RENDERED: SEPTEMBER 17, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000003-MR

MICHAEL L. NORMAN
AND ELLEN NORMAN — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE TOM McDONALD, JUDGE
ACTION NO. 96-CI-004787

GALEN OF KENTUCKY, INC.,
D/B/A SUBURBAN MEDICAL CENTER;
ROBERT WOLFE, C.R.N.A.; AND
ANETHESIOLOGY ASSOCIATES, P.S.C. — APPELLEES

AND NO. 2003-CA-000086-MR

GALEN OF KENTUCKY, INC.,
D/B/A SUBURBAN MEDICAL CENTER — CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD
ACTION NO. 96-CI-004787

MICHAEL L. NORMAN
AND ELLEN NORMAN — CROSS-APPELLEES

AND NO. 2003-CA-000131-MR

ROBERT WOLFE, C.R.N.A. CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD
ACTION NO. 96-CI-004787

MICHAEL L. NORMAN
AND ELLEN NORMAN CROSS-APPELLEES

AND NO. 2003-CA-000167-MR

ANESTHESIOLOGY ASSOCIATES, P.S.C. CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD
ACTION NO. 96-CI-004787

MICHAEL L. NORMAN
AND ELLEN NORMAN CROSS-APPELLEES

OPINION
AFFIRMING ON DIRECT APPEAL
AND DISMISSING THE CROSS-APPEALS

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

SCHRODER, JUDGE: This is an appeal and three protective cross-appeals from a jury verdict finding no medical malpractice in a suit by a surgical patient against the hospital, the

anesthesiologist's nurse, and his anesthesiologist employer. Because we affirm the trial court on direct appeal, we dismiss the cross-appeals as moot.

On August 30, 1995, Michael Norman (Norman) was operated on by Dr. E. Dean Canan for the repair of a bilateral inguinal hernia. The surgery was performed at Galen of Kentucky, Inc., d/b/a Suburban Medical Center (Suburban), with Robert Wolfe (Wolfe), a Certified Registered Nurse Anesthetist, overseeing the anesthesia during the surgery. Anesthesiology Associates, P.S.C. (Anesthesiology Associates) was his employer. The surgery lasted less than an hour and appeared to be uneventful. Wolfe transported Norman from the operating room to the recovery room. The day of surgery, Norman complained of shoulder and arm pain that overshadowed the pain from surgery in his groin area. The testimony was conflicting as to when the pain first appeared and the causation. Norman's medical experts diagnosed a disruption of the nerve root in his neck at the C-5 level and theorize Norman had probably suffered a traumatic injury to his neck while under the effects of anesthesia during or around the time of surgery. Several possibilities were offered, such as the arm not strapped down and flopping over the edge of the table, acting as a lever, or the gurney not being locked, with Norman falling toward the floor and either being caught with a jerk or landing on the floor.

The defense had a different diagnosis and different etiology. The defense expert claimed the injury was not the result of trauma, but a combination of Parsonage-Turner Syndrome, an idiopathic condition of unknown cause, along with diabetes and reflex sympathy dystrophy, another condition of unknown cause. The jury sided with the defense and unanimously held all the appellees not liable. Norman appeals to this Court contending the trial court erred by refusing to give a *res ipsa loquitur* instruction and by allowing the operating room personnel to testify as to their routine or habit when they could not remember the specifics of Norman's surgery. The appellees filed protective cross-appeals contending the trial court erred in allowing the jury to hear about Wolfe's drug addiction, certification, in not granting the appellees separate trials, and finally, in not giving them directed verdicts.

Norman's first allegation of error by the trial court is its refusal to give the jury an instruction on the doctrine of *res ipsa loquitur*. We disagree. "In order for the doctrine of *res ipsa loquitur* to apply in a medical malpractice action, the injury must be such as would not occur in the absence of negligence." Turner v. Reynolds, Ky. App., 559 S.W.2d 740, 741 (1977), citing Jewish Hospital Association of Louisville, Ky. v. Lewis, Ky. App., 442 S.W.2d 299 (1969). The doctrine of *res ipsa loquitur* is not usually applicable in malpractice cases,

but may be invoked where accepted procedures produce abnormal results. Meiman v. Rehabilitation Center, Inc., Ky., 444 S.W.2d 78 (1969). Negligence cannot be inferred simply from an undesirable result. Perkins v. Hausladen, Ky., 828 S.W.2d 652, 655 (1992). "A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it." Id. at 656, quoting the RESTATEMENT (SECOND) OF TORTS, Section 328D, comment 6, p. 157, (1965).

According to the RESTATEMENT (SECOND) OF TORTS, Section 328D(1) (1965), several conditions must be met before the doctrine of *res ipsa loquitur* can be applied:

> 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. (emphasis added.)

The trial court found that there was a battle of the expert witnesses which produced other possible causes that were not sufficiently eliminated. The trial court found:

> much evidence on the topic of Parsonage-Turner Syndrome, which is a problem that is unpredictable and unpreventable part of surgery, and could occur whether or not the Defendant's were in complete control of the instrumentality. Dr. David Preston, Plaintiff's own experts, first impression of Mr. Norman's injury was believed to be attributable to this syndrome. Additionally, Dr. William Berger, another expert witness of the Plaintiff's produced five possible scenarios for the cause of Mr. Norman's injuries but was unable to state which theory applied, and that the injury could have occurred in the absence of negligence.

We cannot say the trial court's findings were clearly erroneous. CR 52.01; Sommerkamp v. Linton, Ky., 114 S.W.3d 811, 815 (2003). Even if we agreed with appellant that this was a case for application of the *res ipsa loquitur* doctrine, he would not be entitled to have a *res ipsa loquitur* instruction submitted to the jury. The *res ipsa loquitur* doctrine is an evidentiary doctrine which allows a jury to infer negligence on the part of the defendant. Sadr v. Hager Beauty School, Inc., Ky. App., 723 S.W.2d 886, 887 (1987). The doctrine creates a rebuttable presumption of negligence under the following circumstances:

> (1) the defendant had full control of the instrumentality which caused the injury; (2) the accident could not have happened if those having control had not been negligent; and (3) the plaintiff's injury resulted from the accident.

Id., citing Bowers v. Schenley Distillers, Inc., Ky., 469 S.W.2d 565 (1971). On occasion, the rebuttable presumption may be

strong enough to require a directed verdict. Id. Instructions on *res ipsa loquitur*, however, should never be submitted to a jury. The Kentucky Supreme Court succinctly stated the applicable rule in Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992). In that case, the Court recognized that:

> In Kentucky, the burden of proof is always on the party who would lose if no evidence was presented. CR 43.01(2). In Kentucky jury instructions do not include evidentiary presumptions. Such presumptions alter the burden of going forward with the evidence, and thus may result in a directed verdict in the absence of countervailing evidence, but the jury instructions should be framed only to state what the jury must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.

Id. at 824. Clearly, this principle applies to the doctrine of *res ipsa loquitur*. The appellants could request the application of the doctrine to avoid a directed verdict or to win a directed verdict, but the trial court properly refused to give a *res ipsa loquitur* instruction. See also Conley's Adm'r v. Ward, Ky., 291 S.W.2d 568 (1955).

The appellants' second argument is that the trial court committed reversible error by allowing testimony of habit to prove the appellees were not negligent in the actual treatment of the appellant. The witnesses supposedly did not remember the surgery on the particular appellant but were allowed to testify that it was their "habit" to conform to the

standard of care required. This is not exactly what happened. Granted, the witnesses did not remember the particular surgery but were allowed to testify as to the hospital's policies and customs requiring mishaps be noted on the chart. The witnesses were then asked what they would have done. No mishaps were so recorded, inferring nothing happened. This case is similar to a recently released case from another panel of this Court, Thomas v. Greenview Hosp., Inc., Ky. App. 127 S.W.3d 663 (2004). In Thomas, our Court said: It is undisputed that historically, Kentucky case law has prohibited the use of "habit" evidence to prove conformity with that conduct on a particular occasion." (citations omitted.) The Court went on to distinguish "habit" from "custom":

> "Habit" is generally defined as an individual person's specific regular or consistent response to a repeated situation. "Custom" is defined as the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual. (citations omitted.)

Id. at 669. More importantly, the Thomas Court concluded that "Kentucky law . . . excludes both personal habit and custom or business routine practice in proving conforming conduct." (emphasis added.) Id. at 670. To the extent Kentucky has a "custom" exception to the exclusionary rule, "custom" can only be introduced for purposes other than to prove conforming conduct on a specific occasion. Id. If we were to stop here we

would be required to exclude both habit and custom evidence. However, in our case, the appellant opened the door by introducing the medical records and asking witnesses, including appellee, Wolfe, what they would have done. The same thing happened in the Thomas case, and our Court responded with the often quoted phrase, "One who asks questions which call for an answer has waived any objection to the answer if it is responsive." (citations omitted.) Id. at 671, quoting Mills v. Commonwealth, Ky., 996 S.W.2d 473, 485 (1999). Under the circumstances of our case, we believe Thomas is on point and the trial court did not err.

With our decision to affirm the trial court on both issues in the direct appeal, the issues raised by the appellees in their respective cross-appeals become moot and we chose to dismiss.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS/CROSS-APPELLEES, MICHAEL L. NORMAN AND ELLEN NORMAN:	COMBINED BRIEF FOR APPELLEE/CROSS-APPELLANT, GALEN OF KENTUCKY, INC., D/B/A SUBURBAN MEDICAL CENTER:
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Bradley R. Hume
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT,
GALEN OF KENTUCKY, INC., D/B/A
SUBURGAN MEDICAL CENTER:

Bradley R. Hume
Louisville, Kentucky

COMBINED BRIEF FOR
APPELLEE/CROSS-APPELLANT,
ROBERT WOLFE, C.R.N.A.

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ORAL ARGUMENT FOR
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