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COURT OF APPEALS

STATE OF NEW YORK

JAMES,

Appellant,

-against-

No. 126

WORMUTH, ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
May 28, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: James v. Wormuth, number
2 126.

3 Okay, counselor, you want some rebuttal time?

4 MR. CARROLL: Yes, I think a minute and a half
5 should do just fine, Your Honor.

6 CHIEF JUDGE LIPPMAN: A minute and a half?

7 MR. CARROLL: Or two minutes, if you want.

8 CHIEF JUDGE LIPPMAN: Two minutes. Go ahead.

9 (Pause)

10 MR. CARROLL: Okay.

11 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

12 MR. CARROLL: Okay. The - - - this case, as
13 requested by the court, involved the relationship of the
14 judgment charge to res ipsa loquitur and - - -

15 CHIEF JUDGE LIPPMAN: Counselor, where's your
16 expert in this case?

17 MR. CARROLL: My expert in this case is in
18 Cincinnati, and we discussed putting him on the stand and
19 decided that, based on what Kambat said, that I didn't
20 need one, that we weren't going to spend the money on one,
21 and we were going to - - - and we were going to try it
22 without one.

23 CHIEF JUDGE LIPPMAN: I can see that you didn't
24 want to spend the money on it, but how can you show a
25 deviation from standard practice without an expert in this

1 case?

2 MR. CARROLL: It's a foreign object case in res
3 ipsa loquitur, and they don't require - - - and that - - -
4 and under Kambat, they didn't require an expert.

5 CHIEF JUDGE LIPPMAN: The doctor didn't even do
6 this - - - the doctor didn't even have the whole
7 procedure, right? He only did part of it?

8 MR. CARROLL: No, doctor did the whole procedure
9 from beginning to end at the operation.

10 JUDGE SMITH: But he didn't - - - but he's not
11 the guy who lost the wire.

12 MR. CARROLL: He is the guy that - - - Dr.
13 Wormuth is the one who lost the wire.

14 JUDGE SMITH: Well, then he - - -

15 JUDGE GRAFFEO: He's not the one who inserted
16 the wire.

17 MR. CARROLL: The wire was inserted by a
18 radiologist, but the control issue - - -

19 JUDGE GRAFFEO: So it's - - - it's not the
20 classic res ipsa - - -

21 MR. CARROLL: Well, it - - -

22 JUDGE GRAFFEO: - - - type situation, is it?

23 MR. CARROLL: Well, he admitted that he was in
24 control of the - - - control of the operation at all
25 times, and the defense - - - the defense said they - - -

1 that there was no control - - - it wasn't an issue - - -

2 JUDGE PIGOTT: But before that - - -

3 MR. CARROLL: - - - at the close of argument.

4 JUDGE PIGOTT: Before that, you - - - you had
5 questioned the doctor, and he said, so that means between
6 the radiology room where they put it in and transporting
7 her to where you were, meaning the doctor, and - - - and
8 deflated the lungs, somewhere in that period of time, the
9 wire fell into the pleural space?

10 MR. CARROLL: Maybe that's what happened.

11 JUDGE PIGOTT: That's what - - -

12 MR. CARROLL: That area is a - - -

13 JUDGE PIGOTT: But you suggested that to him.

14 That was your - - -

15 MR. CARROLL: I suggested that to him; yes, I
16 did. There's a factual vacuum there between the insertion
17 of the wire and when he went in and couldn't find it.

18 JUDGE SMITH: But isn't - - - isn't that fatal -
19 - - isn't the factual vacuum fatal to a res ipsa case?
20 Don't you have to show that the defendant was in control
21 of the instrumentality?

22 MR. CARROLL: Well, no. He was - - - was in
23 control during that time, Your Honor, but he - - - but the
24 factual vacuum - - -

25 JUDGE SMITH: I mean, if you - - -

1 MR. CARROLL: - - - is actually necessary for a
2 res - - - in many res ipsa cases.

3 JUDGE SMITH: I see your point that if - - - if
4 the - - - if the wrong, the tort is the failure to find
5 the wire, then sure, he was in control, but - - - but can
6 you really - - - but is - - - how can you - - - how can
7 you say on this record that the failure to find the wire
8 is something that could not occur without negligence?

9 MR. CARROLL: The - - - first, on that premises,
10 we are - - - I - - - I am of the position that I'm arguing
11 a res ipsa - - - arguing res ipsa loquitur and it is
12 covering all of the acts that involve under the control of
13 Dr. Wormuth from the radiologist all the way through to
14 the - - -

15 JUDGE GRAFFEO: But didn't - - -

16 MR. CARROLL: - - - end of the operation.

17 JUDGE GRAFFEO: Didn't you - - -

18 MR. CARROLL: Let me - - - then let me - - - oh,
19 yes, Your Honor.

20 JUDGE GRAFFEO: Go ahead, go ahead.

21 MR. CARROLL: Okay. Now, testing to the issue
22 of whether you could find the wire or not and finding it,
23 that was based on whether he could get a C - - - a CT scan
24 into the room, which he didn't do - - -

25 JUDGE PIGOTT: But that - - - that's - - -

1 MR. CARROLL: - - - or - - -

2 JUDGE PIGOTT: You said when - - - in response
3 to their defense motion, it says, "Testimony is very clear
4 that at the time of the operation that when the - - - when
5 the wire was lost that they made a decision between a
6 thoracotomy and leaving the - - - leaving it in when
7 really the decision should have been why don't I walk down
8 the hall and just get a C-Arm and go find the thing."

9 MR. CARROLL: Yes.

10 JUDGE PIGOTT: All right. Now, that - - -
11 doesn't that call into - - - into question his medical
12 judgment?

13 MR. CARROLL: No, it does not because his
14 medical judgment requires a - - - how do you say - - -
15 because it's - - - the wire is already lost. He is now
16 trying to go and correct that problem. So it's like
17 having an automobile accident and then having - - - they
18 run up and say, oh, my God, there's blood coming out of
19 his nose, I'm going to call - - - I'm going to - - - I'm
20 now going to make a judgment decision, I'm going to call
21 an ambulance because I think I've hurt this man.

22 JUDGE READ: Well, didn't he - - - didn't he
23 make a medical judgment that - - -

24 MR. CARROLL: You see what I'm saying? Is that
25 - - -

1 JUDGE READ: No. Didn't he make a medical
2 judgment at that point that it was, at least at some
3 point, after he fished around for it for a while, that it
4 was better to leave it in place? I mean, isn't that a
5 question of the standard of care?

6 MR. CARROLL: That is - - - that is a medical
7 judgment, but it - - -

8 JUDGE READ: Yeah.

9 MR. CARROLL: - - - shouldn't be a defense to
10 losing the wire in the first place.

11 JUDGE GRAFFEO: Oh, but isn't that why you
12 needed a medical expert, to contest whether his
13 explanation for why he stopped looking for the wire was a
14 deviation from - - -

15 JUDGE READ: Standard of care.

16 JUDGE GRAFFEO: - - - the reasonable standard of
17 care?

18 MR. CARROLL: No, I don't believe I needed an
19 expert to - - - to argue that he was - - - that the
20 judgment issue - - - what - - - that that one issue was
21 right there. I think they - - - jury was more than able
22 to understand this case and every facet of it. What we
23 discovered and what should have been - - - well, if I were
24 to try it again, put in the record, was that a large
25 number of people have had this type of operation. The

1 jury was very, very familiar with it.

2 JUDGE ABDUS-SALAAM: But, counsel, didn't you -
3 - -

4 MR. CARROLL: It's the breast - - - it's the
5 breast mammogram - - -

6 JUDGE ABDUS-SALAAM: Right. But, counsel,
7 didn't - - - when you were trying this case and the -
8 - - the court was trying to pin you down on what - -
9 - what your theory of the case was - - -

10 MR. CARROLL: Yes.

11 JUDGE ABDUS-SALAAM: - - - didn't you say
12 that you were claiming that the negligence was in not
13 removing this wire, not in - - - in leaving it in
14 place?

15 MR. CARROLL: I had two theories at the end
16 of - - - at the close of proof. I had a theory that
17 - - - that I was putting forward that I claim didn't
18 require an expert, that he had a CT, that he should
19 have gone and gotten the C-Arm and located it on a
20 C-Arm and recovered it like he did in the second
21 operation, which was no problem, and I was claiming
22 res ipsa loquitur based on the presence of a foreign
23 object in the - - - in the patient.

24 JUDGE RIVERA: But that circles back to the
25 ques - - -

1 MR. CARROLL: Res ipsa loquitur is what - -
2 -

3 JUDGE RIVERA: But that circles you back to
4 the question of the control, and even you admit that
5 there is a vacuum.

6 MR. CARROLL: No, no, no, no, no, I didn't
7 admit there was a vacuum. What I admit is that he -
8 - - he admitted he had control the whole time. All
9 right. I asked the question, were you in control of
10 this operation, and he said yes. And Mark, in his
11 closing argument or in the summation of - - - of the
12 direct, first thing said, you are in - - - that there
13 is no control issue here, and there was no
14 contributory negligence issue. It's in both places
15 so - - -

16 JUDGE ABDUS-SALAAM: Well, but, counsel,
17 with respect to the foreign object - - -

18 MR. CARROLL: Yes.

19 JUDGE ABDUS-SALAAM: - - - the res ipsa
20 doctrine applies when the object is unintentionally
21 left in the - - - in the patient, right? This object
22 was intentionally left in the patient.

23 MR. CARROLL: The - - - the intent - - -

24 JUDGE ABDUS-SALAAM: That was your theory,
25 that he failed to remove it.

1 MR. CARROLL: The - - - what - - - that - -
2 - that line of reasoning confuses the medical devices
3 where they put in fixation things such as hip
4 implants and things that are intended to be left
5 there in a medically accepted way, and with the other
6 - - - with the cases of things that weren't intended
7 to be left there. The fact he had found it and
8 decided not to remove it intentionally does not shift
9 it from one category to the other.

10 JUDGE READ: Well, but doesn't that make
11 the question whether or not that was a sound medical
12 - - - a reasonable medical judgment or was in the
13 standard of care?

14 MR. CARROLL: I don't think it has anything
15 to do with two medically accepted propositions in
16 that regard, because it doesn't - - - it doesn't
17 reflect two medically accepted theories of approach.
18 You're leaving in something that shouldn't be left
19 there, and that's not - - - and that's not medically
20 acceptable.

21 JUDGE READ: Well, that's, I guess, where
22 we get back to the fact that you didn't have an
23 expert testify to that.

24 MR. CARROLL: Well, I don't - - - didn't
25 believe I needed one, and the judgment charge

1 appeared, quite frankly, at the end of the case.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 Thanks, counsel.

4 MR. CARROLL: Thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: You'll have your
6 rebuttal time.

7 Counsel.

8 MR. DUNN: Thank you, Your Honor.

9 May it please the court, my name is Mark
10 Dunn, and I'm counsel for Dr. Wormuth and his
11 practice group. And simply stated, it's my position
12 that the Appellate Division order, which affirmed the
13 trial court's dismissal of this case, was
14 appropriate.

15 JUDGE PIGOTT: Did you try this case?

16 MR. DUNN: I did, Your Honor. This is not
17 a - - - my position is this was not a res ipsa case.
18 As you've alluded to, Your Honor, at the motion, I
19 think the first statement out of plaintiff's
20 counsel's mouth was that the challenge conduct here
21 is the decision at the time he discovered that the
22 guidewire had dislodged from the lung, and his
23 statement that, you know, the decision should have
24 been maybe to obtain a C-Arm image instead of some
25 other things that he did, those are judgments and

1 decisions that require, I believe - - -

2 JUDGE SMITH: Does - - - does this work in
3 any foreign object case? I mean, I suppose it's hard
4 to imagine, but suppose the - - - suppose the
5 defendant in - - - in Kambat says, oh, I left that
6 laparoscopy pad in there on purpose. Do you have to
7 get an expert to say we don't leave eighteen-by-
8 eighteen lapar - - - that's a departure from the
9 standard of care?

10 MR. DUNN: Well, again, I think it - - - it
11 may be that way, Your Honor. The - - - first of all,
12 I think the limited cases using res ipsa in that case
13 is where it's forgotten that the lap pad is not
14 there, but I couldn't - - -

15 JUDGE SMITH: But is it - - - I guess what
16 I'm really saying is, is it just that it's the
17 difference between forgetting and doing it
18 intentionally or is it the difference between an
19 eighteen-by-eighteen-inch pad and a tiny little wire?

20 MR. DUNN: Well, it's probably both. I
21 mean, I could envision a situation. Suppose the
22 patient has multiple gunshot wounds and the - - - and
23 the hospital - - - you know, the patient is under
24 critical condition. The surgeon is attending to
25 multiple wounds. Anesthesia tells him, we don't want

1 this patient under anesthesia that long. The nurses
2 say to the doctor, you know, our sponge count in one
3 of the wounds is off. You know, the doctor then
4 makes a decision that, you know, we're going to see
5 what manifests but to get the patient through this
6 surgery, that's a judgment that I have to make, and
7 so I can't answer a - - - a yes or no to that
8 question because I think there may be situations
9 where, even with a lap pad, I think res ipsa may not
10 - - - may not apply.

11 JUDGE GRAFFEO: You're -- you're not saying
12 in every res ipsa case there has to be - - - the
13 plaintiff has to have expert testimony, are you?

14 MR. DUNN: No, I'm not - - - I'm not saying
15 that in every res ipsa case. I mean, certainly in
16 res ipsa cases and medical malpractice cases, I think
17 the court has already determined that in some cases
18 expert testimony is used to sort of bridge the gap to
19 show that this is something that would not occur.

20 JUDGE PIGOTT: Well, the defense - - - the
21 defense citing that our case in Lourdes says it does
22 not occur in the absence of negligence, exclusive
23 control of the defendant, no action or contribution
24 by the plaintiff. And here, we have a foreign body
25 unintentionally left resulting in injury to the

1 plaintiff, and making the distinction saying,
2 intentionally abandoning the search is not the same
3 as intentionally leaving it in as part of procedure.
4 Where are they wrong?

5 MR. DUNN: Well, that - - - that was the
6 dissent - - -

7 JUDGE PIGOTT: Right. Where are they
8 wrong?

9 MR. DUNN: - - - in the Appellate Division.
10 I - - - I think they're wrong because I - - - the - -
11 - they go hand-in-hand. I mean, he - - - he - - - at
12 the - - - at the beginning of the surgery - - -
13 beginning of the procedure, I should say, because
14 it's been pointed out numerous people were involved,
15 numerous specialties were involved in the placement
16 of this guide wire - - - never was there any
17 suggestion in the case that the guide wire became
18 dislodged because of negligence. The whole focus has
19 been what should have been done once the wire became
20 dislodged and it was note of - - - noticed by the
21 surgeon.

22 JUDGE PIGOTT: It struck me that, you know
23 - - - was it your - - - your client that cut it?

24 MR. DUNN: On the outside of the skin, it
25 is trimmed to reduce the amount of drag. Remember -

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- -

JUDGE PIGOTT: Right.

MR. DUNN: - - - this is a wire that's used for a breast biopsy. It's - - - it's a plastic tube, Your Honor.

JUDGE PIGOTT: But it struck me - - - it struck me that if he left it longer, he wouldn't have lost it.

MR. DUNN: But - - - but then you have the risk though - - - it's not for that purpose, to lose it - - - it's not for that purpose, to track it through. The risk is - - - Dr. Wormuth explained, during his examination by plaintiff's counsel, is that you have - - - it's hooked into the lung tissue, but you have a stronger tissue, the - - - the chest wall tissue. And to reduce the amount of drag, when that lung is deflated, to help make sure that it stays in the lung, you - - - you do trim to reduce that amount of drag. So, yes, that was - - - that was done. But again, the focus is solely on what should he have done once he discovered that's - - -

JUDGE RIVERA: Was there an intervening act by an actor between the point in time - - - a point in time when the doctor was in control of the wire and when this wire is dislodged?

1 MR. DUNN: I didn't hear the first part of
2 your - - -

3 JUDGE RIVERA: I'm sorry. Was there an
4 intervening act by any other actor at the point - - -
5 between the last moment that the doctor had control
6 of the wire and it becomes dislodged?

7 MR. DUNN: Well, the - - - the - - - there
8 could have been - - -

9 JUDGE RIVERA: I'm trying to find out if
10 there really is this vacuum.

11 MR. DUNN: Well, there - - - there's this -
12 - - I think the testimony was that this could have
13 been dislodged during several steps of the case.
14 First, you know, the interventional radiologist
15 places the guidewire, but then the interventional
16 radiologist and the nursing staff help transport the
17 patient from the interventional radiology table to a
18 gurney. Nursing staff then moves the patient gurney
19 to the operating room where nursing staff - - -

20 JUDGE ABDUS-SALAAM: Well, I think what
21 Judge Rivera is asking is after the wire was trimmed
22 - - - your client actually trimmed the wire.

23 MR. DUNN: Yes, Your Honor.

24 JUDGE ABDUS-SALAAM: So was there anything
25 in between his trimming the wire and the wire getting

1 lost?

2 MR. DUNN: Well, the - - - the deflation of
3 the lung occurs by anesthesia at or about that time.
4 So that also - - - you know, whether it dislodged as
5 the - - - the lung is deflated, again, no one
6 suggested that it became dislodged due to anyone's
7 negligence so that the whole - - - again, the whole
8 focus is on his judgment. And even - - - I don't
9 think you can suggest that that judgment is a
10 judgment that laypeople are competent to evaluate.

11 JUDGE SMITH: So I mean, maybe I - - - I'm
12 confused about the time sequence. When does the wire
13 get trimmed?

14 MR. DUNN: The wire gets trimmed at or
15 about the same time that the patient is prepped, and
16 after prep, the wire is - - - is trimmed. The lung
17 is deflated by anesthesia at or about that same time.
18 It wasn't clear in the record which it - - - whether
19 it was before or after.

20 JUDGE SMITH: So - - - but as far as we can
21 tell, Dr. Wormuth is there every moment - - - maybe I
22 don't understand. At the time the wire is trimmed,
23 obviously it hasn't been lost yet, right?

24 MR. DUNN: We don't know that, Your Honor.
25 Could have been.

1 JUDGE SMITH: Well, how can you trim a wire
2 that's already gone?

3 MR. DUNN: No, no. The wire - - - trimming
4 is exterior - - -

5 JUDGE SMITH: Uh-huh.

6 MR. DUNN: - - - but the wire is interior,
7 hooking onto the lung tissue. During transportation
8 of the patient from the interventional radiology
9 suite to the operating room, it could have been - - -
10 become dislodged from the lung yet still extruding -
11 - -

12 JUDGE SMITH: I see.

13 MR. DUNN: - - - outside. Have I answered
14 - - -

15 JUDGE SMITH: Okay, I get it.

16 MR. DUNN: Okay.

17 JUDGE GRAFFEO: So it's no longer attached
18 where he thought it was attached. Is that what
19 you're - - -

20 MR. DUNN: Correct.

21 JUDGE GRAFFEO: - - - trying to say?

22 MR. DUNN: The only - - - yes. The only
23 reason they were able to complete the procedure is we
24 know it was attached at some point because there was
25 an indentation in the lung tissue, so he could

1 sufficiently see the indentation in the lung tissue
2 where it was attached at one point, did the biopsy,
3 wedge biopsy of that area, continued with the
4 procedure. He did do a search, and again, he
5 visually searched, manually searched, and then made a
6 decision that that small piece of plastic wire, in
7 his experience, would not cause harm; that the
8 greater harm would be to extend the incision in the
9 chest wall and - - - and to make a larger procedure
10 under anesthesia time, a longer anesthesia time.

11 And I just submit that that's not a
12 decision that we're capable of making. And I would
13 just point out that even the plaintiff's own
14 testimony during the trial, she recognized that he
15 made a decision, and she said, I can't make that
16 decision as to whether that's a proper decision.

17 JUDGE PIGOTT: He discussed it with her?

18 MR. DUNN: After she awoke from anesthesia,
19 yes, Your Honor.

20 I see my time is up.

21 CHIEF JUDGE LIPPMAN: Okay. Thanks,
22 counselor.

23 Counselor, rebuttal?

24 MR. CARROLL: Yes, Your Honor. I would
25 point out that a wire is not a - - - normally a thing

1 ordinarily found in a person, and it usually does not
2 occur there absent negligence, and that the jury is
3 entitled to infer from its very presence, under the
4 Kambat decision - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
6 counselor, how do you get around the fact that the
7 whole focus is on his decision to leave it there?
8 That's what you emphasized what this case seems to be
9 about.

10 MR. CARROLL: Yes, it is what this case is
11 about.

12 CHIEF JUDGE LIPPMAN: And - - - and without
13 it - - -

14 MR. CARROLL: And that came subsequent to
15 any act of negligence which would - - - which - - -
16 which is more in a different group of facts; it
17 shouldn't exonerate a defendant from it. It's in the
18 area of facts that occur after he's already injured
19 the plaintiff and put her in harm's way, and he's
20 trying to straighten the mess out and get out of it.

21 CHIEF JUDGE LIPPMAN: Yeah, but - - -

22 MR. CARROLL: It's like having a car going
23 fifty miles an hour down a hill dodging trees.

24 JUDGE PIGOTT: But the intervent - - -

25 JUDGE RIVERA: But he's saying there are

1 all these other actors who have - - -

2 MR. CARROLL: They all occurred earlier.

3 JUDGE RIVERA: - - - in some way been
4 involved in this process.

5 MR. CARROLL: They all occurred earlier,
6 and we don't - - - and it's impossible to say what it
7 was, but they were all under the - - - what caused
8 that wire to become dislodged. He found it in the
9 chest wall wrapped around a muscle, okay? So no one
10 knows how it became dislodged or what happened or why
11 it didn't go in. It may have been wrapped around the
12 muscle when the - - - when the - - - when it was put
13 in. It may have happened in transit, may have
14 happened sitting there. We don't know. But that's
15 what res ipsa covers. And he said he was in control
16 of all the - - - of the operation in all its aspects
17 and the - - - if you read the - - - the transcript,
18 you will see that Mark said that control wasn't an
19 issue in the case at trial at that time.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you,
21 both.

22 MR. CARROLL: Thank you, Your Honor.

23 CHIEF JUDGE LIPPMAN: Appreciate it. Thank
24 you.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of James v. Wormuth, No. 126 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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