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8
9 SUPREME COURT OF THE STATE OF NEVADA

11 AVA LANDERS-DAVIS,)
Appellant,)
12)
13 vs.)
14 FRANK SILVER, M.D.)
Respondent.)

Supreme Court No. 40331

FILED

JUL 29 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

17 RESPONDENT'S ANSWERING BRIEF

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19 Appeal from the Eighth Judicial District Court of the State of Nevada in and for the
20 County of Clark, Department 8, the Honorable Lee Gates
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Fed Ex 7-28-03

03-12718

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1 correctly concluded that Ms. Landers-Davis had not shown, by a preponderance of the
2 evidence, that a procedure had been performed on the incorrect part of her body, that Dr.
3 Silver had been in the exclusive control of the instrumentality causing harm and that the
4 accident was one that does not ordinarily occur in the absence of negligence. These
5 requirements will be discussed more fully *infra*.
6

7 Additionally, Ms. Landers-Davis makes reference to the testimony of Robert Futoran,
8 M.D. Dr. Futoran did not testify at the time of trial and the Court did not consider any of his
9 opinions in reaching its decision. Therefore, any reference to Dr. Futoran in the Opening
10 Brief should not be considered.
11

12 Although Ms. Landers-Davis was entitled to present evidence to consider a *res ipsa*
13 *loquitur* cause of action, she clearly did not satisfy the standard that her evidence be made
14 by a preponderance of the evidence in order to entitle her to a presumption of *res ipsa*
15 *loquitur*. This is more fully discussed below.
16

17 **ARGUMENT**

18 **I. The Court Correctly Applied the Doctrine of *Res Ipsa Loquitur* Pursuant**
19 **to NRS § 41A.100.**

20 Ms. Landers-Davis's arguments supporting her contention that the Court committed
21 reversible error by not shifting the burden to Dr. Silver after presenting a *res ipsa loquitur*
22 theory, is fundamentally flawed and is not supported by Nevada statutory or case law. The
23 totality of cases cited by Ms. Landers-Davis pertain to jury trials, where the issue of whether
24 a *res ipsa* instruction should have been given to the jury was front and center in the appeals.
25 The instant case was presented without a jury, as a bench trial before the Honorable Lee
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28

1 Gates.

2 Judge Gates was well informed of Ms. Landers-Davis's *res ipsa* theory before the
3 trial started. In fact, Dr. Silver had brought a Motion for Summary Judgment on the theory
4 prior to the commencement of trial. (Joint Appendix, pp. 26-35.) Ms. Landers-Davis
5 correctly points out to this Court that Judge Gates denied Dr. Silver's Motion and permitted
6 Ms. Landers-Davis to present her theory at the time of trial. Ms. Lander-Davis incorrectly
7 assumes, however, that having an opportunity to present a theory automatically means that
8 the Court must accept the theory as being true. Essentially, Ms. Landers-Davis is alleging
9 that because Dr. Silver prevailed at trial, the Court must have done something wrong. This
10 is not a correct interpretation of the law.
11

12
13 Ms. Landers-Davis cites to *Johnson v. Egtedar*, 112 Nev. 428, 915 P.2d 271 (1996)
14 as support for her contention that the presumption is met when she "presents some evidence
15 of the existence of one or more of the factual predicates enumerated in the statute [NRS
16 41A.100]." Ms. Landers-Davis incorrectly interchanges "instruction" with "presumption"
17 and deletes one very important step in the analysis process. *Johnson* actually states that
18 when evidence of the existence of one or more of the factual predicates is present "[i]f the
19 trier of fact then finds that one or more of the factual predicates exist, then the
20 presumption must be applied." *Id.* at 274 (emphasis added).
21

22
23 Ms. Landers-Davis would have this Court adopt a rule that would take away the
24 ability of the jury to listen to the evidence and make an independent determination of
25 whether the plaintiff had met his/her burden, by a preponderance of the evidence, showing
26 the existence of one or more of the factors. The legislature clearly wanted the jury, or trier
27

1 of fact, to determine the existence, or lack thereof, of one or more of the factors. Thus,
2 before you receive the presumption, you must prove that you qualify for the presumption.
3 Nev. J.I. 6.17 clearly states that "If, on the other hand, you do not find by a preponderance
4 of the evidence that: [specific qualifying event here] then the burden of proving, by a
5 preponderance of the evidence consisting of [expert medical testimony,] [material from
6 recognized medical texts or treatises,] [or] [the regulations of the licensed health care facility
7 wherein the alleged negligence, occurred,] that the [personal injury] [death] was caused by
8 negligence **remains with the plaintiff.**" (emphasis added.)
9

10 Thus, while the plaintiff only needs "some evidence" to qualify for the instruction,
11 she must demonstrate a "preponderance of the evidence" to receive the presumption. This
12 is precisely where Ms. Landers-Davis failed in the instant matter. Judge Gates correctly
13 recognized that she was entitled to present "some evidence" for *res ipsa loquitur*
14 consideration and denied Dr. Silver's Motion for Summary Judgment. Judge Gates, as the
15 trier of fact in the bench trial, then had to weigh the evidence to determine if Ms. Landers-
16 Davis had satisfied her burden by a preponderance of the evidence. She failed to do so.
17

18 In *Otis Elevator Co. v. Reid*, 101 Nev. 515, 519, 706 P.2d 1378, 1380 (1985), this
19 Court stated that "*Res ipsa loquitur* is a balancing doctrine, and while the plaintiff need not
20 show the exact cause of injury, he must at least show that it is more probable than not that
21 the injury resulted from the defendant's breach of duty." Ms. Landers-Davis did not
22 convince the Court that her injuries were more probably than not caused by any action on the
23 part of Dr. Silver. Dr. Silver testified himself that he did not staple Ms. Landers-Davis's
24 ureter. "Q. Doctor, do you have an opinion as to whether or not any staples that you placed
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1 there were placed into the area where Dr. Kaplan found an obstruction? A. No, because
2 staples should not be down there.” (Transcript on Appeal, pp. 199-200, ll. 21-25, 1.) “Q.
3 Doctor, in your opinion to a reasonable degree of medical probability, do you believe that
4 you placed a staple into the ureter? A. No.” (Transcript on Appeal, pp. 205-206, ll. 23-25,
5 1.)
6

7 Further, Dr. Silver’s expert, Michael Pearson, a Board Certified OB/GYN, testified
8 that he did not think the obstruction was caused by a staple or suture, but by abnormal
9 scarring, or fibrosis. “THE COURT: What do you think caused the occlusion? THE
10 WITNESS: I think it was caused by fibrosis, which is abnormal. THE COURT: Why do you
11 think that? THE WITNESS: It’s an abnormal scarring situation. The biggest red flag on that
12 as far as causation is that took an awful long time to develop; that’s number one.”
13 (Transcript on Appeal, p. 233, ll. 10-18.)
14

15 Even Ms. Landers-Davis’s treating physician, Michael Kaplan, agreed that fibrosis
16 could not be ruled out. “Q. Now, the opinions have been put forth previously in this case that
17 it’s fibrotic tissue that was actually obstructing the ureter. Do you disagree with that
18 opinion? A. To me personally, it looked like either a suture or a clip, which I guess is not
19 to say that fibrosis can’t look like this.” (Transcript on Appeal, p. 51, ll. 14-20.)
20

21 This Court has consistently stated that *res ipsa loquitur* is an exception to the general
22 negligence rule, and it permits a party to infer negligence, as opposed to affirmatively
23 proving it, only when certain elements are met. The elements are: (1) the event must be of
24 a kind which ordinarily does not occur in the absence of someone’s negligence; (2) the event
25 must be caused by an agency or instrumentality within the exclusive control of the defendant;
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1 and (3) the event must not have been due to any voluntary action or contribution on the part
2 of the plaintiff. *See Woosley v. State Farm Ins. Co.*, 18 P.3d 317, 321 (2001). As this Court
3 can see, Ms. Landers-Davis was not successful in proving that an agent or instrumentality
4 within the exclusive control of Dr. Silver caused her injuries, much less that it was of a kind
5 which ordinarily does not occur in the absence of someone's negligence.
6

7 The trial Court did not err in failing to shift the burden to Dr. Silver on the *res ipsa*
8 *loquitur* cause of action. While the Court correctly allowed her to present some evidence
9 tending to show that one of the 41A.100 elements was present, she still had the burden of
10 then proving her case by a preponderance of the evidence. Since she did not satisfy this
11 higher standard, and the Court was entitled to accept one expert's opinion over another, the
12 Court properly ruled that Ms. Landers-Davis had not proven negligence against Dr. Silver.
13 As such, the Court did not commit reversible error and Ms. Landers-Davis's Appeal must
14 be denied in this regard.
15
16

17 **II. Failure to Comply With NRCP 52(a) Does Not Constitute Reversible**
18 **Error**

19 Ms. Landers-Davis also incorrectly states that the Court's failure to make findings
20 of fact and conclusions of law constitutes reversible error because it is one more indication
21 that the trial court failed to shift the burden of proof to Dr. Silver on the *res ipsa loquitur*
22 cause of action. Dr. Silver repeats and realleges the arguments made in Section I of this Brief
23 in support of his contention that the Court correctly applied the *res ipsa loquitur* theory of
24 liability. Again, the Court correctly found that Ms. Landers-Davis did not prove by a
25 preponderance of the evidence that Dr. Silver was in exclusive control of an agent or
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1 instrumentality which caused her injuries.

2 The case cited by Ms. Landers-Davis, *Bing Const. Co. v. Vasey-Scott Engineering*,
3 100 Nev. 72, 674 P.2d 1107 (1984), is inapposite to the facts of this case. In *Bing*, the trial
4 Court found for the plaintiff and awarded a lump sum in damages. The Supreme Court ruled
5 that the award had to be remanded because the failure to explain the constituent parts
6 prevented the Supreme Court from effectively reviewing the propriety of the award on
7 appeal. Such is not the case here. Judge Gates' Minute Order ruling that "the Plaintiff has
8 not met her burden in proving negligence by Defendant" (Record, pp. 296-297) is clearly
9 sufficient, especially given the arguments made *supra* regarding Ms. Landers-Davis's burden
10 of proving negligence.
11

12
13 Given that the burden did not shift to Dr. Silver, Judge Gates' statement that she did
14 not meet her burden, i.e. prove her case by a preponderance of the evidence, is appropriate.

15 This Court has stated that where the record clearly supports a judgment and where findings
16 may be implied, as is the case here, the failure to make specific findings as to critical issue
17 may not be fatal.¹ As such, the absence of findings of fact and conclusions of law pursuant
18 to NRCP 52(a) does not constitute reversible error.
19

20 **III. The Court Appropriately Considered the Evidence and Correctly Ruled**
21 **that Ms. Landers-Davis Did Not Meet Her Burden of Proving Negligence**

22 "A court does not abuse its discretion when the court reaches a result which could be
23 found by a reasonable judge." *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 (1951).
24 In this case, a reasonable judge could certainly find that the testimony of Dr. Silver, as well
25

26 ¹ See *Griffin v. Westergard*, 96 Nev. 627, 615 P.2d 235 (1980); see also *Gorden v.*
27 *Gorden*, 93 Nev. 494, 569 P.2d 397 (1958).

1 as his Board Certified expert, Dr. Pearson, was credible and believable. Ms. Landers-Davis
2 states that Dr. Silver's expert presented testimony based on pure speculation. This is not
3 correct. The trial Court has broad discretion in admitting or rejecting offered evidence. Its
4 decision will not be overturned absent a showing of "palpable abuse." *State ex rel.*
5 *Department of Highways v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095
6 (1976).
7

8 Additionally, this Court has stated that:

9 Once a physician is qualified as an expert, he or she may testify to all
10 matters within his or her experience or training, and the expert is
11 generally given reasonably wide latitude in the opinions and
12 conclusions he or she can state, being subject only to the general
13 exercise of discretion by the district court concerning whether the
14 expert is truly qualified to render such testimony.

15 *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354 (1992).

16 This Court has further stated that "a proposed expert should not be scrutinized by an
17 overly narrow test of qualifications." *People v. Whitfield*, 388 N.W.2d 206, 209 (Mich.
18 1986), and that the expert testimony "goes to the weight, not the admissibility, of the
19 evidence." *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299 (1989). While Ms.
20 Landers-Davis attempts to paint a picture where the defense presented theories; in actuality,
21 her entire case, from beginning to end, was centered on theory. The bottom line to the
22 evidence was, no individual ever actually physically observed or tested the alleged
23 obstruction in Ms. Landers-Davis's ureter and, therefore, any subsequent opinions were
24 based on speculation and presumption.
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1 "Q. If I understand you correctly, you never did actually take a piece of ureter where
2 there was obstruction, cut it open and see whether or not it was a suture or fibrotic condition;
3 did you? A. No. Q. As you sit here today you don't know which one it was; do you? A.
4 That's correct." (Testimony of treating physician, Michael Kaplan, M.D., p. 74, ll. 16-24.)
5 Additionally, Ms. Landers-Davis's designated expert, Joel Davidson, M.D., relies on Dr.
6 Kaplan's analysis in speculating that a staple was found inside her ureter. "A. I think it was
7 a staple. Q. What do you base that on? A. Dr. Kaplan's comments on several documents."
8 (Transcript on Appeal, p. 155, ll. 15-16.) Therefore, it was speculation on both Dr. Kaplan's
9 and Dr. Davidson's part that a foreign object was even present in Ms. Landers-Davis's ureter.

10
11 Additionally, even if there had been an obstruction positively identified in Ms.
12 Landers-Davis's ureter, it would have been pure speculation as to the source of the
13 obstruction and the offending surgical procedure. When questioned in this regard, again, Dr.
14 Kaplan was not able to testify that Dr. Silver had caused the obstruction. "Q. You can't tell
15 this Court to a reasonable degree of medical probability that the obstruction you saw came
16 from Dr. Silver's procedure as opposed to a suture in a C section procedure in 1986; can
17 you? A. No, absolutely not." (Transcript on Appeal, p. 81, ll. 8-13.) Thus, Ms. Landers-
18 Davis was not able to prove, by a preponderance of the evidence, that 1. she even had an
19 obstruction in her ureter caused by a staple or suture, nor 2. that the offending material was
20 caused by a procedure performed by Dr. Silver.
21
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23
24 Clearly, Ms. Landers-Davis did not meet her burden in proving negligence on the part
25 of Dr. Silver. As such, the trial Court could not possibly have erred by "disregarding" the
26 clear weight of the evidence favoring Ms. Landers-Davis, as alleged in her Opening Brief.
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1 In fact, the clear weight of the evidence demonstrated that Ms. Landers-Davis was not
2 injured in any respect by Dr. Silver and Dr. Silver in no way fell below the standard of care.

3 "Q. Dr. Pearson, based on your review of the records and review of the testimony and
4 the depositions and X-rays, do you have an opinion as to whether or not Dr. Silver complied
5 with the standard of care for a board certified OB/GYN and the method by which he
6 performed this procedure and also examined the patient at the conclusion of the procedure
7 before closing to make sure that there was no problems? A. Yes, I do. Q. What is your
8 opinion? A. I believe he complied with the standard of care." (Transcript on Appeal, pp.
9 231-32, ll. 25, 1-12.)
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1 CONCLUSION

2 Dr. Silver has clearly demonstrated to this Court that the trial Court properly applied
3 the *res ipsa loquitur* doctrine and ruled that Ms. Landers-Davis had not met her burden of
4 proof by a preponderance of the evidence. The Court's decision favoring Dr. Silver was
5 supported by the evidence presented at the time of trial. Additionally, the Court's Minute
6 Order reflecting Ms. Landers-Davis's lack of proof and failure to demonstrate negligence
7 was appropriate and cannot be the basis for an appeal. Finally, the Court considered all of
8 the testimony presented and arrived at the correct conclusion. Ms. Landers-Davis cannot
9 show that the clear weight of the evidence favored her position. For all of the above reasons,
10 this Court must deny Ms. Landers-Davis's Appeal in its entirety.
11

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14 DATED this 25 day of July, 2003.

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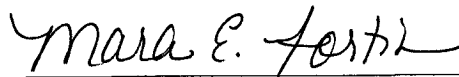
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Certificate of Compliance

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25 day of July, 2003.



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I HEREBY CERTIFY that on the 28 day of July, 2003, I served the foregoing

RESPONDENT'S ANSWERING BRIEF upon the following parties by placing a true and correct copy thereof in the United States Mail at Las Vegas, Nevada, certified mail, return receipt requested with first class postage fully prepaid thereon and addressed as follows:

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