No. 127942
Consolidated with No. 127944

IN THE SUPREME COURT OF ILLINOIS

WILLIAM “WES” JOHNSON, *Plaintiff-Appellee* v. LUCAS ARMSTRONG, M.D., SARAH HARDEN, and ADVOCATE HEALTH AND HOSPITALS CORPORATION, ADVOCATE BROMENN MEDICAL CENTER, *Defendants-Appellants*.	) On Petition for Leave to Appeal) From the Illinois Appellate Court,) Fourth District, No. 4-21-0014,)) 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)

REPLY BRIEF OF DEFENDANT-APPELLANT, LUCAS ARMSTRONG, M.D.

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. *Taylor v. City of Beardstown* is an accurate statement of the law and is applicable to this case.

On appeal, Plaintiff argues *Taylor v. City of Beardstown*, 142 Ill.App.3d 584, 491 N.E.2d 803 (4th Dist. 1986) is irrelevant to this case. (Appellee's Brief, pp. 7-8). The Fourth District Appellate Court, in its opinion below in this matter, found it relevant but chose to ignore it. *Johnson v. Armstrong*, 2021 IL App (4th) 210038 ¶ 69.

Plaintiff argues that the Fourth District Court of Appeals in *Taylor* did not rule that expert testimony is absolutely needed when *res ipsa loquitur* is plead. (Appellee's Brief, pp. 7-8). Plaintiff, however, misinterprets the *Taylor* opinion. Plaintiff appears to claim now, for the first time on appeal to the Supreme Court, that the "common knowledge" and understanding of non-medical persons exception to the requirement of expert testimony applies. (Appellee's Brief, pp. 8).

Neither the Circuit Court, nor the Appellate Court, determined that this case fell within the "common knowledge" exception to the expert witness requirement. The Fourth District in *Taylor* made clear that the expert witness requirement applied to how and whether the defendants therein properly restrained the plaintiff's decedent in the medical setting. 142 Ill.App.3d at 592-94. Here, the Fourth District determined it simply was not going to follow its opinion in *Taylor. Johnson*, ¶ 69.

Taylor, in citing to this Court in *Spidle v.* Steward, 79 Ill.2d 1, 10, 402 N.E.2d 216, 220 (1980), underscored the proposition that plaintiffs must present

proof of a negligent ***act*** (emphasis added). 142 Ill.App.3d at 592-93. "The doctrine 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." *Id.* at 593 (citing to *Taber v. Riordan*, 83 Ill. App. 3d. 900, 403 N.E.2d 1349 (2d Dist. 1980)).

> Of particular importance in pleading *res ipsa* is the first element, involving results which would not ordinarily occur where it not for the negligenct conduct of the defendant. **That element will be established by either 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. at 593 (emphasis added). *Taylor* found that the plaintiff never presented competent expert testimony or evidence concerning that standard of care. *Id*. at 594-94. The failure to do so resulted in judgment in favor of the defendants *Id*.

To be sure, throughout, Plaintiff has indicated a reliance upon the expert testimony of his expert Dr. Sonny Bal. On no occasion before filing his brief in the Illinois Supreme Court has Plaintiff indicated that the facts of this case fall within the "common knowledge" exception. Rather, Plaintiff contends that Dr. Sonny Bal is competent to testify regarding duty and the negligent act of a surgical tech, as called for under *Spidle*, when in fact there is no evidence Dr. Bal ever acted as a surgical tech, trained surgical techs, or was in any way familiar with the standard of care of a surgical tech. Dr. Bal never testified as to the standard of care of a surgical tech in this matter.

Contrary to the position of the Plaintiff, there is no case law that holds competent expert testimony as to the negligent actions of one Defendant is sufficient to establish the right to have a jury consider *res ipsa loquitur* as to another Defendant for which there is no competent expert testimony regarding the standard of care or breach thereof. *Taylor* stands for the proposition that plaintiffs must present proof from which an inference of negligence may be drawn, by at least establishing the minimum standard of care by expert testimony. 142 Ill.App.3d at 593-95. "[T]he mere showing of a bad result does not in all instances mean someone was negligent" *Id.* at. 595 (citing *Stringer v. Zacheis*, 105 Ill. App. 3d. 521, 434 N.E.2d 50, (4th Dist. 1982)).

Plaintiff cites *Poole v. University of Chicago*, 186 Ill.App.3d 554, 542 N.E.2d 746 (1st Dist. 1989), for the proposition that he is not required to prove conclusively all the elements of *res ipsa loquitur* but need only present evidence reasonably showing that the elements exist. This phrase appears in other case law. It is a phrase that applies to any civil matter. No Plaintiff is required to *conclusively* prove anything, but the rest of the statement is important, as "to invoke the doctrine, a proper foundation must be alleged **and the elements** established." *Taylor*, 142 Ill.App.3d at 593; *Poole*, 186 Ill.App.3d at 558.

As set forth in the briefs filed herein at both the Appellate Court and the Supreme Court level, the elements include the requirement that plaintiffs must demonstrate injury in an occurrence which would ordinarily not occur absent some negligence. Thus, as set forth in *Spidle*, there must be proof of a negligent act. This requires plaintiffs in a medical malpractice claim to meet at least the

threshold of proof – that a negligent act occurred – by way of expert testimony from a qualified witness. *See e.g., Taylor*, 142 Ill.App.3d at 593-95.

Here, Plaintiff has presented no competent evidence of a negligent act on the part of Tech. Harden. Rather than retain a surgical tech expert, Plaintiff chose to stand on the testimony of the orthopedic surgeon, who clearly is not competent to testify as a surgical tech. Plaintiff never attempted to establish that Dr. Sonny Bal had experience as a surgical tech or that he otherwise fit within the requirements of Section 8-2501 of the Illinois Code of Civil Procedure as an expert witness sufficiently qualified to render an opinion as to the standard of care and breach thereof of a surgical tech. That decision, by Plaintiff, is fatal to the requirement of Plaintiff to establish threshold evidence of a negligent act on the part of a care provider in the surgical setting where the "common knowledge exception" does not apply. In short, what Plaintiff fails to acknowledge is his obligation to establish a breach in the standard of care on behalf of Surgical Tech. Harden through competent expert evidence. (*Illinois Supreme Court Committee on Jury Instructions in Civil Cases, Illinois Pattern Jury Instruction – Civil* (2021 Edition, Instruction Number 105.09).

Plaintiff contends that it is an unreasonable burden for the Court to impose upon him the obligation to produce threshold evidence through expert testimony or some other evidence, that there was actual negligence on the part of Tech. Harden. Plaintiff has failed to present even general or specific acts of negligence on the part of the surgical tech through competent expert testimony. This is fatal to his *res ipsa loquitur* claim.

Plaintiff argues that he asked his expert, Dr. Bal, at deposition if he agreed with his Supreme Court Rule 213(f)(3) disclosures, which read "[i]n the normal course of a total hip arthroplasty, complete denervation of two of the plaintiff's quadricep muscles does not happen in the absence of negligence." (Appellee's Brief, p. 5). This statement, however, makes no reference to Tech. Harden, or that Tech. Harden's actions were negligent, or that she breached the standard of care. In his Statement of Facts and in the allegations in the complaint, Plaintiff argues that Dr. Armstrong acted improperly in retracting Wes Johnson's femoral nerve or improperly directing the placement of the retractors. (Appellee's Brief, pp. 1-5). Later, Plaintiff argues "…. that Harden, and Harden alone, was holding the retractors during the surgery in question." (Appellee's Brief, p. 14). Attempts at changing one's own set of facts is an indication of failure to establish the basic elements of a claim.

The next argument Plaintiff makes is that the *Taylor* decision on *res ipsa loquitur* is *dicta* because the court ruled that Plaintiff's attempt to amend the complaint immediately before summary judgment was untimely. This position ignores the clear statements by the *Taylor* Court, that it had the duty, nonetheless, to examine the amended pleading:

> In passing on a motion to amend, a court should properly consider the ultimate efficacy of a claim as well as previous opportunities to assert it (citations omitted). Thus, the merits of a proposed amendment should be considered, and a trial court should not deny leave to amend solely on the basis of a delay in filing, unless accompanied by a showing of prejudice to the opposing party which goes beyond mere inconvenience. *Taylor*, supra at 591.

142 Ill.App.3d at 591.

The *Taylor* court rendered an opinion on the amended complaint which added a count under the doctrine of *res ipsa loquitur* in its ruling. *Id*. at 591-92. Specifically, it considered the lack of proof of a breach in the standard of care as fatal to the *res ipsa loquitur* claim. *Id*. at 592-95. The case was before the court on a motion for summary judgment and the Fourth District determined that even accepting the proposition that if the trial court allowed the amendment to the complaint to add a claim for *res ipsa loquitur*, the plaintiff failed to present sufficient proof to establish the standard of care or the deviation therefrom under any theory. *Id.* at 595-99.

Plaintiff argues that there was no attempt by the plaintiff in *Taylor* to counter the evidence presented by the defendants regarding the proposition that the nursing staff at Beardstown Hospital met the standard of care. However, the opinion makes clear that the plaintiff did so by filing standards regarding patient accommodations and care. That evidence, like the evidence here, fell woefully short.

The Plaintiff claims that only one court after the *Taylor* decision adopted its holding, *i.e., Smith v. South Shore Hospital*, 187 Ill.App.3d 847, 543 N.E.2d 868 (1st Dist. 1989)). This is not true. *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8 (1986); *Gatlin v. Ruder*, 137 Ill.2d 284, 560 N.E.2d 586 (1990); and *Heastie v. Roberts*, 226 Ill.2d 515, 877 N.E.2d 1064 (2007) all underscored the obligation of plaintiffs to present expert evidence of the standard of care.

Moreover, such a contention is contrary to the IPI Jury Instruction 105.09 which states, in pertinent part:

> The Plaintiff has the burden of proving each of the following propositions:
>
> 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 her control or 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.

Illinois Supreme Court Committee on Jury Instructions in Civil Cases, Illinois Pattern Jury Instructions – Civil (2021 Edition), Instruction Number 105.09 (emphasis added). This instruction makes clear that the law requires Plaintiff to present expert testimony in a *res ipsa loquitur* claim.

Plaintiff cites *Gatlin* where the defendant OB/GYN admitted he may have rotated that baby in utero, and the defendant's own expert testified that action may have caused the non-displaced skull fracture. 137 Ill.2d at 293-94. No such admission is present in the facts of this case. Defendant Harden filed an Answer to the Complaint denying the allegations of negligent conduct. Her deposition testimony indicated she was not negligent in her care. This Court found in *Gatlin* that the testimony of the defendant's expert gave rise to a material issue of fact as to the defendant's negligence. 137 Ill.2d at 293-94. This expert was competent to render opinions regarding the conduct of another OB/GYN.

Dr. Bal testified that the injury would not have occurred but for Dr. Armstrong's negligence, but never assigned that opinion to Tech. Harden. The law does not allow the assignment of liability to all present in the operating room

just because there is expert testimony that but for the negligence of one of those care providers who might have control of the instrumentality, the injury would not occur. To allow such a clear change in the doctrine of *res ipsa loquitur* will open anyone in the operating room in any case to liability without proof of their individual conduct was negligent.

II. *Dyback* Underscores the Need for Expert Testimony.

Plaintiff cites *Dyback* for various propositions. In *Dyback*, the homeowner experienced a fire. 114 Ill.2d at 235. It was alleged that the defendant construction contractor left a fuel oil heater on the premises during the evening hours while repairs were ongoing at the house. *Id*. at 237-38. The trial court directed a verdict for the defendant with respect to the Count seeking recovery under the theory of *res ipsa loquitur*. *Id*. at 238.

In reversing the Appellate Court, this Court noted that fires frequently have causes other than negligence (lightning strikes, arson, etc.) and cited to *American Family Mutual Insurance v. Dobrzynski,* 88 Wis.2d.617, 623-24, 277 N.W.2d. 749, 752 (1979), for its holding that the "application of *res ipsa loquitur* is not appropriate where the accident was just as reasonably attributable to causes other than the defendant's negligence." *Id.* at 243.

This Court also found that the plaintiff's expert in *Dyback* was qualified to testify as to the origins and causes of fires, along with evaluations of the resulting losses, but was not qualified to offer opinions on the duty of care owed by home construction contractors' use and maintenance of heaters of the type at issue. *Id.* at 244. Possibly foreshadowing its opinion in *Sullivan v. Edward Hosp.*, 209

Ill.2d 100, 806 N.E.2d 645 (2004), this Court made clear that having an expert who was qualified to render opinions regarding duty of care, who could annunciate what that duty consisted of and that there was a breach thereof, was essential to proceeding forward with a *res ipsa loquitur* claim. *Id*. at 244. Dr. Bal, Plaintiff's expert, was equally unqualified to render opinions about Tech. Harden's duty of care or breach thereof per not only *Sullivan*, but also *Dyback*.

Plaintiff also relies on *Metz v. Central Illinois Electric & Gas Company,* 32 Ill.2d 446, 207 N.E.2d 305 (1965). The relationship between a 1965 gas explosion case and the unique and discreet skills required to perform surgery is thin, if not non-existent.

In *Metz* there was a gas explosion which damaged the home. 32 Ill.2d at 447. There was a verdict rendered at trial in favor of the plaintiffs. *Id*. The Second District reversed that verdict. *Id*. This Court affirmed the trial court's judgment on the verdict. *Id*. at 453.

The case went to the jury on the *res ipsa loquitur* count alone. *Id*. at 447. The Second District held that *res ipsa loquitur* did not apply because Plaintiff was unable to establish the control issue related to the gas pipe. *Id*. at 447. It is important to recognize that this is a case involving a public utility where the duty owed is typically heightened under Illinois Law:

> Even though the gas company may in a particular instance be blameless, yet we believe in the view of its superior knowledge of the facts at hand and its responsibility to the community, it has a duty to come forward and make explanation.

Id. at 451. This Court underscored that gas is a dangerous commodity and that there would be a higher level of care imposed upon a public utility. *Id*. So the relationship of the holding in *Metz* to the facts here is dubious.

III. Plaintiff Avoids Discussing Sullivan.

The requirement that the expert witness be licensed in the same school of medicine is foundational. "

> Once the foundational requirements have been met, the trial court has discretion to determine whether a physician is qualified and competent to state his opinion as an expert regarding the standard of care. If the expert physician fails to satisfy either of the foundational requirements, the trial court must disallow the expert's testimony.

Sullivan, 209 Ill.2d at 113 (internal citations omitted) (citing to *Jones v. O'Young* 154 Ill.2d 39, 607 N.E.2d. 224 (1992)).

Citing *Dolan v. Galluzzo*, 77 Ill.2d 279, 284, 396 N.E.2d 13 (1979), the *Sullivan* Court recognized the legislature established that health professionals had different training and chose to regulate each profession separately. *Id*. at 113-14. The *Dolan* court recognized that there is no assumption science and medicine have achieved a universal standard of treatment of disease and injury that applies to all practitioners of medicine and surgery, physical therapy, nursing, etc. *Id*. at 113-14. "In its wisdom, the legislature has recognized a fundamental tenet of contemporary life: no one person, group or school has yet succeeding in abstracting a universal medical method from the many changing methods used in science and medicine." *Id*. at 113-14.

Dr. Sonny Bal, Plaintiff's expert, expressed nothing in his deposition to indicate he was familiar with the methods, procedures, and treatments ordinarily observed by other health care providers, particularly surgical techs. He was never qualified by Plaintiff to have expertise in Sarah Harden's area of education, training, knowledge, and experience.

This Court in *Sullivan* found it important that different medical professionals be held to the standard of their school's education, training, and knowledge. A surgical tech should not be held to the same standard as an orthopedic surgeon because of the disparate levels of education, training, and knowledge. Plaintiff here is seeking that this Court reverse its holding in *Sullivan* that expert testimony must come from those trained in the same school of medicine as the defendant.

IV. Fault-Based Liability.

In his brief, Plaintiff seeks a move by this Court away from fault-based liability. (Appellee's Brief, pp. 7-18). If Plaintiff is absolved from the responsibility of establishing duty and breach by expert testimony in a medical negligence case in the context of *res ipsa loquitur,* then injury during any medical procedure constitutes negligence *per se.* A fault-based determination is then no longer required. Injury during an operative procedure becomes a strict liability occurrence. Strict liability merely ascertains that a potentially harmful injury occurred and says nothing about the circumstances of any action committed by the defendant. Illinois has not established a "no-fault" approach to *res ipsa loquitur* which would eliminate the requirement of proving negligence.

The basis for the doctrine of *res ipsa loquitur* (whether one believes it is a tort doctrine or an evidentiary doctrine) is based in the proposition that the circumstances surrounding an injury can be evidence that the defendant's negligence caused it. However, here we have two defendants, each with their own individual duty to the patient. Withdrawing the requirement of expert testimony, where a lay jury would have no surgical experience, allows the inference of negligence to go forward without any limits on the circumstantial evidence the trier of fact is permitted to consider. It becomes a doctrine that espouses liability without fault. The effect of interpreting the doctrine of *res ipsa loquitur* where no expert testimony is necessary to explain the conduct required of a surgical tech, is to promote the imposition of liability on defendants when they are not negligent, which is to imposes strict liability. It puts the trial judge in the position of finding that a reasonable juror could find that the conditions are satisfied without qualified expert opinion testimony and therefore the judge is obliged to allow the jury to impose their own untrained determination of fault.

The requirement necessary to proceed under the doctrine of *res ipsa loquitur* which is most controversial is that "the event be of a kind which ordinarily does not occur in the absence of negligence." Restatement (Second) of Torts §328, d (Am. Law Inst. 1965). The biggest concern for courts is determining the probability calculation required by the doctrine. Negligence must be part of the determination. And, negligence is defined as a failure to exercise due care. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3 (Am. Law Inst. 2010) ("A person acts negligently if the person does not exercise

reasonable care under all of the circumstances.") An assessment of breach in the standard of care is at the heart of the jury determination.

Hypothetically, when a surgical procedure is performed carefully, injury to a femoral nerve branch occurs 10% of the time. Without expert testimony to testify regarding the exercise of due care, *res ipsa* would apply even though a care provider was simply unlucky based upon the statistics of injury. The test is not whether a particular injury rarely occurs, but rather, when it occurs, is it ordinarily the result of negligence.

In Illinois the only way in which negligence can be established in a medical negligence claim is through expert testimony. *Res ipsa loquitur* should apply only if, in the universe of adverse outcomes, the care provider was negligent more often than when he or she exercised due care. In other words, given the injury, expert testimony is required to establish that the probability of negligence is greater than half. Stated otherwise, the doctrine should only apply when the adverse event more probably true than not resulted from the defendant's negligence as determined by expert testimony. Courts should avoid the implication that *res ipsa loquitur* may apply when the event is equally likely a result of appropriate care.

CONCLUSION

It has never been the law in Illinois that the doctrine of *res ipsa loquitur* can be applied in a fashion where plaintiffs can meet their burden of proof without expert opinion evidence of negligent care in the fact setting of this case. If the Fourth District's Opinion here stands, jurors will be directed to speculate as to whether the care provided by a defendant was negligent in the complete absence of expert medical testimony that a defendant breached the applicable standard of care.

FROM THE FOREGOING, Appellant, Lucas Armstrong, M.D., prays that the decision of the Illinois Appellate Court for the Fourth District, dated October 28, 2021, be reversed and the case be remanded for further proceedings consistent with this Court's opinion.

Dated: April 14, 2022.

Respectfully submitted,
LUCAS ARMSTRONG, M.D.,
Defendant-Appellant,

By: LIVINGSTON, BARGER, BRANDT & SCHROEDER, LLP

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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(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is fifteen (15) pages.

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NOTICE OF FILING

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PLEASE TAKE NOTICE that on April 14, 2022, the REPLY BRIEF OF DEFENDANT-APPELLANT, LUCAS ARMSTRONG, M.D., CERTIFICATE OF COMPLIANCE, AND NOTICE OF FILING, are being filed electronically with the Clerk of the Supreme Court of Illinois, a copy of which is attached and served upon you.

Respectfully submitted,

LUCAS ARMSTRONG, M.D.,
Appellants-Defendants

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	) Eleventh Judicial Circuit,
LUCAS ARMSTRONG, M.D.,	) McLean County, Illinois,
SARAH HARDEN, and ADVOCATE	) Trial Court No. 2018 L 126
HEALTH AND HOSPITALS CORPORATION,	)
ADVOCATE BROMENN MEDICAL CENTER,	) The Honorable Rebecca S. Foley,
	) Judge Presiding
Defendants-Appellants.	)

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The undersigned, an attorney, on oath state I served the foregoing REPLY BRIEF OF DEFENDANT-APPELLANT, LUCAS ARMSTRONG, M.D., CERTIFICATE OF COMPLIANCE, AND NOTICE OF FILING, upon counsel listed above via electronic mail on April 14, 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 REPLY BRIEF OF DEFENDANT-APPELLANT, LUCAS ARMSTRONG, M.D. to the Clerk of the Supreme Court, 200 East Capitol Avenue, Springfield, Illinois 62701.

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