



Received: 2024-SC-0224 03/04/2025
Filed: 2024-SC-0224 03/04/2025
M. Katherine Bing, Clerk
Supreme Court of Kentucky

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
2024-SC-0224-DG

SHEILA SLONE KSCA

APPELLANT

v. ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS
No. 2023-CA-0748

DEBORAH LLOYD

APPELLEE

REPLY BRIEF OF DEFENDANT/APPELLANT SHEILA STONE

Charles H. Stopher
Michael D. Risley
Bethany A. Breetz
STITES & HARBISON, PLLC
400 West Market Street, Suite 1800
Louisville, Kentucky 40202

*Counsel for Defendant/Appellant,
Sheila Slone KSCA*

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2025, I sent copies of this brief via electronic or first-class mail to: Kenneth H. Baker, 325 West Main Street, Suite 1812, Louisville, KY 40202, khbakerlaw1500@aol.com; Richard P. Schiller, 4350 Brownsboro Road, Suite 110, Louisville, KY 40207, rpschiller@rpsattorney.com; Karen Keith, Stoll Keenon Ogdon, 400 West Market Street, Suite 2700, Louisville, KY 40202, karent.keith@skofirm.com; Craig Johnson, Steptoe and Johnson, 700 N. Hurstbourne Parkway, Suite 115, Louisville, KY 40222, craig.johnson@steptoe-johnson.com; Hon. Tracy E. Davis, Judge, Division 5, Jefferson Circuit Court, TracyDavis@kycourts.net and StuartScherer@kycourts.net, and Kate Morgan, Kentucky Court of Appeals Clerk, KateMorgan@kycourts.net.

/s/ Bethany A. Breetz

Bethany A. Breetz

STATEMENT OF POINTS AND AUTHORITIES

A. Given the absence of any evidence that Slone was negligent, summary judgment was appropriate. 1

B. This Court should make clear that the three “essential elements” of *res ipsa loquitor* must be established before the doctrine applies. 2

Adams v. Sietsema, 533 S.W.3d 172 (Ky. 2017) 2–3

Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1999)..... 2, 3, 4, 5

Lewis v. Wolk, 228 S.W.2d 432 (Ky. 1950)..... 3

Saint Elizabeth Medical Center, Inc. v. Arnsperger, 686 S.W.3d 132 (Ky. 2024) 3, 4, 5, 6

Andrew v. Begley, 203 S.W.3d 165 (Ky. App. 2006) 4

Jarboe v. Hartin, 397 S.W.2d 775 (Ky. 1965) 4

Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985) 5

PROSSER AND KEETON ON TORTS, Sec. 39 (5th ed. 1984)..... 5

Cho v. Kempler, 177 Cal.App.2d 342, 2 Cal.Rptr. 167 (1960)..... 5–6

C. Lloyd failed to meet her burden of proving that each of the three “essential elements” of *res ipsa loquitor* applies to Slone. 7

Laws v. Harter, 534 S.W.2d 449 (Ky. 1975) 7–8

Nazar v. Branham, 291 S.W.3d 599 (Ky. 2009)..... 8–9

Savage v. Three Rivers Medical Center, 390 S.W.3d 104 (Ky. 2012)..... 9–10

CONCLUSION 11

WORD-COUNT CERTIFICATE..... 12

A. Given the absence of any evidence that Slone was negligent, summary judgment was appropriate.

Sheila Slone demonstrated that the trial court appropriately granted summary judgment due to undisputed evidence relating to how a needle was lost—and then retained—in Deborah Lloyd’s knee and due to the absence of evidence that Slone violated any standard of care in the losing or retention of the needle. (Slone Brief at 1–8.) Rather than responding to Slone’s argument, Deborah Lloyd instead claims that the “facts concerning the tech’s dropping of the needle are not in dispute,” while simultaneously asserting that Slone (the “tech” at issue who is, in fact, a surgical assistant) “was unable to describe what happened or how it happened.” (Lloyd Brief at 2.) But the facts regarding what happened, how it happened, Slone’s lack of control over the surgeon’s decision to end the surgery without locating the needle that was known to be missing and ultimately found to have been left in Lloyd’s knee, and Slone’s compliance with the standard of care are undisputed.

- While acting as a surgical assistant under surgeon Sean Griffin’s direct supervision and while using a suture needle to close the outermost layer of skin, when Slone “was nearly finished with the closure, she noticed that the suture needle had become separated from the needle holder and that the needle was missing.” (Slone Brief at 1; undisputed in Lloyd Brief.)
- Slone stopped closing the wound, methodically looked over the surgical site and palpated the area, let the nurses in the operating room know that a needle had been lost, and the entire surgical team, including the surgeon, searched for the needle. (*Id.*)
- The **surgeon** ordered an x-ray of Lloyd’s knee; the **surgeon** and **radiologist** reviewed the x-ray and concluded there was no radiographic evidence that the needle was inside Lloyd’s knee; exercising his professional judgment, the **surgeon** determined that Lloyd’s knee should not be re-opened to search for the needle; and the **surgeon** released Lloyd from the operating room. (*Id.*)
- An x-ray during Lloyd’s follow-up visit with the surgeon revealed the needle was inside Lloyd’s knee, and the surgeon subsequently removed it. (*Id.*)

- Slone had a very limited role and authority; all she could do was notify the supervising surgeon that the needle was lost (which she did), then follow the surgeon’s directions (which she also did). (Slone Brief at 2–3; undisputed in Lloyd Brief.)
- Lloyd’s own medical experts placed blame on the surgeon and radiologists, not Slone. (Slone Brief at 3–4; undisputed in Lloyd Brief.)
- The medical professionals involved in the case—including the surgeon and Lloyd’s own expert—agreed that Slone did not violate her standard of care and was not negligent. (Slone Brief at 3–4; undisputed in Lloyd Brief.)

Given the complete lack of evidence of Slone’s negligence or breach of Slone’s standard of care, combined with Lloyd’s own expert’s testimony that Slone was “fine” and did nothing wrong, Slone demonstrated that the trial court appropriately granted Slone’s motion for summary judgment. (Slone Brief at 7–8; unrefuted in Lloyd Brief.)

B. This Court should make clear that the three “essential elements” of *res ipsa loquitor* must be established before the doctrine applies.

Lloyd does not dispute the lack of any evidence of Slone’s negligence—inaccurately characterized as a “defense” of Slone’s—arguing instead that “this undisputed retained foreign body case is exactly the type of case previously approved by the Kentucky Supreme Court for the application of the Res Ipsa Loquitor presumption of negligence.” (Lloyd Brief at 2–3, citing *Adams v. Sietsema*, 533 S.W.3d 172 (Ky. 2017), and *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1999).) *Adams* was not, however, a retained foreign body case, but concerned prison medical staff’s failure to diagnose an inmate’s bowel obstruction while treating the prisoner for nausea and diverticulitis. Even more importantly, the Supreme Court in *Adams* agreed with the “trial court’s decision to grant summary judgment based on” plaintiff’s failure to provide expert testimony and disagreed with the Court of Appeals’ view of the “case as presenting a *res ipsa loquitor* situation in which no expert testimony is needed,” where the issues were not “within the

common experience of the ordinary person.” *Id.* at 180–81. While *Perkins* did at least rule that the *res ipsa loquitur* doctrine applied there, in *Perkins* the doctrine applied to the **surgeon**, not a surgical assistant, when the surgeon tore the sigmoid sinus during ear surgery, which the defendant surgeon admitted during his deposition was “one of the prime objectives of the surgeon” to avoid. *Id.* at 653. Neither case supports reversal of the summary judgment in favor of Slone given: the lack of evidence that Slone was negligent; affirmative evidence by the co-defendant surgeon and Lloyd’s own expert that Slone did nothing wrong; and Lloyd’s failure to demonstrate the three essential elements of the *res ipsa loquitur* doctrine.

The doctrine’s three required elements have been part of Kentucky law for 75 years: (1) “the instrumentality must be under the control or management of the defendant”; (2) “the circumstances, according to common knowledge and experience, must create a clear inference that the accident would not have happened if the defendant had not been negligent”; and (3) “the plaintiff’s injury must have resulted from the accident.” *Lewis v. Wolk*, 228 S.W.2d 432, 433–34 (Ky. 1950). Compare, e.g., *Saint Elizabeth Medical Center, Inc. v. Arnsperger*, 686 S.W.3d 132, 140 (Ky. 2024) (discussing the same three *res ipsa loquitur* requirements, slightly reworded). While the Court of Appeals touched on or around these requirements, its opinion never explicitly recognizes that all three elements are required and does not adequately address each of the required elements. Lloyd’s brief fails to even acknowledge the requirements’ existence.

Instead of framing its opinion around the three essential elements for application of the *res ipsa loquitur* doctrine, the Court of Appeals began its *res ipsa* analysis by

citing Kentucky cases that refer to the two *res ipsa loquitor* exceptions to the expert witness requirements in Kentucky law, which Lloyd’s brief obliquely references. (Opinion at 13–15, citing *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. App. 2006); *Jarboe v. Hartin*, 397 S.W.2d 775, 778 (Ky. 1965), *Perkins v. Hausladen*, 828 S.W.2d 652, 654–55 (Ky.1992), and *Arnsperger, supra*). According to these cases, the two *res ipsa* exceptions to the requirement that the party attributing fault present expert testimony as to negligence are where : (1) “any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care” or (2) “medical experts [] provide a sufficient foundation for *res ipsa loquitor* on more complex matters.” *Andrew*, 203 S.W.3d at 170, *Perkins*, 828 S.W.2d at 654–55; *Jarboe*, 397 S.W.2d at 778 (discussing first “exception”).

As to the first “layman’s exception,” this Court has recognized that the “term is a bit of a misnomer.” *Arnsperger*, 686 S.W.3d at 138. “The ‘layman’s exception’ is in fact nothing other than the application of *res ipsa loquitor*—the thing speaks for itself.” *Id.* Indeed, the “layman’s exception” is simply a variant wording of the second of the three required elements for *res ipsa loquitor*: “according to common knowledge and the experience of mankind, the accident could not have happened if those having control and management had not been negligent.” *Id.* at 140. “Only when” the three *res ipsa loquitor* elements are demonstrated does the doctrine apply. *Id.*

The so-called “second” *res ipsa loquitor* exception to the requirement for medical expert testimony is when “medical experts may provide a sufficient foundation for *res ipsa loquitor* on more complex matters.” *Perkins*, 828 S.W.2d at 655 (ostensibly quoting

Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256–57 (Ky. 1985).¹ This “occurs when expert testimony establishes the ‘type of injury was not an ordinary risk of the surgery, that the method by which it occurred was within the exclusive control of the defendant, and that the injury was not due to any voluntary action or contribution on the part of the plaintiff.’” *Arnsperger*, 686 S.W.3d at 138–39, quoting *Perkins*, 828 S.W.2d at 655. In other words, this “exception” to the requirement for medical expert testimony, in fact, requires “expert testimony,” meaning it’s not really an exception to the medical evidence requirement.

This fact is even more apparent when *Cho v. Kempler*, 177 Cal.App.2d 342, 2 Cal.Rptr. 167 (1960), the case from which *Perkins* derived this “exception” (*see Perkins*, 828 S.W.2d at 655), is examined. Notably, in *Cho*, according “to the medical testimony, and that of [the] defendant” eye surgeon, if the “standard of care” were used, then the nerve severance would not occur “under ordinary circumstances,” meaning that the medical testimony “afforded the jury a basis to find as a fact that the injury does not *ordinarily* eventuate in the absence of negligence.” *Cho*, 177 Cal. App. 2d at 350 (emphasis in original). In addition, the testimony of the defendant’s medical expert “described negligent conduct upon the part of a surgeon” as the only explanation. *Id.*

Thus, this second so-called *res ipsa* “exception” to plaintiff’s requirement to present expert medical evidence is not really due to the *res ipsa* doctrine, but is because

¹ *Paintsville* concerns a hospital’s liability for the negligence of a physician providing treatment in the hospital’s emergency room. It is not a *res ipsa loquitur* case, and this quotation does not appear in the opinion, nor do various words from the quotation, such as “experts,” “foundation,” or “*res ipsa loquitur*.” It appears that *Perkins* is actually quoting from PROSSER AND KEETON ON TORTS, Sec. 39 (5th ed. 1984); Westlaw incorrectly links “*Id.* at 257” to *Paintsville*. *Perkins*, 828 S.W.2d at 655.

the defendants' own medical evidence makes the defendant's negligence sufficiently apparent that plaintiff doesn't need to provide any additional expert medical evidence. As this Court recognized in *Arnsperger*, "where the defendant physician makes certain admissions that make his negligence apparent," it is the "type of case that does not require expert medical testimony on the part of the plaintiff," which is "distinguish[ed] from *res ipsa loquitur*." *Arnsperger*, 686 S.W.3d at 139, n.2 (citation omitted). Neither *Cho*—a 65-year-old California case in which there was medical evidence as to the defendant's negligence—nor any Kentucky case provides a basis for a "second" *res ipsa loquitur* exception to the requirement for expert medical testimony, particularly where, as here, the **only** medical evidence—including from Lloyd's own expert—was that Slone was not negligent.

The bench and bar would be greatly aided if this Court makes clear that there is no "first" or "second" *res ipsa* exception to the requirement for expert medical testimony. Rather, the issue is simply whether *res ipsa loquitur*—"the thing speaks for itself"—is applicable under the circumstances, and whether the three "essential elements" of the doctrine have been demonstrated. Regardless, however, of whether the Court clarifies that the three *res ipsa loquitur* requirements—not the two so-called *res ipsa* "exceptions"—are what must be demonstrated, Slone was entitled to summary judgment because the *res ipsa* doctrine, no matter how characterized, does not apply to her conduct. To properly apply the *res ipsa loquitur* doctrine, all three of the required or essential elements of the doctrine must be established.

C. Lloyd failed to meet her burden of proving that each of the three “essential elements” of *res ipsa loquitor* applies to Slone.

Although Lloyd asserts that Slone “never articulates any reason that the *Res Ipsa* doctrine and inference do not apply to her” (Lloyd Brief at 3–4), Slone demonstrated that none of the three requirements for application of the *res ipsa loquitor* applied:

- (1) Slone did not have **any** management and control—let alone “**full**” control—over the needle being left in Lloyd’s knee;
- (2) The circumstances where a needle was **retained** do not create an inference of negligence as to the person who dropped the needle and notified the surgeon of the missing needle; and
- (3) Lloyd’s injury resulted from **retention** of the needle, not from the detachment of the needle, thus her injury was not caused by Slone.

(Slone Brief at 13–25.) Lloyd fails to demonstrate otherwise.

Lloyd does not address the fact that, even if *res ipsa loquitor* means that someone is responsible in retained foreign object cases, that someone is not the person who had no responsibility for the object’s retention. (Slone Brief at 14–18.) For example, although Lloyd claims that, if the negligence per se standard from *Laws v. Harter*, 534 S.W.2d 449, 450 (Ky. 1975), still applied, then “the tech would be liable as a matter of law” (Lloyd Brief at 3), in reality the surgeon would be responsible.

In *Laws*, after a count showed a sponge was missing, the surgeon, anesthesiologist, and radiologist were unable to find the sponge and “decided, upon medical considerations, that it would be better to close the patient and later explore for the missing sponge if it could be located.” *Id.* Later x-rays revealed a sponge, which was subsequently removed. *Id.* After dismissal of claims against the surgeon and the anesthesiologist, Kentucky’s high court reversed and remanded for proceedings against the surgeon, concluding that the surgeon “was negligent as a matter of law.” *Id.* While it may be true that, when the sponge count revealed a missing sponge, the surgeon

“exercised to the highest degree all of the skills known to the medical profession in his attempt to locate the missing sponge, and having failed to locate it, the condition of the patient at that time may have been such that any reasonably prudent surgeon would have closed the patient,” nevertheless, “when the incision . . . was closed a sponge was left in the abdomen.” *Id.* “The failure to correctly account for the sponges under the circumstances constituted negligence as a matter of law.” *Id.* at 451. Notably, the negligence was that of the surgeon, not any other medical professionals involved in the surgery, and certainly not an assistant who had no control over the decision to close the incision without locating the missing object. Of course, the surgeon in this case settled.

Lloyd cites *Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009), as standing for the proposition that Kentucky law imposes “a negligence per se standard making the **caregiver** strictly liable in a Res Ipsa case.” (Lloyd Brief at 3 (emphasis added.)) In *Nazar*, a Durahook was left in the patient’s head after a largely successful removal of a brain tumor. *Id.* at 601. At trial, the surgeon testified that he did not count the hooks himself because the nurses were responsible for counting them. The surgeon’s expert witness agreed that nurses, not the surgeons, were responsible for accounting for “sharps” after surgery. *Id.* at 601–02. After the trial court refused to instruct the jury on the plaintiff’s vicarious liability theory against the surgeon, the jury returned a verdict in the surgeon’s favor, finding he had not breached the standard of care.

On appeal, this Court “rejected the per se rule in retained foreign object cases,” holding that “the trial court was correct in refusing to hold the surgeon negligent as a matter of law for failing to remove the Durahook” from the patient’s head. *Id.* at 605. Instead, the Court adopted “the *res ipsa loquitur* approach,” holding “that juries should

generally be permitted to determine a healthcare professional’s liability in a retained foreign object case.” *Id.* at 604. “Under this standard, juries may—but are not required to—infer negligence from the fact that a surgical item was left in a patient’s body. While the retained foreign object is evidence of negligence, the jury is free to determine the ultimate issue of the **surgeon’s** liability from the evidence presented at trial.” *Id.* at 603 (emphasis added). After noting that “any number of people, including the surgeon, anesthesiologist, nursing staff, and other hospital staff may be at fault for having left an offending item in a plaintiff’s body,” the Court held that the “*res ipsa loquitur* approach” avoids the unfairness of ascribing “fault to surgeons, regardless of their responsibility for the plaintiff’s injury” by “permitting juries to infer negligence from the fact of the retained foreign object, while granting them the latitude to analyze other facts and evidence relevant to liability.” *Id.* at 604. Accordingly, “juries are free to analyze the reliability and veracity of the defendant’s expert witnesses and weigh it against the likelihood that **the surgeon** was negligent in failing to remove an object from the plaintiff’s body during surgery.” *Id.* (emphasis added). In other words, if the *res ipsa loquitur* doctrine applies here, it applies to the surgeon only.

Lloyd acknowledges that *res ipsa loquitur* does not apply if “the instrumentality that caused the injury was not in the exclusive control of the Defendant.” (Lloyd Brief at 3, citing *Savage v. Three Rivers Medical Center*, 390 S.W.3d 104 (Ky. 2012).) In *Savage*, a patient sued the surgeon and three of Three Rivers’s operating room nurses because a sponge had been left in her body during a 2001 surgery. *Id.* at 109. Following two trials and various appeals and cross appeals, the Supreme Court disagreed with the application of the *res ipsa loquitur* doctrine to plaintiff’s case because “the inference afforded by *res*

ipsa loquitur that someone was negligent does not necessarily mean that Three Rivers was negligent.” *Id.* at 113. Rather, “[a]pplying *res ipsa loquitur* to a specific defendant in a specific case requires a showing that the defendant had full control of the instrumentality which caused the injury.” *Id.*

The Court similarly ruled against Three Rivers’s argument that the trial court erred in failing to allow the jury to apportion fault to the surgeon, who had settled before trial. *Id.* at 117. Under Kentucky law, not only plaintiffs, but defendants who want “to apportion fault to a medical provider based upon an allegation of medical negligence must put forth expert testimony to show that the medical provider failed to conform to the standard of care.” *Id.* at 118. Three Rivers failed to present testimony identifying “with specificity the relevant standard of care applicable to a surgeon in a retained object case,” and failed to examine the surgeon’s “specific conduct during the surgery,” meaning it failed “to demonstrate how he breached the relevant standard of care” or “relate that conduct to a breach of the standard of care.” *Id.* at 119. Because Three Rivers failed to meet its burden of establishing by expert testimony the standard of care imposed upon the surgeon “and that he breached that standard of care by his specific actions or failure to act, the trial court properly denied Three Rivers’s request for an apportionment instruction.” *Id.* Thus, retained foreign object cases do not fall into a special category of cases in which a claimant is excused from establishing each of the required elements of the *res ipsa loquitur* doctrine.

Lloyd failed to demonstrate that she meets any of the three essential elements of the doctrine—let alone all three. Instead, Lloyd—who acknowledges that “the defendant’s relation” to the event matters—states that Slone was “the only actor holding

the culprit surgical needle at the time it fell or popped into the wound.” (Lloyd Brief at 2, 4.) But having control over the needle when it separated from the holder and fell into the wound is not the problem. There is no medical issue with foreign objects (like sponges, clamps, sharps, or the like) being in a patient’s body; the medical issues arise when a foreign object that should have been removed is “retained” in the body. This is why this is a “**retained** foreign object” case, not simply a “foreign object” case. Where, as here, a needle becomes detached while being used by a surgical assistant who: (1) has no control over the **retention** of the needle; (2) was not negligent in the needle separating from the holder or in the retention of the needle; and (3) the patient’s injury resulted from the **retention** of the needle rather than the separation from the holder, the *res ipsa loquitur* doctrine simply does not apply. The Court of Appeals erred in holding that the doctrine applied in the circumstances presented in this case, and it should be reversed.

CONCLUSION

Given the absence of expert medical evidence that Slone was negligent and the affirmative expert medical evidence that she did nothing wrong, Lloyd has failed to demonstrate that the trial court erred in granting summary judgment to Slone. The Court of Appeals confusingly, and inappropriately, relied on Kentucky cases discussing the so-called *res ipsa loquitur* exceptions to the requirement for a medical expert—which is nothing more than the application of the doctrine itself—rather than analyzing the three “essential elements” required for the application of the *res ipsa loquitur* doctrine in every case. Lloyd has failed to demonstrate that any of those three requirements are met here, where Slone had no control over the retention of the needle, was not negligent as to the

losing or retention of the needle, and Lloyd's injury resulted from the retention of the needle. Summary judgment in favor of Lloyd should be reinstated.

Respectfully submitted,

/s/ Bethany A. Breetz

Charles H. Stopher
Michael D. Risley
Bethany A. Breetz
STITES & HARBISON, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202-3352
Telephone: (502) 587-3400

Counsel for Appellant Sheila Slone KSCA

WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G) because, excluding the parts of the document exempted by RAP 15(E), this document contains 3,462 words.

/s/ Bethany A. Breetz

Bethany A. Breetz