINGS

MADE OF RECORD IN THIS CAUSE ON SAID DATE

CERTIFICATE

I, Amy J. Jennings, Official Court Reporter in and for the County of McLean and State of Illinois, Eleventh Judicial Circuit, do hereby certify the foregoing to be a true and accurate transcript of the video conference proceedings had in the before-entitled cause on said date.

Dated this 19th day of February, 2021.



AMY J. JENNINGS, RPR, CRR
Official Court Reporter
IL CSR No. 084-004135

No. 127942
Consolidated with No. 127944

IN THE

SUPREME COURT OF ILLINOIS

WILLIAM "WES" JOHNSON, Plaintiff-Appellee, v. LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, Defendants-Appellants.	)	On Petition for Leave to Appeal From the Illinois Appellate Court, Fourth District, No. 4-21-0038 There Heard on Appeal From The Eleventh Judicial Circuit, McLean County, Illinois, Trial Court No. 2018 L 126 The Honorable Rebecca S. Foley, Judge Presiding

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NOTICE OF FILING

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PLEASE TAKE NOTICE that on March 1, 2022, the **BRIEF and APPENDIX OF DEFENDANTS-APPELLANTS SARAH HARDEN and ADVOCATE HEALTH AND HOSPITIALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, CERTIFICATE OF COMPLIANCE, and CERTIFICATE OF SERVICE,** is being filed electronically with the Clerk of the Supreme Court of Illinois, a copy of which is attached and served upon you.

By: /s/ Stacy K. Shelly
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No. 127942
Consolidated with No. 127944

IN THE

SUPREME COURT OF ILLINOIS

WILLIAM "WES" JOHNSON, Plaintiff-Appellee, v. LUCAS ARMSTRONG, MCLEAN COUNTY ORTHOPEDICS, LTD., SARAH HARDEN, AND ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, Defendants-Appellants.	)	On Petition for Leave to Appeal From the Illinois Appellate Court, Fourth District, No. 4-21-0038 There Heard on Appeal From The Eleventh Judicial Circuit, McLean County, Illinois, Trial Court No. 2018 L 126 The Honorable Rebecca S. Foley, Judge Presiding

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CERTIFICATE OF SERVICE

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The undersigned, an attorney, on oath state I served the foregoing **BRIEF and APPENDIX OF DEFENDANTS-APPELLANTS SARAH HARDEN and ADVOCATE HEALTH AND HOSPITIALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER, CERTIFICATE OF COMPLIANCE, and NOTICE OF FILING,** upon counsel listed above via electronic mail on March 1, 2022.

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

Additionally, upon acceptance by the court's electronic filing system, the undersigned will mail thirteen (13) copies of the **BRIEF and APPENDIX OF DEFENDANTS-APPELLANTS SARAH HARDEN and ADVOCATE HEALTH AND HOSPITIALS CORPORATION, d/b/a ADVOCATE BROMENN MEDICAL CENTER** to the Clerk of the Supreme Court, 200 East Capitol Avenue, Springfield, Illinois 62701.

By: /s/ Stacy K. Shelly
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