NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 07-27-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PATRICK COONS and SANDRA COONS, husband and wife, Plaintiffs-Appellants, v. USP PHOENIX, INC., an Arizona corporation dba WARNER PARK SURGERY CENTER, L.P., a limited partnership, aka ARIZONA EYE CENTER; J. ALAN RAPPAZZO, M.D. and JANE DOE RAPPAZZO, husband and wife; J. ALAN RAPPAZZO, M.D., P.C., an Arizona corporation; JOHN F. SCHAIBLE, M.D. AND JANE DOE SCHAIBLE, husband and wife, Defendants-Appellees.	1 CA-CV 09-0037 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-015085

The Honorable Larry Grant, Judge

REVERSED AND REMANDED

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G E M M I L L, Judge

¶1 Plaintiffs-Appellants Patrick and Sandra Coons appeal the superior court's summary judgment for Defendants-Appellees USP Phoenix, Inc. dba Warner Park Surgery Center ("Warner Park"), J. Alan Rappazzo, M.D., J. Alan Rappazzo, M.D., P.C., and John F. Schaible, M.D., on their claim for negligence arising out of a flash fire that occurred while Patrick was undergoing eye surgery. For the following reasons, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On November 19, 2003, Patrick underwent an excisional biopsy of a lesion on his right eyelid at Warner Park. Dr. Rappazzo performed the surgery using an electrocautery device. Anesthesiologist Dr. Schaible administered supplemental oxygen to Patrick through a nasal tube. Warner Park employees placed surgical drapes over Patrick's face to separate it from the surgical field. During the surgery, a flash fire erupted, burning Patrick's mustache, nostrils, and eyelid.

¶3 The Coonses filed this action against Warner Park, and Drs. Rappazzo and Schaible. They alleged in their complaint that the defendants' negligent acts were established by the doctrine of res ipsa loquitur and had proximately caused injuries to the Coonses. In conjunction with their complaint, and as required by Arizona Revised Statutes ("A.R.S.") section 12-2603(A) (Supp. 2008), the Coonses' counsel filed a statement certifying his good faith belief that expert opinion testimony was not necessary to prove the defendants' standard of care or liability for the claim. Counsel averred that expert opinion testimony would not be necessary because the circumstances warranted the application of the doctrine of res ipsa loquitur.

¶4 Dr. Rappazzo filed a controverting certificate in which he disputed that the Coonses were not required to present expert testimony to establish the applicable standards of care, violations of those standards, and any causal connection to the Coonses' alleged injuries. Warner Park and Dr. Schaible joined Dr. Rappazzo's controverting certificate.

¶5 Thereafter, the parties filed a joint comprehensive pretrial conference memorandum in which, as relevant, they alerted the court to their dispute regarding the need for the Coonses to offer expert opinion testimony, stating:

> The Defendant[s] agree[] to disclose area of experts on November 1, 2006.

> The Defendants propose that they disclose standard of care experts, with opinions, on January 15, 2007.
>
> If the court should require standard of care expert testimony from Plaintiff[s] to establish a prima facie case, Plaintiff[s] propose that they disclose their standard of care expert with opinions on January 15, 2007, or within 90 days following the Court's order regarding same, which ever is later.
>
> The Defendants propose that they simultaneously disclose causation experts, with opinions by March 15, 2007.
>
> The Defendants propose any rebuttal expert witnesses, and their opinions, be disclosed on May 16, 2007.
>
> The parties agree dates for the parties' disclosure of expert witnesses shall not be construed as a waiver of compliance with A.R.S. § 12-2603 and 12-2604.

¶6 The court ordered that the defendants' final expert disclosures be produced by November 1, 2006, but did not set a deadline for the Coonses to make an expert disclosure.[1] The court ordered all non-expert disclosures exchanged and all written discovery propounded by January 15, 2007 and all discovery completed by March 1, 2007. Based on a later stipulation of the parties, the court in November 2006 extended all discovery deadlines an additional 60 days.

¶7 On February 20, 2007, Warner Park moved for summary

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[1] The parties then stipulated, and the court allowed, the deadline for production of the defendants' final expert disclosures to be extended until January 5, 2007.

judgment on the ground that the Coonses had not disclosed an expert witness to testify that Warner Park had failed to satisfy the applicable standard of care and could not establish a prima facie case of negligence under the doctrine of res ipsa loquitur. Warner Park also cited Dr. Schaible's disclosure of an expert witness, Aubrey Maze, M.D., who Dr. Schaible claimed would testify that flash fires do occur in operating rooms, are an inherent risk of most surgeries, are usually not due to negligence, and cannot be entirely prevented even with careful monitoring. Drs. Rappazzo and Schaible joined the motion. Warner Park also argued separately that res ipsa loquitur did not apply to it, as a matter of law, because it did not have any control over the instrumentalities that allegedly caused the fire.

¶8 The Coonses argued that summary judgment was improper because the doctrine of res ipsa loquitur allowed them to establish a prima facie case of negligence without expert testimony based upon the common knowledge that operating room fires do not occur in the absence of negligence. Nevertheless, they also offered the affidavit of their previously-disclosed causation and damages expert, Michael S. Balis, M.D., setting forth his opinion that the flash fire that occurred during Patrick's surgical procedure "would not ordinarily have occurred in the absence of negligence." The Coonses argued in the

alternative that, if the court determined they could not rely on the doctrine of res ipsa loquitur and were required to produce an expert opinion regarding the applicable standard of care, the court should follow the statutory procedure prescribed in A.R.S. § 12-2603 and allow them to file a proper preliminary expert opinion affidavit.

¶9 The court granted the defendants' motion, stating that upon Dr. Schaible's disclosure of an expert opinion that operating room fires do occur in the absence of negligence, it was necessary for the Coonses to obtain contrary expert testimony, which they had not done. It rejected Dr. Balis' affidavit testimony that operating room fires ordinarily do not occur in the absence of negligence because there had been no showing that Dr. Balis practiced in the same specialty as either Drs. Rappazzo or Schaible, as required by A.R.S. § 12-2604. The court also found that the Coonses had not offered any evidence that Warner Park's employees exercised any control over the instrumentalities at issue at, or near, the time of the incident and, therefore, the doctrine of res ipsa loquitur did not apply to Warner Park as a matter of law.

¶10 The Coonses moved for new trial, arguing that a question of fact existed regarding whether Patrick's injuries could have been caused absent negligence by the defendants and that they were entitled to additional time to secure an expert

under A.R.S. § 12-2603. The court denied the motion.

¶11 The Coonses timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

ISSUES

¶12 The Coonses argue on appeal: (1) the trial court erred in granting defendants' motion for summary judgment because the doctrine of res ipsa loquitur applies in this case; and (2) the trial court erred and violated the Coonses' right to due process of law by failing to follow the statutory procedure for challenging their counsel's certification that no expert testimony is required in this case.

ANALYSIS

¶13 A court may grant summary judgment when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). We view the evidence in the light most favorable to the Coonses, against whom judgment was entered, and determine de novo whether there are genuine issues of material fact and whether the trial court erred in its application of the law. *Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999).

Res Ipsa Loquitur

¶14 Res ipsa loquitur is a rule of circumstantial evidence that allows a trier of fact to draw an inference of negligence

when:

> (1) the injury is "of a kind that ordinarily does not occur in the absence of negligence";
>
> (2) the injury is "caused by an agency or instrumentality subject to the control of the defendant"; and
>
> (3) the claimant is not "in a position to show the particular circumstances that caused the offending agency or instrumentality to operate to her injury."

Sanchez v. Old Pueblo Anesthesia, P.C., 218 Ariz. 317, 321, ¶ 11, 183 P.3d 1285, 1289 (App. 2008) (quoting *Lowery v. Montgomery Kone, Inc.*, 202 Ariz. 190, 192, ¶ 7, 42 P.3d 621, 623 (App. 2002). The application of the rule does not create a conclusive finding of negligence; it permits, but does not require, a trier of fact to draw an inference of negligence.

¶15 Res ipsa loquitur is applicable only when it is a matter of common knowledge that the injury would not ordinarily have occurred if due care had been exercised. *Sanchez*, 218 Ariz. at 321, ¶ 12, 183 P.3d at 1289 (citation omitted). When common knowledge would not allow a trier of fact to know whether an injury was likely to occur absent negligence, expert testimony that the injury would not occur in the absence of negligence may be essential to the plaintiff's case. *Cox v. May Dep't Store Co.*, 183 Ariz. 361, 364-65, 903 P.2d 1119, 1122-23 (App. 1995) (plaintiff established first element of res ipsa

loquitur by presenting expert's opinion that escalator accident could not have occurred unless the escalator had been improperly designed or maintained); *Lowery,* 202 Ariz. at 194, ¶ 15, 42 P.3d at 625 (plaintiff created question for trier of fact regarding whether res ipsa applied by offering expert testimony that elevator would not ordinarily have fallen absent negligence by defendant). If the defendant then presents a conflicting expert opinion that there is a likely non-negligent explanation for the event, the trier of fact determines, based on the conflicting expert opinions, whether the doctrine of res ipsa loquitur applies. *See Lowery*, 202 Ariz. at 194, ¶ 15, 42 P.3d at 625 (stating that if common knowledge does not suffice, "a jury may require expert assistance in resolving the threshold question whether an accident was of a kind not likely to occur in the absence of negligence."); *Riedisser v. Nelson*, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975) (holding plaintiffs failed to create a material issue of fact because whether injury more probably than not resulted from physician's negligence was not a matter of common knowledge among laymen and plaintiff did not offer expert testimony that the defendant fell below the appropriate standard of care); Restatement (Second) of Torts ("Restatement") § 328(D) cmt. d (1965) ("[Expert] testimony may be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common

knowledge which may permit laymen reasonably to draw the conclusion. On the other hand there are other kinds of medical malpractice, as where a sponge is left in the plaintiff's abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence.”).

¶16 We considered whether the trial court properly ruled as a matter of law that a plaintiff could not rely on res ipsa loquitur in *Faris v. Doctors Hosp., Inc.*, 18 Ariz. App. 264, 501 P.2d 440 (1972). In that case, immediately after the plaintiff underwent abdominal surgery, she experienced neck pain that was discovered to be from a herniated cervical disk. *Id*. at 265-66, 501 P.2d at 441-42. She brought a medical malpractice action and attempted to rely on res ipsa loquitur to establish that her injury was the likely consequence of negligence on the part of her surgeons or anesthesiologist. *Id*. at 267, 501 P.2d at 443. The defendants offered expert testimony that plaintiff’s disk condition was not necessarily related to trauma and, given her age-related degenerative disk disease, could have been triggered by “coughing, sneezing, or merely awakening in the morning.” *Id*. at 266, 501 P.2d at 442. In affirming the trial court’s summary judgment for the defendants, we ruled that because the plaintiff’s injury was not the type that is “so grossly apparent that a layman would have no difficulty in recognizing it as

having been caused by negligence," the plaintiff was required to offer evidence that a negligent act by defendants was more likely the cause of the injury than any other possible cause. *Id.* at 270, 501 P.2d at 446.

¶17 The Coonses have argued vigorously that lay people are able to draw the inference of negligence in this case, based on the doctrine of res ipsa loquitur. We have carefully considered this assertion, but we disagree. In this case, as in *Faris*, the injury is not so grossly apparent that a layman would have no difficulty in recognizing it as having been caused by negligence. Patrick did not suffer an injury wholly unrelated to his surgical procedure, *see e.g.*, *Carranza w. Tucson Med. Ctr.*, 135 Ariz. 490, 662 P.2d 455 (App. 1983) (holding it was unnecessary for plaintiff to offer expert medical testimony to show that burn child sustained on her leg while undergoing heart surgery could not have occurred without negligence because that was within the realm of common knowledge), nor would a person without medical training clearly understand that the flash fire would not have resulted absent negligence. *See e.g., Tiller v. Von Pohle*, 72 Ariz. 11, 15-16, 230 P.2d 213, 217-18 (1951) (holding res ipsa loquitur allowed the jury to infer negligence from a cloth sack found inside plaintiff's intestines after abdominal surgery). Rather, Patrick underwent a facial surgical procedure involving a cautery tool that utilized electrical

current and he sustained facial burns. It is not within the common knowledge of laypersons whether Patrick's burns are the type of injury that normally does not occur in the absence of negligence. *See Riedisser*, 111 Ariz. at 544, 534 P.2d at 1054 ("Ordinarily, negligence of a doctor cannot be presumed in hindsight to be so gross that a layman can recognize it solely because an injury did occur.").

¶18 Nevertheless, the Coonses argue that sufficient evidence existed to create a material question of fact regarding the applicability of res ipsa loquitur. In particular, they cite the deposition testimony of Warner Park employee Jennifer Tobey, who testified it is "common knowledge" that there is a risk of fire when cautery and oxygen are present, and the circumstantial evidence that neither Dr. Rappazzo nor Warner Park's surgical consent form included fire as a potential risk of surgery. We are not persuaded. Although the Coonses may be correct that how fire starts is common knowledge, the proper use of a cautery tool, supplemental oxygen, and surgical drapes in an operating room is not within the common understanding of laypeople. *See Sanchez*, 218 Ariz. at 321, ¶ 12, 183 P.3d at 1289 ("Arizona law has never applied the res ipsa loquitur doctrine to relieve a claimant of the necessity of securing expert testimony when such testimony would be required to establish the prerequisites for applying the doctrine.").

Further, the failure to disclose a particular surgical risk on a surgical consent form does not mean *ipso facto* that it will only occur in the event of negligence.

¶19 The mere fact of a fire and an injury does not automatically give rise to an inference of negligence. *See Ward v. Mount Calvary Lutheran Church*, 178 Ariz. 350, 352, 357, 873 P.2d 688, 690, 695 (App. 1994) (concluding that a 4-year old falling while running at recess and breaking his femur does not support an inference of negligence on the part of day care center); *Falcher v. St. Luke's Hosp. Med. Ctr.*, 19 Ariz. App. 247, 249, 251, 506 P.2d 287, 289, 291 (1973) (concluding that patient falling off of hospital cart and sustaining injuries does not support an inference of negligence on the part of hospital and its staff). Nor does the fact a particular occurrence is rare create an inference of negligence. *See Falcher*, 19 Ariz. App. at 250, 506 P.2d at 290 ("The mere fact that an occurrence is rare does not automatically lead to the conclusion that it was more likely than not caused by someone's negligence."); *McWain v. Tucson Gen. Hosp.*, 137 Ariz. 356, 359, 670 P.2d 1180, 1183 (App. 1983) ("The mere fact that an occurrence is rare does not lead to the application of the doctrine [of res ipsa loquitor]. There must be evidence that the event or injury is more likely than not, the result of negligence."). Nor is the applicability of res ipsa loquitur

controlled by the *expectations* of consumers of medical services as opposed to the common knowledge of lay people. The question is whether lay people, without the assistance of expert testimony, possess sufficient common knowledge regarding an occurrence that they can say without speculation that the probabilities "weigh heavily" in favor of negligence being the cause. *Ward*, 178 Ariz. at 355, 873 P.2d at 693 (quoting *Tucson Gas & Elec. Co. v. Larsen*, 19 Ariz. App. 266, 267, 506 P.2d 657, 658 (1973)). We do not believe that there is a "common fund of knowledge" about this particular type of occurrence to permit lay people reasonably to draw the conclusion of negligence. *See Lowrey*, 202 Ariz. at 193, 42 P.3d at 624 ("[A] jury may require expert assistance in resolving the threshold question whether an accident was of a kind not likely to occur in the absence of negligence.").

¶20 For these reasons, we conclude that the Coonses, to establish the application of res ipsa loquitur, were required to present expert testimony that Patrick's injury would not have occurred without negligence. *Sanchez*, 218 Ariz. at 321, ¶ 12, 183 P.3d at 1289; Restatement § 328(D) cmt. d.[2]

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[2] We therefore disagree with the Indiana Court of Appeals' holding in *Cleary v. Manning*, 884 N.E.2d 335, 340 (Ind. Ct. App. 2008), that a plaintiff was not required to present expert testimony that fire resulting from use of electrocautery unit combined with the use of supplemental oxygen was something that

¶21 The Coonses next contend they satisfied any obligation to provide such expert testimony by producing Dr. Balis' affidavit in response to the defendants' motion for summary judgment. The defendants argued that the Balis affidavit should be rejected because the opinions expressed in the affidavit were not timely disclosed and also were too conclusory to create a question of fact.[3] The trial court determined that Dr. Balis' affidavit was insufficient as a matter of law because it did not comply with A.R.S. § 12-2604(A)(1) (Supp. 2008), which requires a person giving expert testimony in a medical malpractice action to be licensed in the same specialty as the party against whom the testimony is offered. This determination, however, appears to be in error. One of the defendant doctors, Dr. Rappazzo, is an ophthalmologist. And defendant Warner Park acknowledged in its reply to the Coonses' response to the motion that Dr. Balis

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does not happen in the ordinary course of surgical procedure if proper care is used.

[3] The defendants did not argue in the trial court and do not assert now that the affidavit should be rejected because of technical deficiencies. While it was considered by both parties and by the court to be an affidavit, Dr. Balis's statement does not indicate that the statements therein were made under oath. We do not address challenges regarding the affidavit's technical deficiencies, however, because defendants' failure to raise the issue has waived it. *See Knight v. DeMarcus*, 102 Ariz. 105, 107, 425 P.2d 837, 839 (argument challenging affidavit's failure to comply with formal requirements is waived when no objection was made below).

is a retired ophthalmologist.[4] We, however, must affirm the summary judgment if it was correctly granted, even if we conclude that part of the trial court's reasoning was incorrect. *See Aida Renta Trust v. Maricopa County*, 221 Ariz. 603, 608, ¶ 5, 212 P.3d 941, 946 (App. 2009) (stating that a grant of summary judgment will be affirmed "even if the trial court reached the right result for the wrong reason") (quoting *Guo v. Maricopa County Med. Ctr.*, 196 Ariz. 11, 15, ¶ 16, 992 P.2d 11, 15 (App. 1999).

¶22 Accordingly, we have considered the defendants' arguments that the Balis affidavit was untimely disclosed and too conclusory. Although the defendants assert that the affidavit was untimely, they do not direct us to the record to establish any deadline.[5] As noted in ¶ 6 *supra*, there was no deadline set for disclosures of *plaintiffs*' experts regarding standard of care, presumably because plaintiffs were relying on res ipsa loquitur. Moreover, the deadline for completion of discovery was originally March 1, 2007, but that deadline had been extended an additional 60 days. The Balis affidavit is

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[4] Additionally, we note that the defendants had deposed Dr. Balis on January 11, 2007, and had learned at least by that time that he was a board-certified ophthalmologist.

[5] By failing to cite to the record, defendants have not complied with Arizona Rule of Civil Appellate Procedure 13(a)(4) which requires "appropriate references to the record" for all facts relevant to the issues presented.

dated March 21, 2007 and was filed with the Coonses' response to the motion for summary judgment on March 22, 2007. This was well over a month before the deadline for completion of discovery. We do not find the affidavit to be untimely.

¶23 Nor do we find Dr. Balis' opinions in his affidavit too conclusory to create a question of fact regarding the applicability of res ipsa loquitur. Dr. Balis' affidavit stated the following information:

> a) According to the FDA (Food and Drug Administration) and ECRI (Emergency Care Research Institute), approximately 50 million surgical procedures are performed per year. There are approximately 100 reported cases of surgical fires each year, many resulting in serious injury to the patient. According to the vice president of ECRI, "The basic elements of a fire are always present during surgery and a misstep in procedure or a momentary lapse of caution can quickly result in a catastrophe," and "Virtually all surgical fires are preventable."
>
> b) The Defendants should have been more diligent in recognizing the potential risks for a flash fire and they should have taken measures to prevent this occurrence. The substrate for a flash fire, the fire triangle, (heat, fuel, and oxidizer) was present: 1. Cautery was being used (heat). 2. The Plaintiff had a mustache (fuel). 3. There was a high concentration of oxygen under the drape (oxidizer). As a result of their negligence, the flash fire occurred, resulting in serious injury to the Plaintiff.
>
> c) Based on my knowledge, skill, and

experience, and in my expert opinion, I find to a reasonable degree of medical probability that the flash fire that occurred during the surgical procedure that took place on November 19, 2003, and which caused the Plaintiff's injuries, would not ordinarily have occurred in the absence of negligence.

d) As a result of the preventable flash fire, the Plaintiff experienced significant pain and suffering, and has incurred permanent damage to his intranasal passage; tear drainage apparatus, and eyelid structure.

¶24 In the context of this case, this affidavit testimony is sufficient to state that this accident would not have happened in the absence of negligence and thereby advance plaintiffs' potential entitlement to application of res ipsa loquitur. An affidavit on this precise issue -- that this type of accident ordinarily does not happen without negligence -- must necessarily be somewhat conclusory and lacking in specifics regarding the cause of the actual incident, because the doctrine of res ipsa loquitur is intended to apply when specific evidence explaining what went wrong is unavailable. *See Lowery*, 202 Ariz. at 192, ¶ 7, 42 P.3d at 623 (noting that one required element for res ipsa loquitur is that the claimant is not "in a position to show the particular circumstances that caused the offending agency or instrumentality to operate to her injury").

¶25 Dr. Balis in his affidavit provided statistics regarding the infrequency of these fires and cited with approval

a statement that "[v]irtually all surgical fires are preventable." He further stated that because of the presence of sources of heat, oxygen, and fuel, "a misstep in procedure" or a "lapse of caution" could result in a fire. He concluded that based on his knowledge, skill, and experience, and in his expert opinion, this fire "would not ordinarily have occurred in the absence of negligence." *See Connors v. Univ. Assoc. in Obstetrics and Gynecology, Inc.*, 769 F.Supp. 578, 587 (D. Vt. 1991) (referring to textual materials and one's experience can establish common knowledge of experts); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985) (factual basis for conclusions, even though underlying factual details and reasoning are not stated, may defeat summary judgment). This testimony is more than a mere assertion that something must have gone wrong simply because an adverse and unintended result has occurred. *Cf. Smith v. Reitman*, 389 F.2d 303, 304 (C.A.D.C. 1967) ("The record here does not create the basis for invoking res ipsa loquitur. Appellant's expert merely said that a 'mistake' must have been made because of the 'bad' result.").

¶26 Although the affidavit might have spelled out in more detail Dr. Balis' experience and background, the parties had already deposed Dr. Balis in January of 2007 and presumably explored at that time his background and experience as a board-certified ophthalmologist. And most likely the parties would

have re-deposed him in light of his additional opinion that this accident would not have occurred in the absence of negligence, if the motions for summary judgment had not been granted.[6]

¶27 Although we conclude that Dr. Balis' affidavit is sufficient to defeat summary judgment on this record and at this juncture in the case, we express no opinion regarding whether a later motion for summary judgment or motion for directed verdict challenging the same element of res ipsa loquitur may be meritorious. We recognize that additional discovery will likely focus on whether a fire such as this one would not ordinarily occur in the absence of negligence and the reasons for and against such a conclusion.

¶28 Because we conclude that Dr. Balis' affidavit is sufficient to establish at this time a triable issue whether this accident would not ordinarily occur in the absence of negligence, we must reverse the summary judgment granted by the trial court based on its conclusion that this element of res ipsa loquitur was not established.

The Separate Argument of Defendant Warner Park

¶29 Warner Park urges us to affirm the trial court's

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[6] In fact, we note that Defendant Warner Park argued in its reply to the Coonses' response that the Balis affidavit was untimely and insufficient, and, alternatively, that "[a]t the very least, defendants are entitled to redepose Dr. Balis on this issue." Defendant Rappazzo joined in Warner Park's reply.

summary judgment for it on the independent basis that the Coonses failed to create a material question of fact regarding whether Warner Park exercised control over the instrumentality that caused Patrick's injury.

¶30 Arizona law allows a plaintiff to apply the doctrine of res ipsa loquitur against multiple defendants, even if the plaintiff cannot show that the defendants had "joint simultaneous control" over the harmful instrumentality. *Jackson v. H.H. Robertson Co., Inc.,* 118 Ariz. 29, 32, 574 P.2d 822, 825 (1978). The plaintiff may invoke the doctrine against multiple defendants when the individual circumstances of the case show that one or more defendants was in control of the instrumentality at times that permit an inference that the negligence of those defendants resulted in harm to the plaintiff. *Id.* At 33, 574 P.2d at 826. The traditional requirement of exclusive control is flexibly applied on a case by case basis. *See Lowrey*, 202 Ariz. at 192 n.5, ¶ 7, 42 P.3d at 623 n.5.

¶31 Here, Warner Park contends it is undisputed that it did not have any control over the instrumentalities that allegedly caused the harm – the electrocautery device and the oxygen – and therefore the Coonses cannot satisfy that element of res ipsa loquitur as a matter of law. However, the record shows that Warner Park provided the equipment used during

Patrick's surgery, a Warner Park employee placed the sterile drapes that caught on fire around Patrick's face, and Warner Park employees were present during the surgery. This evidence is sufficient to show that Warner Park had control over the injuring instrumentalities and to allow an inference that Warner Park's negligence resulted in harm to the Coonses. *Jackson*, 118 Ariz. at 33, 574 P.2d at 826. Thus, this case differs from *Sanchez v. Tucson Orthopaedic Inst., P.C.,* 220 Ariz. 37, 40-41, ¶ 11-15, 202 P.3d 502, 505-06 (App. 2008), in which the plaintiffs alleged that either one defendant or the other -- but not both -- controlled the instrumentality causing injury.[7]

¶32 We conclude for these reasons that the trial court erred in determining as a matter of law that the doctrine of res ipsa loquitur was inapplicable to Warner Park on this record.

CONCLUSION

¶33 For these reasons, we reverse the trial court's granting of summary judgment in favor of the defendants, and we remand for further proceedings.

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[7] Although we disagree with the Indiana Court of Appeals in that portion of *Cleary* that held the plaintiff was not required to present expert testimony to trigger potential application of res ipsa loquitur under facts analogous to the facts here, *see supra* n. 2, we do agree with the Indiana court's discussion of hospital's control over the instumentalities that may have caused the flash fire. 884 N.E.2d 336-40. These principles apply, analogously, regarding Warner Park.

___/s/______________________________
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/______________________________
PATRICK IRVINE, Judge

T H O M P S O N, Judge, dissenting,

¶34 I respectfully dissent. I would affirm summary judgment because Dr. Balis' opinions in his affidavit are too conclusory to create a question of fact regarding the applicability of res ipsa loquitur. Dr. Balis' affidavit stated the conclusion that, "[b]ased on my knowledge, skill, and experience, and in my expert opinion, I find to a reasonable degree of medical probability" that the flash fire "would not ordinarily have occurred in the absence of negligence." But the affidavit does not explain Dr. Balis' knowledge and experience relative to this type of surgery and this type of unfortunate occurrence, and, perhaps more importantly, does not explain why this flash fire or a similar fire "would not ordinarily have occurred in the absence of negligence." The opinions in the affidavit are too conclusory to create a question of fact regarding this essential element for application of res ipsa loquitur.

¶35 I would also reject the Coonses' argument that the

trial court erred by refusing to allow them additional time to file a preliminary expert opinion affidavit after it determined they were required to produce expert testimony to establish the applicability of res ipsa loquitur.

¶36 Arizona law requires a plaintiff who asserts a claim against a health care professional in a civil action to certify "whether or not expert opinion testimony is necessary to prove the health care professional's standard of care or liability for the claim." A.R.S. § 12-2603(A). If the claimant certifies that such testimony is necessary, he must serve, with his Arizona Rule of Civil Procedure 26.1 initial disclosures, a preliminary expert opinion affidavit that contains the expert's qualifications for providing an opinion regarding the standard of care, the factual basis of the claim, the acts that violated the standard of care, and the manner in which those acts harmed the claimant. A.R.S. § 12-2603(B).[8] If the claimant certifies that expert testimony is not necessary, and the health care professional disputes that certification in good faith, it may move the court for an order requiring the claimant to obtain and serve a preliminary expert opinion affidavit. A.R.S. § 12-

[8] The expert must be licensed as a health professional in Arizona or another state and must satisfy qualifying statutory criteria regarding specialization, clinical practice, and instruction. A.R.S. § 12-2604.

2603(D).[9] The statute does not, however, require the health care professional to move the court for such an order.

¶37 In this case, the Coonses certified that no expert opinion testimony was necessary to prove the defendants' liability for their claims because they intended to rely on the doctrine of res ipsa loquitur. The defendants controverted that certification, but did not move the court for an order requiring the Coonses to file a preliminary expert opinion affidavit. Despite the fact that the parties brought this issue to the court's attention in their Joint Comprehensive Pretrial Conference Memorandum, the court did not determine the issue until raised in the summary judgment motions. The Coonses contend that once the trial court determined, when ruling on the defendants' motion for summary judgment, that the Coonses were required to offer expert testimony to establish a prima facie case of negligence, it was required to allow the Coons to submit a preliminary expert opinion affidavit pursuant to the provisions of A.R.S. § 12-2603. I disagree.

¶38 The Arizona legislature declared that, as relevant, the purpose of A.R.S. § 12-2603 is "to curtail the filing of

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[9] If, in response to such a motion, the court determines the claimant must file a preliminary expert opinion affidavit, it is required to set a date and terms for compliance, and may dismiss the claim without prejudice if the affidavit is not timely filed. A.R.S. § 12-2603(E), (F). Upon an allegation that an affidavit is insufficient, the court must allow the claimant a reasonable time to cure any deficiency. A.R.S. § 12-2603(F).

frivolous lawsuits against health care professionals . . . ." Laws 2004, Ch. 4, § 2. Thus, a defendant may challenge a plaintiff's certification that expert testimony is not required and move the court for an order requiring the plaintiff to provide a preliminary expert opinion affidavit at the outset of litigation before it has incurred substantial fees defending the case. *See* A.R.S. § 12-2603(D). However, the statute does not require a defendant to do so, and its failure to take such action does not deprive it of the opportunity to move for summary judgment if the plaintiff fails to establish a prima facie case.

¶39 Nevertheless, the Coonses contend that the trial court's refusal to allow them to cure their failure to produce an expert deprived them of their constitutional right to due process. As the Coonses point out, the language of A.R.S. § 12-2603(F) requires the trial court to allow the claimant an opportunity to cure any defect in its preliminary expert opinion affidavit before it dismisses the claim. The problem for the Coonses is that A.R.S. § 12-2603 relates primarily to the front end of a medical malpractice case and the defendants' motions for summary judgment came at the back end of the case, just a few days before the deadline for completion of discovery. Section 12-2603 addresses "preliminary expert opinions." Additionally, the court in this case did not dismiss the

Coonses' complaint for non-compliance with §§ 12-2602 and -2603, but instead granted summary judgment for the defendants because the Coonses failed to state a prima facie claim for medical malpractice. Under these circumstances, the mandatory cure provisions of A.R.S. § 12-2603(F) are inapplicable. Further, because the Coonses did not ask, pursuant to Arizona Rule of Civil Procedure 56(f), for additional time to obtain an expert opinion, the court was not required to afford them additional time to disclose an expert opinion.

¶40 For these reasons, I would affirm the summary judgment entered in favor of the defendants.

____/s/____________________________
JON W. THOMPSON, Judge