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IN THE SUPREME COURT
OF THE STATE OF NEVADA

AVA LANDERS-DAVIS,
Appellant,
v.
FRANK SILVER, M.D.,
Respondent.

Case No. : 40331

APPELLANT'S REPLY BRIEF

FILED

AUG 08 2003

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Appeal from the Eighth Judicial District Court of the State of Nevada
in and for the County of Clark
Department 8, the Honorable Lee Gates

Law Office
RALEIGH, HUNT & MCGARRY, P.C.
112 GARCES AVENUE
SUITE 200
LAS VEGAS, NEVADA 89101
(702) 386-4842

RALEIGH, HUNT & MCGARRY
Christopher J. Raleigh, Esq.
Nevada Bar No. 1596
S. Brent Vogel, Esq.
Nevada Bar No. 6858
112 Garces Avenue, Suite 200
Las Vegas, Nevada, 89101
(702) 386-4842
Attorneys for Appellant
Ava Landers-Davis

JOHN H. COTTON & ASSOCIATES
John H. Cotton, Esq.
Nevada Bar No. 5268
Mara E. Fortin, Esq.
Nevada Bar No. 7105
2300 W. Sahara Ave., #420
Las Vegas, NV 89102
(702) 367-9977
Attorneys for Respondent
Frank Silver, M.D.

MAILED ON

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1 **I. REBUTTAL ARGUMENT**

2 **A. NRS §41A.100 Replaces Traditional *Res Ipsa Loquitur* Analysis.**

3 Dr. Silver uses the traditional principles of *res ipsa loquitur* to support his argument the trial
4 court was correct in refusing to shift the burden of proof. Dr. Silver cites to Otis Elevator Co. v.
5 Reid, 101 Nev. 515, 706 P.2d 1378 (1985) and Woosley v. State Farm Ins. Co., 18 P.3d 317 (Nev.
6 2001), as authority for his argument. (Answer Brief at page 4:19-25 and 6:2.) As this is a medical
7 malpractice action, however, traditional principles of *res ipsa loquitur* do not apply. Johnson v.
8 Egtedar, 112 Nev. 428, 915 P.2d 271 (1996).

9 This Court analyzed the doctrine of *res ipsa loquitur* in the medical malpractice context in
10 the Johnson case. In reviewing NRS §41A.100 this Court stated:

11 “We believe the legislature intended NRS 41A.100 to replace, rather than
12 supplement, the classic *res ipsa loquitur* formulation in medical malpractice cases
13 where it is factually applicable.” *Id.* at 274.

14 . . .

15 “Under NRS 41A.100, however, the presumption automatically applies where any
16 of the enumerated factual circumstances are present. In regard to these factual
17 predicates, the legislature has, in effect, already determined that they ordinarily do
18 not occur in the absence of negligence.” *Id.* at 274.

19 The evidence presented in this case demonstrated the factual predicates for application of
20 NRS §41A.100 existed. Dr. Kaplan’s testimony and medical records document a piece of suture
21 material and/or staple was found to be partially obstructing Mrs. Landers-Davis’s right ureter. (ROA
22 334, 432 and TOA 47:6-51:13, 70:19-71:1). Dr. Kaplan photographed the foreign material he
23 observed inside Mrs. Landers-Davis’s ureter. (ROA 334 and 432). The medical record state staples
24 were used is the October, 1992, hysterectomy surgery performed by Dr. Silver, wherein he used a
25 GIA stapler. (ROA 548-549). A ring of staples was found to exist on x-ray/retrograde pyelogram
26 at the same level as the ureteral obstruction. (ROA 425.) No valid evidence was presented showing
27 the foreign material came from anyone but Dr. Silver. The partial obstruction of the right ureter led
28 directly to the death and loss of the right kidney according to both Dr. Kaplan’s and Dr. Davidson’s

1 trial testimony. (TOA 68:17-69:2 and 165:2-19). This is textbook *res ipsa loquitur*, yet the trial
2 court didn't apply the statutory presumption. This failure by the trial court is error. See Johnson v.
3 Egtdar, 112 Nev. 428, 915 P.2d 271 (1996) and NRS §41A.100.

4 **B. Dr. Silver's Expert's Opinion Lacked Foundation.**

5 Dr. Silver's entire theory rests upon his expert Dr. Pearson's testimony it was fibrotic tissue
6 partially obstructing Mrs. Landers-Davis's ureter - not foreign material. Dr. Pearson's "opinion" is
7 not based upon the evidence developed in the case and presented at trial. Opinion testimony should
8 not be received if shown to rest upon assumptions rather than facts. Wrenn v. State, 89 Nev. 71, 506
9 P.2d 418 (1973).

10 Mrs. Landers-Davis's treating physician, Michael Kaplan, M.D., despite being a witness
11 biased in favor of his friend Dr. Silver and his attorney John Cotton, testified he observed a foreign
12 body inside the lumen of Mrs. Landers-Davis's right ureter during a procedure performed November
13 29, 1996. Dr. Kaplan described this material as "suture material/wire" and "staple material" in his
14 records. (ROA 432, 434, 466.) He took photographs to document his finding of the suture
15 material/wire in the ureter. (ROA 334, 432.) X-rays showed a ring of staples at the level of the
16 ureteral obstruction. (ROA 427.) Dr. Kaplan testified this is consistent with his findings confirming
17 the staple/wire inside the ureter. (TOA 85:8-20.)

18 Joel Davidson, M.D., testified it was his opinion to a reasonable degree of medical
19 probability the staple material found by Dr. Kaplan was placed there by Dr. Silver during the
20 October, 1992, hysterectomy surgery. (TOA 161:12-18.) This opinion was based in large part upon
21 Dr. Kaplan's photographs, records and testimony, all which clearly indicate a "shiny" foreign object
22 was partially obstructing Mrs. Landers-Davis's right ureter. (TOA 155:11-156:2.) The only
23 "evidence" offered by Dr. Silver in opposition to Dr. Kaplan's photographs, records and recollection
24 is Dr. Pearson's personal opinion Dr. Kaplan didn't see what he says he saw and photographed.

25 Dr. Pearson testified he didn't believe Dr. Kaplan actually saw foreign material inside Mrs.
26 Landers-Davis's ureter. (TOA 238:7-11.)

27 Q: Doctor, if I understand your testimony correctly, you do not believe Dr. Kaplan actually saw
28 foreign material inside of Mrs. Landers-Davis' ureter?

1 A: No, I don't believe so.

2 Q: Correct me if I'm wrong, Doctor: You've never actually seen fibrosis within the ureter, have
3 you?

4 A: No, I haven't.

5 Dr. Pearson's testimony is rank speculation as to what Dr. Kaplan observed and
6 photographed. In Dr. Pearson's opinion, Dr. Kaplan must have been mistaken and actually saw
7 fibrotic tissue inside Mrs. Landers-Davis's ureter. (TOA 237:10-18.) This was Dr. Pearson's
8 testimony even though he has *never* seen fibrotic tissue inside a ureter. (TOA 238:12-15.) Dr.
9 Kaplan testified he did **not** observe fibrosis causing the obstruction. (TOA 84:2-12.) Dr. Kaplan
10 testified:

11 Q: Doctor, the retroperitoneal fibrosis that you just discussed –

12 A: Yes.

13 Q: – that's not a condition you observed in Mrs. Landers-Davis; correct?

14 A: Correct.

15 Q: So the obstruction, original [ureteral] obstruction in this case wasn't caused by
16 retroperitoneal fibrosis; is that correct?

17 A: **I believe it was caused by a foreign material.** (Emphasis added.)

18 Contrary to Dr. Silver's assertion no one ever actually physically observed the obstruction
19 (Answering Brief at page 8:22), the evidence is clear Dr. Kaplan saw the foreign material and
20 photographed it. Dr. Silver's counsel attempted to get around Dr. Kaplan's testimony regarding what
21 he observed obstructing the ureter by getting him to admit he didn't know how it got there.
22 (Answering Brief at page 9:15-19.) Dr. Silver's counsel tries to get Dr. Kaplan to imply the foreign
23 material could have been placed in the ureter during Mrs. Landers-Davis's 1986 C-section, the only
24 pre-1996 surgery not performed by Dr. Silver. Dr. Silver's counsel, however, might as well have
25 asked Dr. Kaplan if the foreign material was placed in the ureter by aliens - the bottom line being
26 Dr. Kaplan didn't know who put the material where it was found.

27 The relevant testimony regarding whether the foreign material could have come from the C-
28 section surgery was given by Dr. Davidson and Dr. Pearson, the doctors who reviewed the C-section

1 records. Both stated the foreign material that obstructed Mrs. Landers-Davis's ureter was not put
2 there during the cesarean section surgery. (TOA 160:5-14 and 242:10-24).

3 Given Dr. Kaplan's first hand observation of the obstruction at issue, and his testimony it was
4 **not** fibrotic tissue causing the obstruction, Dr. Pearson's opinion is based upon his assumption and
5 is without adequate foundation. An expert opinion may not be based upon guesswork or conjecture.
6 Wrenn v. State, 89 Nev. 71, 506 P.2d 418 (1973). Dr. Kaplan, the treating physician who actually
7 visualized the staple/suture material inside the ureter, testified it was not fibrosis that he observed
8 obstructing the ureter. Therefore, Dr. Silver failed to present any admissible evidence to rebut the
9 established factual predicates he operated on the wrong part of the body by placing the staple/suture
10 material inside the lumen of Mrs. Landers-Davis' ureter.

11 In addition, testimony regarding causation in a medical malpractice action must be to a
12 reasonable degree of medical probability. Fernandez v. Admirand, 108 Nev. 963, 843 P.2d 354
13 (1992), Perez v. Las Vegas Medical Center, 107 Nev. 1, 6, 805 P.2d 589, 592 (1991), Brown v.
14 Capanna, 105 Nev. 665, 671-72, 782 P.2d 1299, 1304 (1989). In light of Dr. Kaplan's testimony and
15 the photographs he took of the wire/suture material located within Mrs. Landers-Davis's right ureter,
16 Dr. Pearson's testimony cannot be to a reasonable degree of medical probability due to it is
17 speculative basis. Thus, it should not have been accepted by the trial court.

18 At trial, counsel for Mrs. Landers-Davis objected to the introduction of Dr. Pearson's
19 speculative opinion that it was fibrotic tissue observed by Dr. Kaplan, rather than the "staple
20 material" or "wire" described by Dr. Kaplan. (TOA 237:10-19.) This objection was overruled and
21 the testimony was allowed. Allowing Dr. Pearson's opinion was error.

22 As cited in Appellant's Opening Brief, where there is no substantial conflict in the evidence
23 on a material point, and the decision is manifestly contrary to the evidence, the reviewing court is
24 bound to take remedial action. Day v. West Coast Holdings, Inc., 101 Nev. 260, 699 P.2d 1067
25 (1985). The Supreme Court will not hesitate to disturb a verdict or decision where there is no
26 substantial conflict in evidence on any material point, and the verdict or decision is manifestly
27 contrary to the evidence. Canfield v. Gill, 101 Nev. 170, 697 P.2d 476 (1985). The factual
28 predicates for application of the presumption prescribed by NRS §41A.100 clearly existed in this

1 case. The only testimony and evidence with proper foundation regarding the cause of Mrs. Landers-
2 Davis's ureteral obstruction is that given by Dr. Kaplan and concurred with by Dr. Davidson. Their
3 testimony overwhelmingly indicates it was the vaginal hysterectomy procedure performed by Dr.
4 Silver that caused the obstruction. Dr. Silver offered no competent evidence in rebuttal. Therefore,
5 it is incumbent upon this Honorable Court to correct the trial court's errors and reverse the trial
6 court's decision.

7 **II. CONCLUSION**

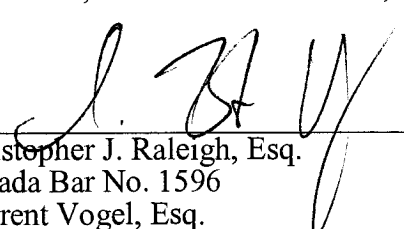
8 Based upon the foregoing reasons and authorities it is respectfully submitted the district court
9 committed reversible error as follows:

- 10 1. By failing to shift the burden of proof to Dr. Silver on Mrs. Landers-Davis's *res ipsa*
11 *loquitur* cause of action as required by NRS 41A.100;
- 12 2. By failing to make written findings of fact and conclusions of law as required by
13 NRCP 52(a), and;
- 14 3. By finding in favor of Dr. Silver and against Mrs. Landers-Davis in disregard for the
15 manifest weight of the evidence presented at trial.

16 WHEREFORE, Appellant Ava Landers-Davis respectfully requests this Honorable Court
17 reverse the district court and remand the case for a new trial.

18 DATED this 5 day of August, 2003.

19 RALEIGH, HUNT & McGARRY, P.C.

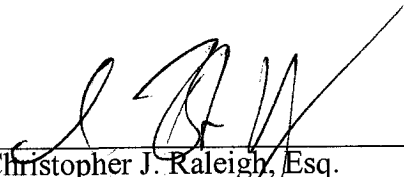
20
21 
22 _____
23 Christopher J. Raleigh, Esq.
24 Nevada Bar No. 1596
25 S. Brent Vogel, Esq.
26 Nevada Bar No. 6858
27 112 Garces Avenue, Suite 200
28 Las Vegas, Nevada, 89101
(702) 386-4842
Attorneys for Appellant
Ava Landers-Davis

1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further certify
4 that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP
5 28(e), which requires every assertion in the brief regarding matters in the record to be supported by
6 appropriate references to the record on appeal. I understand that I may be subject to sanctions in the
7 event that the accompanying brief is not in conformity with the requirements of the Nevada Rules
8 of Appellate Procedure

9 RESPECTFULLY SUBMITTED this 5 day of August, 2003.

10 RALEIGH, HUNT & MCGARRY, P.C.

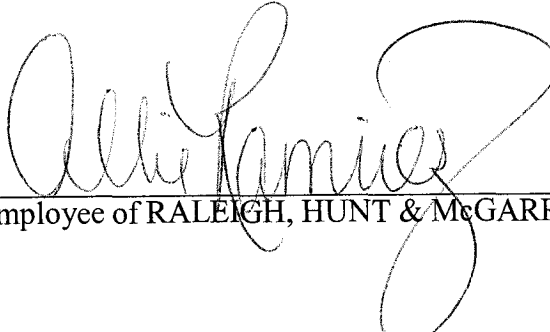
11
12
13 
14 Christopher J. Raleigh, Esq.
15 Nevada Bar No. 1596
16 S. Brent Vogel, Esq.
17 Nevada Bar No. 6858
18 112 Garces Avenue, Suite 200
19 Las Vegas, Nevada, 89101
20 (702) 386-4842
21 Attorneys for Appellant
22 Ava Landers-Davis
23
24
25
26
27
28

CERTIFICATE OF SERVICE

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I hereby certify pursuant to NRAP 25(d) that on the ^{5th} day of August, 2003, I did deposit in the U.S. Mail, postage pre-paid First-Class Mail, a true and correct copy of the above and foregoing APPELLANT'S REPLY BRIEF to the following:

JOHN H. COTTON & ASSOCIATES
John H. Cotton, Esq.
Nevada Bar No. 5268
Mara E. Fortin, Esq.
Nevada Bar No. 7105
2300 W. Sahara Ave., #420
Las Vegas, NV 89102
(702) 367-9977
Attorneys for Respondent
Frank Silver, M.D.


An employee of RALEIGH, HUNT & McGARRY, P.C.