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IN THE SUPREME COURT OF PENNSYLVANIA
21 MAP 2021

ELIZABETH H. LAGEMAN, by and through her Power of Attorney and Daughter, ADRIENNE LAGEMAN,

Plaintiffs/Appellees,

v.

JOHN ZEPP, IV, D.O., ANESTHESIA ASSOCIATES OF YORK, PA, INC., , YORK HOSPITAL, and WELLSPAN HEALTH t/b/d/a YORK HOSPITAL,

Defendants/Appellants.

BRIEF *AMICUS CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY

Appeal from the Opinion and Order of the Superior Court dated July 20, 2020, Reconsideration denied September 22, 2020, at No. 756 MDA 2018, vacating/remanding the May 10, 2018 Judgment of the Court of Common Pleas of York County at Docket No. 2014-SU-000846-82

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Pa.R.A.P. 531(a), *Amici Curiae*, the American Medical Association and the Pennsylvania Medical Society, file this Brief in Support of Appellants.

Amicus Curiae, the American Medical Association (the "AMA"), is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Amicus Curiae, the Pennsylvania Medical Society (the "Medical Society"), is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. The Medical Society regularly participates as *amicus curiae* before this Court in cases raising important health care issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and the Medical Society submit this brief on their own behalf and

as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The above organizations have a unique and substantial interest in the resolution of the instant case as they are concerned that requiring a *res ipsa loquitur* charge in a case where a plaintiff has presented a *prima facie* case of liability against a defendant healthcare provider dramatically lowers the bar for the provision of this instruction and has the potential to transform medical malpractice actions into strict liability cases rendering physicians the unwitting guarantors of patient safety. These organizations are also concerned that allowing a jury to presume negligence in cases where direct evidence of negligence is permitted will drive up substantially the number of plaintiffs' verdicts and have an adverse effect on healthcare providers' ability to obtain cost-effective malpractice insurance which would lead to increased healthcare costs for all.

The AMA and the Pennsylvania Medical Society submit that they are appropriate *amici* under Rule 531 of the Pennsylvania Rules of Appellate Procedure. *Amici* urge this Honorable Court to consider the legal and policy considerations advanced in this Brief *Amicus Curiae*, which compels the conclusion that the Superior Court's decision should be reversed.

II. <u>INTRODUCTION AND SUMMARY OF ARGUMENT</u>

Res ipsa loquitur has no applicability in a case where a plaintiff is able to prove a defendant's malpractice through direct evidence. Where a plaintiff has *direct* evidence of the negligent acts or procedures that caused the plaintiff's injuries, there is no need for a jury *to infer* what occurred, no occasion for the jury to be told that the plaintiff's injury "speaks for itself," and no reason to instruct the jury that it can find a defendant negligent based on the mere fact of the plaintiffs' injury. Indeed, allowing a jury to be instructed on the *res ipsa loquitur* doctrine in the face of direct evidence in a complicated medical malpractice case will be perceived for what it is: an implicit endorsement of the plaintiff's case, which the jury can, and likely will, use to avoid weighing the evidence. Misuse of the doctrine in this fashion, which, as the dissent noted below, "would virtually guarantee … that the charge may be given in every medical malpractice case despite direct proof of negligence,"[1] will therefore tilt the scales in plaintiffs' favor and cause defendants' substantial prejudice.

In this case, the trial court heard the evidence first-hand, recognized that the details of the medical procedure at issue were not in dispute, and understood that the primary issue for the jury was whether the defendant physician's conduct fell below the standard of care. In light of Plaintiff's direct proof of negligence, the court recognized that this was not the rare instance where the jury needed to "infer," or

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[1] *Id.* at 1118. (Stabile, J., dissenting).

rely on its own common sense to evaluate circumstantial evidence in determining whether or not Defendant was negligent (as it might be, for example, in a case where the wrong limb has been amputated or where a quadriplegic, unmonitored patient falls off an examining table). Thus, the trial court properly declined to give the *res ipsa* charge. A majority of the Superior Court Panel reversed, however, finding that the trial court abused its discretion by not giving the *res ipsa* instruction, and vacated the defense verdict.

Amici submit that the Superior Court's decision contravenes well-established precedent, and, as a matter of fairness and equity, should not be permitted to stand. Specifically, *Amici* submit that it defies logic to allow a jury to "infer" that the defendant doctor acted outside of the standard of care after the plaintiff has proven it by direct evidence during her case-in-chief. Giving the jury license to infer, rather than carefully consider the proofs at trial, will significantly expand a plaintiff's ability to convince a jury of a defendant's negligence and unfairly lower the bar to liability for unsuccessful medical treatment, making physicians guarantors of a good outcome. In turn, this will increase medical malpractice liability costs—with no corresponding benefit—and result in all citizens having to foot the bill in the form of higher insurance rates and medical costs.

For the reasons set forth herein, *Amici* urge this Court to reverse the Superior Court's decision and clarify for the bench and bar that a *res ipsa* charge should not be given in a case where a plaintiff is able to prove liability through direct evidence.

III. FACTS

This Court granted Plaintiff's Petition for Allowance of Appeal to decide the following question, as framed by Defendants:

> Did the Superior Court's majority opinion conflict with this Court's holdings in *Quinby v. Plumsteadville Family Practice, Inc*., 907 A.2d 1061 (Pa. 2006), and *Toogood v. Rogal*, 824 A.2d 1140 (Pa. 2003) (plurality), and the Superior Court's *en banc* opinion in *MacNutt v. Temple Univ. Hosp*., 932 A.2d 980 (Pa. Super. 2007) (*en banc*), when the Superior Court found an abuse of discretion and reversible error in the trial court's refusal to give a jury instruction on *res ipsa loquitur* where the underlying case was medically complex and the plaintiff had otherwise established a *prima facie* case of medical professional negligence by direct expert testimony offered to a reasonable degree of medical certainty?

The relevant facts are not in dispute. Plaintiff alleged that anesthesiologist Dr. John Zepp negligently placed a catheter into the carotid artery of her mother, Elizabeth Lageman, during an emergency exploratory laparotomy which, in turn, caused an arterial cannulation that led her mother to suffer a stroke and partial paralysis. Plaintiff sued Dr. Zepp, alleging that his placement of the catheter was negligent and that his negligence was the cause of Plaintiff's mother's harm. At trial, Plaintiff offered direct proof of negligence through the testimony of a qualified expert physician. The trial court indicated that it intended to give standard

instructions for a medical malpractice case. In an attempt to hedge her bets, Plaintiff also asked the trial court to give the *res ipsa loquitur* instruction—in effect, advising the jury that it could "presume" negligence from the fact that Plaintiff's mother experienced an arterial cannulation. Defendants objected, the trial court refused to provide this instruction and the jury thereafter returned a defense verdict.

On appeal, in a split 2-1 decision, the Superior Court held that the trial court's refusal to give a *res ipsa* instruction was improper and warranted the grant of a new trial. On March 31, 2021, this Court accepted the above issues for appeal.

IV. ARGUMENT

This is a run-of-the-mill "battle of the experts" case, in which the jury arrived at a defense verdict. Both sides agreed that Dr. Zepp placed the catheter into Mrs. Lageman's artery which caused an arterial cannulation and a stroke. The parties vehemently disagreed, however, about whether Dr. Zepp's insertion of the line into Mrs. Lageman's artery constituted a breach of the standard of care. By allowing a jury to "presume" negligence in a case where direct evidence of liability is presented, the Superior Court significantly broadened the circumstances where this instruction will be given, effectively allowing juries to avoid weighing the evidence in difficult cases.

Because the Superior Court's decision is out of step with the law (in particular, this Court's precedent in *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d

1061 (Pa. 2006), and *Toogood v. Rogal*, 824 A.2d 1140 (Pa. 2003) (plurality), and the Superior Court's *en banc* opinion in *MacNutt v. Temple Univ. Hosp*., 932 A.2d 980 (Pa. Super. 2007)), and with traditional allocation of burdens of proof, *Amici* believe this Court should vacate the Superior Court's decision and reinstate the defense verdict below.

1. The History of the *Res Ipsa* Doctrine Makes Clear that It Should Apply Only Sparingly and in Rare and Unusual Circumstances.

The *res ipsa* doctrine ("the thing speaks for itself") has its genesis in *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863), an English case involving a bystander who sustained injuries after being struck by a barrel lowered from a window onto a sidewalk below. In *Byrne*, the plaintiff was unable to offer any evidence as to why the barrel fell or to show any negligence on the part of the defendant, and the defendant was granted a non-suit as a result. The Court of Exchequer reversed the judgment. It found that the plaintiff had established a *prima facie* case of negligence by proving the defendant's exclusive control over the mechanism of injury and shifted the burden to the warehouse owner to produce "any facts inconsistent with negligence." In other words, the *Byrne* court permitted the jury to use its deductive reasoning to infer fault in a case where the accident (a barrel of flour falling from the premises operated by defendant) would not normally occur absent negligence of the person in control of the instrumentality. *See Schurgast v. Schumann*, 156 Conn. 471, 479, 242 A.2d 695 (1968) (describing *res ipsa* as "a convenient formula for

saying that a plaintiff may, in some cases, sustain the burden of proving that the defendant was more probably negligent than not, by showing how the accident occurred, without offering any evidence to show why it occurred").

Pennsylvania later adopted the Restatement (Second) of Torts' test for when and under what circumstances the doctrine should be used. Today, Pennsylvania courts recognize that there may be rare instances where direct evidence is absent, lost or unavailable and a plaintiff is unable to show exactly what negligent act or omission by a defendant caused his injury. Section 328D of the Restatement (Second) of Torts, which this Court has adopted, provides that

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Williams v. Otis Elevator Co., 598 A.2d 302, 304-305 (Pa. Super 1991).

Under the Restatement rule, "[r]es ipsa loquitur is neither a rule of procedure nor one of substantive tort law. It is only a shorthand expression for circumstantial proof of negligence—a rule of evidence." *Gilbert v. Korvette*, 327 A.2d 94, 99 (Pa. 1974). Thus, our courts will permit plaintiffs to rely on circumstantial evidence or allow jurors to "infer," using the juror's own common knowledge and experience, that a defendant's negligence caused the plaintiff's injury. *Quinby, supra*. *See also*

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39, at 242 (5th ed. 1984) (footnote omitted).

At the same time, however, Pennsylvania courts have recognized that this doctrine should be applied sparingly and have routinely rejected application of *res ipsa loquitur* in run-of-the-mill medical malpractice cases. *See Grandelli v. Methodist Hosp.*, 777 A.2d 1138, 1147 (Pa. Super. 2001) (*res ipsa loquitur* "is not often applied in medical malpractice actions; except in the most clear-cut cases, res ipsa [] may not be used in a medical malpractice action to...shortcut the requirement that causation be established within a reasonable degree of medical certainty"); *Magette v. Goodman*, 771 A.2d 775 (Pa. Super. 2001) (holding that *res ipsa loquitur* is inapplicable to sudden death from cardiac arrest while the plaintiff was under anesthesia); *Brophy v. Brizuela*, 517 A.2d 1293 (Pa. Super. 1986) (where plaintiffs were unable to establish necessary elements, *res ipsa loquitur* inapplicable to a tubal ligation followed by pregnancy); *Gallegor v. Felder*, 478 A.2d 34 (Pa. Super. 1984)(*res ipsa loquitur* inapplicable to ear surgery that allegedly damaged plaintiff's facial nerve); *Starr v. Allegheny General Hosp.*, 451 A.2d 499 (Pa. Super. 1982) (upholding the trial court's refusal to charge on *res ipsa loquitur* in case involving the repair of a skull fracture that allegedly resulted in slurred speech, blurred vision, and various other neurological problems).

These cases reflect the tradition of allowing use of the *res ipsa* doctrine only when plaintiffs are unable to prove their claims directly and the specific circumstances of the injury permit an inference of negligence. However, what this Court and the Superior Court until now *have not permitted*, was for the *res ipsa* instruction to be given where the plaintiff was required to prove medical malpractice, had direct evidence of the sequence of events that caused the injury, and the suggestion that the injury would not occur absent negligence was rebutted. Thus, until this decision, Pennsylvania courts have recognized that it is only rarely appropriate to give the *res ipsa* instruction in a medical malpractice case.

a. The Doctrine Should Not be Applied to These Facts.

In this case, Plaintiff and Defendants disagreed as to whether the injury Plaintiff sustained was caused by Dr. Zepp's negligence and whether his conduct fell below the standard of care. Plaintiff presented a *prima facie* case of negligence to the jury, as the courts below recognized, while Defendants explained that Mrs. Lageman's anatomy made proper placement of the line more difficult, and that her injury could result in the absence of negligence. Defendants further relied on the testimony of defense expert, Dr. Hudson, who opined that Dr. Zepp followed all of the necessary steps when placing the central line and that Mrs. Lageman's arterial cannulation occurred despite the fact that Dr. Zepp complied with the applicable standard of care.

As in the majority of medical malpractice cases, at the heart of this case was the fully-joined dispute between the parties' experts. This dispute should not have been resolved by the jury applying the inference of negligence that *res ipsa loquitur* permits but should have been resolved after careful weighing of the evidence presented by both sides. *See MacNutt*, *supra*, 932 A.2d at 987 ("The difference of opinion on the nature of Appellant's injury as well as the competent evidence of another possible cause for the injury also created a factual dispute regarding whether Appellant's injury was outside the scope of Appellees' duty to Appellant. Therefore, Appellants did not satisfy the necessary factors under the Restatement to proceed under the doctrine of *res ipsa loquitur*.").

Thus, because the *res ipsa loquitur* doctrine clearly does not apply to this straightforward "battle of the experts" case, this Court should reverse the Superior Court's decision.

b. This Court in *Quinby* and *Toogood* and the Superior Court in *MacNutt*, Have not Allowed a *Res Ipsa* Instruction to be Given in the Face of Direct Evidence.

This case clearly conflicts with *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061 (Pa. 2006), and *Toogood v. Rogal*, 824 A.2d 1140 (Pa. 2003) (plurality), as well as the Superior Court's *en banc* opinion in *MacNutt v. Temple Univ. Hosp.*, 932 A.2d 980 (Pa. Super. 2007). None of these cases held that a

plaintiff is entitled to a *res ipsa* charge in circumstances where the plaintiff has submitted a *prima facie* case of direct evidence.

Contrary to the Superior Court majority's opinion, *Quinby* did not involve direct evidence of a breach of the standard of care. The quadriplegic patient in *Quinby* was found on the floor without any witnesses who could explain what had occurred. Indeed, this Court's conclusion that an incapacitated patient normally would not fall off an examining table absent negligence, is the precise reason the *Quinby* jury was permitted to rely on circumstantial evidence. *Quinby,* 907 A.2d at 1072 ("Regardless of which version of the event is believed, there is no factual issue or possible dispute that Decedent's fall resulted from something other than Defendants' negligence. Simply put, in the absence of negligence, a quadriplegic patient such as Decedent could not fall off an examination table."). Thus, the plaintiff in *Quinby* was not able to prove a *prima facie* case of negligence by direct evidence and had no alternative but to rely on the *res ipsa loquitur* instruction.

MacNutt v. Temple Univ. Hosp., Inc., 932 A.2d 980 (Pa. Super. 2007), also directly conflicts with the Panel's decision in this case. Indeed, *MacNutt* articulated a rule that is the antithesis of the rule the majority applied here; in *McNutt* the Superior Court, *en banc*, stated: "[t]he doctrine of *res ipsa loquitor* is a rule of circumstantial evidence which allows plaintiffs, **without direct evidence** of the elements of negligence, to present their case to the jury based on an inference of

negligence." 932 A.2d at 980 (citation omitted; emphasis added). Because the plaintiffs offered direct evidence of negligence and were not able to eliminate a non-negligent cause of the plaintiff husband's injuries, the *McNutt* Court concluded that the trial court properly refused to give the *res ipsa loquitur* instruction.

Finally, the Panel's decision in this case overlooked the important policy reasons (*i.e.,* the significant challenges the medical profession faces) that this Court, in *Toogood v. Royal*, 824 A.2d 1140 (Pa. 2003), identified when it noted that the *res ipsa* doctrine should be used sparingly in medical malpractice cases. As Justice Newman, writing for the plurality, noted:

> Public policy reasons exist for protecting physicians by limiting *res ipsa loquitur* in medical cases, which must be weighed against the public policy concerns of protecting the general public. First, doctors hold an important place in our society due to the role that they play in the health and even survival of the peoples of this nation. For that reason, society should not allow a doctor's actions to be second-guessed at trial without a clear understanding of the standards required. Second, medicine is not an exact science. Much discretion exists in a doctor's practice of medicine that should not be condemned in hindsight. Third, the practice of medicine is a complex and experimental field. Therefore, expert testimony is necessary to prevent a finding of liability for a simple mistake of judgment, failure of treatment, or accidental occurrence.

Id., at 1151 (citation omitted). Justice Newman was right, of course, that expansive use of the *res ipsa* doctrine could subject physicians to liability simply based on a complication that can occur in the absence of negligence. Because the decision in

this case contravenes the law and policy articulated in *Toogood*, this Court should vacate the Superior Court's decision and reinstate the jury's verdict.

c. This Court Should Follow the Lead of Other States Who Refuse to Instruct on *Res Ipsa* in a Case Where Direct Evidence Has Been Provided.

Other states faced with this issue have firmly rejected the "direct evidence plus *res ipsa*" theory of liability and have found that the doctrine has no applicability in cases where the cause of the accident or injury has been established. *See, e.g., Linnear v. CenterPoint Energy Entex/Reliant Energy,* 966 So. 2d 36, 41-42 (La. 2007) (finding it reversible error for *res ipsa* to apply where direct evidence was presented); *Dover Elevator Co. v. Swann,* 638 A.2d 762, 766 (Md. 1994) (purpose of *res ipsa* is to afford plaintiff the opportunity to present a *prima facie* case when direct evidence of cause of an accident is not available or is available solely to defendant; where direct evidence of the specific cause of his injuries was proffered by expert who "purport[ed] to furnish a sufficiently complete explanation of the specific causes of [the elevator's] misleveling," plaintiff was precluded from relying on *res ipsa loquitur* doctrine); *Cangelosi v. Our Lady of the Lake Regional Med'l Ctr.,* 564 So. 2d 654, 660 (La. 1989) ("doctrine does not apply if direct evidence sufficiently explains the injury"); *Massengill v. Starling*, 360 S.E. 2d 512 (N.C. App. 1987) (*res ipsa* does not apply where all of the facts causing the accident are known and testified to by witnesses at trial); *McPherson v. Hospital*, 43 N.C. App. 164, 167,

258 S.E.2d 410, 412 (1979)(when all facts are known and testified to, there is no need for a plaintiff to resort to the doctrine as nothing is left to infer); *Perry v. H & S Mechanical Contractors*, 578 S.W.2d 423 (Tex. Civ. App. 1979) (where facts surrounding accident were "conclusively established and undisputed by the parties," no basis to provide *res ipsa loquitur* charge); *University Dodge, Inc. v. Drott Tractor Co., Inc*. 198 N.W.2d 621 (Wis. 1972)(doctrine of *res ipsa loquitur* is an evidentiary rule that does not apply in a case where the cause of the accident has been clearly established).[2]

Indeed, in some states, if specific acts of negligence are even *alleged*, the *res ipsa* doctrine does not apply. *Anderson v. Union Pacific*, 295 Neb. 785, 890 N.W. 2d 791 (Neb. 2017)(if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of *res ipsa loquitur* is not applicable); *Stahlecker v. Ford Motor Co*., 266 Neb. 601, 667 N.W.2d 244 (2003)(same). *See also Bargmann v. Soll Oil Co*., 253 Neb. 1018, 574 N.W.2d 478

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[2] *See also Sanderson v. Chapman*, 487 F.2d 264, 267 (9th Cir. 1973) (where plaintiff introduces specific evidence of negligence, doctrine of *res ipsa loquitur* does not apply); *Southern Bell Tel. & Tel. Co. v. La Roche*, 325 S.E.2d 908, 910 (Ga. Ct. App. 1985) (*res ipsa loquitur* doctrine is not applicable where cause of accident is fully explained; it only applies in cases where there is no evidence of consequence). *But see Seneca Ins. Co. v. Vogt Auto Serv*., 573 N.E.2d 223, 224 (Ohio Mun. 1991) (plaintiff does not lose the right to rely on doctrine by pleading or proving specific acts of negligence); *Ciciarelli v. Ames Dep't Stores, Inc*., 557 N.Y.S.2d 787, 788 (N.Y. App. Div. 1990) (pleading specific acts of negligence does not defeat the doctrine of *res ipsa loquitur*); *Jones v. Tarrant Util. Co*., 638 S.W.2d 862, 865 (Tex. 1982) (finding doctrine applicable if specific negligence is shown); *Bedford v. Re*, 510 P.2d 724, 727 (Cal. 1973) (introducing specific acts of negligence does not deprive a plaintiff of use of the *res ipsa loquitur* doctrine).

(1998) (simply pleading specific acts of negligence in complaint will render doctrine of *res ipsa loquitur* inapplicable); *Finley v. Brickman*, 186 Neb. 747, 186 N.W.2d 111 (1971) (if petition alleges particular acts of negligence, then plaintiff must establish specific negligence alleged, and doctrine of *res ipsa loquitur* cannot be applied).

These courts recognize that where there is direct evidence, there is no need for inferences or presumptions, and that the jury can assess whether or not the defendant was negligent from the direct evidence itself. This Court should follow the rationale of these other states and reject the notion that *res ipsa* may be applied in cases where a plaintiff presents direct evidence of the specific acts of negligence at issue.

2. As a Matter of Policy, the Doctrine of *Res Ipsa Loquitur* Should Not Be Expanded to Allow a Plaintiff to Invoke the Doctrine While Also Presenting Direct Evidence of Liability.

As a matter of policy, the Superior Court's decision should be vacated because it will increase medical malpractice liability given the large number of medical malpractice cases to which it will apply. Applying the doctrine in the expanded manner sanctioned by the Superior Court will also cause significant jury confusion.

a. Use of the *Res Ipsa* Doctrine in this Fashion will Expand Liability for Health Care Providers.

Contrary to the Superior Court's analysis, use of the *res ipsa* doctrine in the fashion permitted by the Superior Court will significantly expand liability for health

care providers. Although the Superior Court opined that satisfaction of the prerequisites to a *res ipsa* charge will be "difficult," Slip. Op. at 29, n. 9, the elements applied in the fashion by the Superior Court will, in fact, routinely be satisfied in the context of a trial involving the "battle of the experts."[3] As such, it will become the norm, not the exception, for plaintiffs to offer evidence of negligence and to have their experts argue that the "event" in question does not occur absent negligence—as it is usually the theme of any plaintiff's case.

The Superior Court's decision thus creates a cloud of liability over the medical profession. It is no overstatement to say that the approach below will broadly affect the manner in which medicine is practiced. Every day, physicians in this Commonwealth are required to perform procedures that involve inherent risk of nonnegligent complications in emergent (or other less-than-ideal) circumstances where the likelihood of an untoward result is real. Allowing a jury to infer negligence simply because a patient has suffered a complication or experienced an adverse result—even where the physician prudently performed the procedure and could not control the outcome—will make physicians less likely to perform these procedures. If the jury in every "battle of the experts" case is entitled to infer negligence simply

[3] *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St.3d 300, 2010-Ohio-1041 (2010) ("Under the evidence presented in this case, there are two equally efficient and probable causes of the injury; thus, it would have been improper to instruct the jury that it could infer negligence. Based on the evidence produced, this is not a situation where it can be said that 'the thing speaks for itself.' Rather, this case represents the classic battle between expert witnesses.")

because the surgery or procedure had an adverse result, physicians will be required to procure additional malpractice insurance—of course, at an increased expense to the physicians, and, ultimately, to the general public.

Such an unprecedented and far-reaching expansion of the *res ipsa* doctrine would be potentially devastating for Pennsylvania health care providers. Under such an expanded version of the doctrine, every medical malpractice case with an opinion from an expert will warrant an instruction thereby giving every plaintiff in a medical malpractice action the upper hand in litigation. Overuse of the *res ipsa* instruction will have a staggering toll on health care providers that will reveal itself in the form of higher insurance rates. This Court therefore should reject Plaintiff's attempt to dramatically expand the law in this manner and should not allow *res ipsa* to be used in every run-of-the-mill malpractice case.

b. The Trial Court Properly Exercised its Discretion in Refusing Plaintiff's Request Where the Charge Would Have Confused the Jury.

The Superior Court's decision also effectively strips away any discretion the trial court had to decide how the jury should have been instructed on the law.

It is clear that the purpose of jury instructions is to clarify the legal principles at issue. *Chicchi v. Se. Pa. Trans. Auth*., 727 A.2d 604, 609 (Pa. Cmwlth. 1999). As such, this Court repeatedly has held that "[a] trial court has broad discretion in phrasing its instructions to the jury and can choose its own wording so long as the

law is clearly, adequately and accurately presented to the jury for consideration." *Commonwealth v. King*, 721 A.2d 763, 778 (Pa. 1998). "Furthermore, a trial court need not accept counsel's wording for an instruction, as long as the instruction given correctly reflects the law." *Id.* at 778-79; *see also Williams v. Southeastern Pennsylvania Transportation Authority*, 741 A.2d 848, 858 (Pa. Cmwlth. 1999).

As the Commonwealth Court has explained:

> When reviewing jury instructions for reversible error, an appellate court must read and consider the charge as a whole. [Appellate courts] will uphold an instruction if it adequately and accurately reflects the law and is sufficient to guide the jury through its deliberation.

Commonwealth v. Martz, 824 A.2d 403, 409 (Pa. Cmwlth. 2003) (internal quotations and citations omitted). Here, there is no doubt but that the instructions that were given provided the jury with a robust and correct articulation of Pennsylvania medical malpractice law. There was no need, on this record, to add to these instructions by introducing *res ipsa* concepts.

Equally important, allowing a *res ipsa* instruction to be given in circumstances where direct evidence has been presented will confuse the jury. Had the jury been instructed on Plaintiff's *res ipsa* theory, it would have been given an irreconcilable and inconsistent message—it would have been told *both* that certain events took place and caused harm *and* that the doctor's specific acts of negligence could not be proven. This will lead to hopeless jury confusion, which, in turn, would itself have created reversible error. *Quinby, supra,* 907 A.2d at 1069–70 ("Error in a charge is

sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. Error will be found where the jury was probably [misled] by what the trial judge charged or where there was an omission in the charge.”).

In this case, the jury also was instructed that the doctor was *not* the guarantor of a good outcome. According to the Panel, however, the jury also should have been instructed that they could infer negligence simply because of the outcome that occurred. These two notions are entirely inconsistent and would have resulted in significant jury confusion for this reason as well.

For these reasons, the trial court properly exercised its discretion in refusing to give this charge.

3. This Court Should Make Clear That Any Opinion that the Harm in Question Would Not Have Occurred Absent Negligence Reflects the Consensus of the Entire Medical Community.

In reviewing the applicability of the *res ipsa loquitur* doctrine to medical malpractice cases, this Court also should clarify what type of evidence is sufficient to establish “common knowledge” to justify allowing the inference to be drawn. Specifically, this Court should require that any expert who testifies that such a result does not occur “in the absence of negligence” be required to offer an opinion that reflects the consensus of the *entire* medical community and not simply one expert’s opinion.

The Supreme Court of New Jersey in *Buckelew v. Grossbard*, 87 N.J. 512, 525, 435 A.2d 1150 (1981) recognized that it should not be sufficient for a plaintiff's expert "simply to follow slavishly a 'common-knowledge-within-the-medical-community' formula;" rather, the court held, there "must be some evidential support, experiential or the like, offered for the expert's conclusion that the medical community recognized that the mishap in question would not have occurred but for the physician's negligence. *Id.* at 529, 435 A.2d 1150. Thus, "[i]f the plaintiff's expert's direct and cross-examination provide no basis for the witness's 'common knowledge' testimony other than the expert's intuitive feeling—in other words, no more than a flat-out statement designed to satisfy the 'common knowledge' test," then the court should not apply the *res ipsa* doctrine to the proceedings. 87 N.J. at 528-29, 435 A.2d 1150. *See also Saks v. Ng*, 383 N.J. Super. 76, 91-92, 890 A.2d 983 (App. Div. 2006) (affirming trial court's decision not to give *res ipsa loquitur* instruction because plaintiff's expert "did not state that the medical community recognizes that [plaintiff's injury] does not ordinarily occur in the absence of negligence").

Amici urge this Court to follow the rationale of the New Jersey Supreme Court above and clarify that a court need not provide a *res ipsa* instruction every time an expert advances an unsupported claim that an injury would not have occurred in the absence of negligence. Instead, *Amici* urge this Court to require the expert to provide

the opinion *that the relevant medical community* agrees that the injury ordinarily does not occur in the absence of negligence before such a charge may be given.

Here, far from the evidence demonstrating that arterial cannulation cannot occur in the absence of negligence, Dr. Zepp and his expert both testified that it *can occur* even if all of the best practices are followed. Plaintiff's expert never offered an opinion to the contrary. *See Lageman v. Zepp*, 237 A.3d 1098, 1119-20 (Pa. Super. 2020); Slip. Op. p. 26 (Stabile, J., dissenting) ("*my review of the transcript fails to unearth any unequivocal statement by Dr. Pepple that arterial cannulation does not ordinarily occur in the absence of negligence*") (emphasis in original). Moreover, Plaintiff's expert testified that a physician who takes all of the necessary steps to insert a line "cannot guarantee any specific outcome" for the patient. (R. 182a, 192a-193a),

Thus, the evidence in this case did not even come close to establishing that the Plaintiff's expert believed that this type of injury does not occur absent negligence, let alone that that this is the consensus of the larger medical community pursuant to the analysis identified above. For this reason as well, *Amici* urge this Court to vacate the Superior Court's decision and reinstate the jury verdict.

V. <u>CONCLUSION</u>

The decision to require a *res ipsa loquitur* instruction in this case will undermine, rather than facilitate, better quality health care. If plaintiffs are permitted

to prove negligence by way of both direct evidence and inferences, health care defendants will be placed at greater risk for liability and the cost of healthcare will increase.

This Court should clarify—once and for all—that: (i) the *res ipsa* instruction does not need to be given in circumstances where direct evidence has been presented; (ii) if such instruction is to be given, it should only be given on a record where the expert testimony relevant to the factors set forth in the Restatement are satisfied by testimony that reflects the consensus of the greater medical community.

WHEREFORE, for the foregoing reasons, *Amici Curiae* respectfully request that this Court VACATE and REVERSE the decision of the Superior Court of Pennsylvania.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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IN THE SUPREME COURT OF PENNSYLVANIA

Elizabeth H. Lageman, by and through her Power of Attorney and daughter, Adrienne Lageman, Appellees	:	21 MAP 2021
v.	:	
John Zepp, IV, D.O.; Anesthesia Associates of York, PA, Inc.; York Hospital; and Wellspan Health, t/d/b/a York Hospital, Appellants	:	

PROOF OF SERVICE

I hereby certify that this 9th day of June, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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IN THE SUPREME COURT OF PENNSYLVANIA

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