[J-60-2021] [MO:Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ELIZABETH H. LAGEMAN, BY AND THROUGH HER POWER OF ATTORNEY AND DAUGHTER, ADRIENNE LAGEMAN, Appellees v. JOHN ZEPP, IV, D.O.; ANESTHESIA ASSOCIATES OF YORK, PA, INC.; YORK HOSPITAL; AND WELLSPAN HEALTH, T/D/B/A YORK HOSPITAL, Appellants	:	No. 21 MAP 2021 Appeal from the Order of the Superior Court dated July 20, 2020 at No. 756 MDA 2018, Reconsideration Denied on September 22, 2020, Vacating the Judgment of the York County Court of Common Pleas, Civil Division, dated May 10, 2018 at No. 2014-SU-000846-82 and Remanding for a new trial. ARGUED: September 23, 2021

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE BAER **DECIDED: December 22, 2021**

I agree with the Majority to the extent that it holds that there are cases in which a *res ipsa loquitur* instruction is warranted notwithstanding a plaintiff presenting direct evidence of negligence. As ably explained by the Majority, "[i]t has long been the law of Pennsylvania that a plaintiff has no obligation to choose one theory of liability to the exclusion of another." Majority Opinion, at 36. *See also id.* at 38 (observing that permitting a plaintiff to present direct evidence while simultaneously invoking the *res ipsa loquitur* doctrine "will only disadvantage a defendant as to whom the claim becomes more facially meritorious as more competent evidence emerges— as perhaps, it should").

However, unlike the Majority, I conclude that Lageman failed to make out a *prima facie* case to support a *res ipsa loquitur* instruction. As this Court articulated in *Quinby v.*

Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1071 (Pa. 2006), *res ipsa loquitur* is "a rule that provides that a plaintiff may satisfy his burden of producing evidence of a defendant's negligence by proving that he has been injured by a casualty of a sort that normally would not have occurred in the absence of the defendant's negligence." *See also* REST. (SECOND) TORTS § 328D (providing that it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when, *inter alia*, it is established that "the event is of a kind which ordinarily does not occur in the absence of negligence"). Classic examples of the proper invocation of *res ipsa* are the barrel rolling from the building, the sponge left inside the surgical patient's abdomen, or animal remains found inside a can of food. It should be readily acknowledged that none of these events ordinarily occur in the absence of negligence.

Here, there appears to be no real dispute that the stroke suffered by Lageman was the result of an arterial cannulation, which occurred when, in an attempt to monitor Lageman's condition during an emergency exploratory laparotomy, Dr. Zepp, an anesthesiologist, inserted a central venous pressure ("CVP") line into the carotid artery, as opposed to the internal jugular vein where it belonged.[1] Critically, however, at trial, a dispute arose as to whether arterial cannulation is an event of the kind that ordinarily does not occur in the absence of negligence.

More specifically, Lageman's expert, Dr. Pepple testified that defendant Dr. Zepp was negligent in his placement of the central line, *see* N.T., at 238 (when asked if "the standard of care has been properly observed, that all the steps have not only been taken,

[1] I recognize that while Dr. Zepp acknowledged that arterial cannulation has been associated with stroke, he did not concede that the stroke suffered by Lageman was caused by the arterial cannulation that occurred in this case. However, as the Majority noted, in this case, "more than merely substantial evidence pointed toward arterial cannulation as the cause of Lageman's stroke." Majority's Opinion, at 31. In any event, I believe the focus here is on whether the alleged cause of the injury, *i.e.*, arterial cannulation, is the type of incident that would happen absent negligence.

but they were taken correctly and things were seen and evaluated correctly, is it possible that this artery would have been cannulated to that degree[,]" Lageman's expert responded in the negative. In other words, there had to be negligence by defendant Dr. Zepp for arterial cannulation to occur). Conversely, defendant Dr. Zepp testified that arterial cannulation can occur even in the absence of negligence. *Id.* at 314. His expert, Dr. Hudson, offered a fairly similar opinion, testifying that Dr. Zepp's conduct met the applicable standard of care, he was not negligent, and he did not commit malpractice. *Id.* at 502-03.

Thus, this is not the case of the barrel, sponge, or animal remains, which seemingly cannot occur absent negligence. Rather, this is more akin to the classic, "red car/blue car,"— "he said/she said" — case where a jury listens to the two versions of the event and decides what, in fact, occurred. To that end, I agree with the dissenting opinion authored by Judge Stabile of the Superior Court that "Dr. Pepple's conclusion that Dr. Zepp was negligent does not equate to a conclusion that arterial cannulation does not ordinarily occur in the absence of negligence." *Lageman by & Through Lageman v. Zepp,* 237 A.3d 1098, 1128 (Pa. Super. 2020) (Stabile, J., dissenting). Rather, "it was enough to satisfy the requirements necessary to establish a *prima facie* [case] of negligence[,]" which then had to be weighed by a jury against Dr. Zepp's and Hudson's assertions that there was no deviation from the requisite standard of care, notwithstanding the unfortunate result for Lageman.

Simply said, this is not a *res ipsa* case, but rather a classic case where two versions of the same story were properly presented to the jury without presumptions, in favor or against, either party.