IN THE SUPREME COURT OF OHIO

JACQUELINE HOKE, et al.	*	**CASE NO. _____**
Appellants,	*	
vs.	*	
MIAMI VALLEY HOSPITAL, et al.	*	**ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS FOR MONTGOMERY COUNTY**
Appellees.	*	**CASE NO. CA 28462**

MEMORANDUM IN SUPPORT OF JURISDICTION

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PROPOSITIONS OF LAW

Proposition of Law: A recognized "risk of Surgery" or "complication of Surgery" is not a defense that a plaintiff in a medical negligence suit should be required to disprove as part of the plaintiff's case in chief.

STATEMENT OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case presents questions of public and great general interest because it raises questions regarding available defenses in medical negligence suits that have never been addressed by this Supreme Court. In addition, this case raises questions regarding the use of expert testimony during medical negligence trials that have not been resolved by the Ohio Courts. This case raises the question of whether the allegation that a particular poor result can be described as a "risk of surgery," or a "legitimate complication of surgery," can be presented to the jury during a medical negligence trial. If presented, is such an allegation an affirmative defense regarding which the defendant physician bears the burden of proof. Is it proper for the trial court in a medical negligence case to describe the defendant physician's position that "the injury was the result of a legitimate complication," if that allegation is not either an affirmative defense or a negation of one of the elements of the plaintiff's claims? The defendant should be required to show that the fact of a specific injury is a complication of surgery makes negligence less likely through statistical evidence regarding the occurrence of such injuries or through, at the very least, expert testimony that this is so.

Medical malpractice defendants have disingenuously invented a perfect defense, albeit one that is contrary to fundamental principles of American law. If they are allowed to use it there is no use for any plaintiff, such as those in this case, to bring any type of suit, no matter how horrific and disabling the injury is, even up to the point of death. It was all a complication of surgery, or a risk of surgery, or the plaintiff assumed the risk, or the plaintiff consented to the risk.

According to this theory, anything which happens during medical treatment, especially surgery, is because of a complication. The defense bar has proved, so they think, that there can be no negligence, and interchanges the terms with no negligence. This is a corruption of the law, and

evidentiary rules, and error for either an attorney or a trial court to adopt.

Building on the issue of medical negligence and tort reform, this case raises a question which, while esoteric for much of the public, goes directly to the issue of damages for medical negligence, which is the one issue that concerns every member of the public. This question, whether pension benefits can be used to offset lost earning capacity, has a huge potential effect on medical negligence verdicts, and involves interpreting one of the medical negligence tort reform statutes, R.C. 2323.41. In addition, the issue of whether unauthenticated medical records may be discussed, where there is no intention to introduce the records or the testimony of the physician who created them, may be arcane to the general public, but directly impacts the issue the public cares about: the jury verdict.

For all these reasons, this case presents questions of public and great general interest.

STATEMENT OF THE CASE

This case was originally filed by Plaintiffs-Appellants Jacqueline and James Jason Hoke[1] on March 28, 2014, and designated Case No. 2014 CV 1813. Discovery was conducted, but before the case went to trial Plaintiffs-Appellants voluntarily dismissed the case without prejudice on March 3, 2016. The Case was refiled January 17, 2017, and designated Case No. 2017 CV 283. Again, discovery was conducted, and the case went to trial on September 11, 2018. The trial lasted several weeks, and the jury returned a defense verdict on September 27, 2018. (Verdict Entry, entered Sept. 28, 2018)

Plaintiffs-Appellants filed a Motion for a New Trial and for Judgment Notwithstanding the Verdict. Arguments on the motions were heard by the trial court on May 29, 2019. On June 17, 2019, the trial court entered its decision denying the motions. Plaintiffs-Appellants filed a timely Notice of Appeal on July 15, 2019.

On June 19, 2020 the Second District Court of Appeals issued its Decision affirming the judgment of the Trial Court. Appellants filed a Motion for Reconsideration and Motion for En Banc Hearing. On August 13, 2020 the Second District Court of Appeals overruled Plaintiffs' motions.

STATEMENT OF FACTS

In November 2012, Plaintiff Jacqueline Hoke was referred to urogynecologist, Defendant-Appellee Debra Miller, M.D., by her gynecologist, Roberts Wood, M.D., because of a recurrent cystocele. She complained to Dr. Miller that she was having pressure/fullness in the vagina, trouble urinating and having bowel movements, feeling of fullness in the bladder with inability to empty her bladder. Following examination, Dr. Miller diagnosed Jacqueline with a Grade II cysourethocele and a mid-rectocele. Dr. Miller then explained the procedure that she planned to perform on Jacqueline Hoke and told her that she would like to use a robot to do the surgery because recovery time was less and it was less invasive. They discussed the risks of the mesh and Dr. Miller told her the risks weren't as high as they used to be, but they did not have any discussion concerning the complications of the procedure, itself and while Miller indicates that she advised Jacqueline Hoke of the risks of surgery and that usually notes in the record that she did so but in this case, she did not, Hoke does not recall any such conversations.

On April 1, 2013 Jacqueline Hoke presented to Miami Valley Hospital to undergo a robotic colposuspension with Restorelle mesh, transobturator tape, and posterior repair. Jacqueline Hoke was transported to the operating room and surgery began. As Dr. Miller was placing Gortex sutures she noted copious venous bleeding. Despite applying direct pressure to the left iliac vein for approximately one hour it continued to bleed. The surgery was converted to an open procedure and Dr. Garrietta Falls, a vascular surgeon, was called to repair the laceration. Dr. Miller admitted

at her deposition perforation of a vein does is not the standard of care, and that it is never acceptable.

Dr. Falls arrived in the operating room and found multiple tears in the left iliac vein in close association with the gortex suture used during the primary operation. Dr. Falls removed the pressure being applied and there was torrential bleeding. Dr. Falls continued to surgically repair the multiple venotomies in the left iliac vein adjacent to an area containing gortex suture and mesh. Surgery was completed and Jacqueline Hoke was taken to the PACU. During the procedure she lost approximately 1800 ml. of blood and received 3 units of packed red blood cells. She was thereafter transferred to the intensive care unit for further observation for the first night.

Mrs. Hoke remained hospitalized until April 7, 2013. During her hospitalization she experienced left lower extremity swelling with aching pain when she walked and underwent a Venous Doppler ultrasound that was reported as negative at the time. Upon arrival home, Jacqueline continued to have left leg pain and was not able to move around much. On April 19, 2013 she had her first posteroperative visit with Dr. Miller. At that time she still had swelling and pain in her left leg. Dr. Miller diagnosed her with left nerve trauma and told her to return the following week. No further testing was done at the time.

When Jacqueline returned to see Dr. Miller on April 26, 2013 the swelling in her left leg had continued to increase. Dr. Miller referred Jacqueline back to Dr. Falls who advised Dr. Miller to obtain a venous Doppler and CT Venogram of the left leg. The venogram confirmed extensive deep vein thrombosis in the external iliac, common femoral, proximal femoral, mid femoral, distal femoral, deep femoral, popliteal (above knee), popliteal (fossa), popliteal (below knee, posterior tibial, one soleal and one set of gastrocnemius veins of the left leg. There was also acute superficial venous thrombosis identified in the left saphenous vein at the sapheno femoral junction vein.

Hoke was admitted underwent angiojet thrombectomy and placement of a thrombolysis catheter with insertion of an IVC filter. Jacqueline was discharged from Miami Valley Hospital requiring Coumadin and Lovenox. She received injections of blood thinners twice daily and had to have her blood tested.

On October 28, 2013, Jacqueline was diagnosed with post thrombotic syndrome, affecting her left leg, by Michael Go, M.D., a vascular surgeon at the Ohio State University Medical Center. He explained to her that she would continue to have symptoms for the remainder of her life and advised her that they should focus on symptomatic improvement to the point she was able to complete her normal activities of daily living.

Hoke received extensive medical and psychological treatment thereafter, including treatment at the Cleveland Clinic, pain management, and extensive psychological counseling. She was unable to properly perform her job duties and eventually lost her job at Lexis because of her inability to work.

At the trial of the matter there was significant testimony about complications of surgery. Hoke maintained that she was not advised of the complications of surgery. Plaintiffs experts testified that a complication resulting from the physician's failure to properly identify landmarks is negligence. Even defense experts testified that not all complications of surgery are without negligence.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A "Risk of Surgery" or "Complication of Surgery" is not a defense that a plaintiff in a medical negligence suit should be required to disprove as part of the plaintiff's case in chief.

In its decision in this case, the Second District Court of Appeals reaffirmed its decision in *Witzmann v. Adam*, 2d Dist. Montgomery No. 23352, 2011-Ohio-379, and held that testimony that Ms. Hoke suffered a "recognized complication" may be used to rebut the allegation of negligence in a medical malpractice claim. The Court also reaffirmed its position, first stated in *Witzmann*, that the defense of a recognized complication is not an affirmative defense. *Id*. at ¶¶ 48-49. The court of appeals' decision is inconsistent with precedents of this court regarding burden's of proof for medical causation, with long-standing principles of evidence and tort liability and with fundamental; fairness.

The sole matter at issue in a medical malpractice case is whether or not the physician injured his patient by failing to act as a prudent physician would under the circumstances. *See Lewis v. Toledo Hosp.,* 6th Dist. Lucas No. L-03-1171, 2004-Ohio-3154. In medical malpractice cases, trial courts should exclude any evidence that does not make it more or less likely that the physician met the standard of care. See Ohio Evid. R. 401; *Cromer v. Children's Hosp. Med. Ctr. Of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921 (As part of their standard of care, medical professionals are expected to be able to recognize certain symptoms of illness and injury, and they are expected to be aware of the associated risk of harm).

Medical testimony on the issue of causation must be stated in terms of probability of a causal relationship. *Fox v. Industrial Com. of Ohio*, 162 Ohio St. 569, 580, 125 N.E.2d 1, 7 (1955); *Bishop v. Ohio Bur. of Workers' Comp*., 146 Ohio App.3d 772, 784, 2001-Ohio-4274, 768 N.E.2d 684 (10th Dist.) ("The admissibility of expert testimony that an event is the proximate cause is contingent upon

the expression of an opinion by the expert with respect to the causative event in terms of probability."); *quoting Stinson v. England*, 69 Ohio St. 3d 451, 633 N.E.2d 532 (1994), paragraph one of the syllabus; *Wells v. Miami Valley Hosp*., 90 Ohio App.3d 840, 631 N.E.2d 642 (2d Dist. 1993). In this case, unopposed admissible evidence was admitted that the operation on Mrs. Hoke was the proximate cause of the bleeding, DVT, post-thrombotic disorder, swelling, pain, complex regional pain syndrome, post-traumatic stress disorder, other psychological and psychiatric injuries, and general pain and suffering.

Magic words are not needed to express opinions within terms of probability. *Frye v. Weber & Sons Serv. Repair*, 125 Ohio App. 3d 507, 514, 708 N.E.2d 1066 (8th Dist. 1998). However, there still must be evidence of any alternative theory stated within terms of reasonable probability or certainty. Such testimony cannot be stated as a conclusion, or assumed within terms like negligence, non-negligence, risk of surgery, etc. It is error for the trial court to admit any testimony or argument regarding causation which is not stated within terms of reasonable medical certainty or probability. *Cunningham v. St. Alexis Hosp. Med. Ctr.*, 143 Ohio App. 3d 353, 364, 758 N.E.2d 188, 196 (8th Dist. 2001); *Azzano v. O'Malley-Clements*, 126 Ohio App. 3d 368, 375, 710 N.E.2d 373, 377 (8th Dist. 1998); *Becker v. Lake County Mem. Hosp. W*., 53 Ohio St. 3d 202, 207, 560 N.E.2d 165, 170 (1990).

A physician can cause his or her patient to suffer a "recognized complication" of a medical procedure by failing to meet the appropriate standard of care. Because physicians can cause "recognized complications" by failing to meet the appropriate standard of care, merely establishing that the injury Mrs. Hoke suffered is a "recognized complication" of the surgery did not make it any more or less likely that Dr. Miller committed malpractice. It simply confused the trier of fact into thinking that liability does not attach to "recognized complications," even when the tortfeasor failed

to meet the standard of care. Accordingly, the court below should have excluded any evidence regarding whether or not damage to the iliac vein is a "recognized complication" of the surgery.

According to the ruling in *Stinson v. England*, 69 Ohio St.3d 451, 633 N.E.2d 532 (1994), the trial court should have excluded any testimony that Mrs. Hoke's injury is a "recognized complication" of the surgery. *See id.* That testimony invites speculation as to why Mrs. Hoke suffered the injury. It suggests that any damage to her iliac vein occurred as a natural consequence of the procedure simply because that injury occurs very rarely without malpractice. In effect, that testimony would circumvent the standards for expert testimony set forth in *Stinson* by allowing the expert to suggest an alternative theory of causation without establishing that his theory is more probable than the Plaintiffs' theory. *See id.* Accordingly, the trial court should have forbidden the Defense experts from testifying that Mrs. Hoke's injury is a "recognized complication" of the surgery.

The *Witzmann* decision is itself poorly reasoned and should be overruled and/or clarified by this Court to avoid further confusion and the injection of prejudicial error by the defense bar on the use of phrases like "complication of surgery", "risk of surgery", "assumption of risk" and the misuse of an affirmative defense by the defense as a sword and shield, and the uses of "complication of surgery", etc. as simply a synonym for negligence (thereby allowing the defense experts to substitute complication of surgery as a synonym for negligence, simply using placing the conclusion of law and the ultimate issue to usurp the jury's function as finder of fact.

In *Loura v. Adler*, 105 Ohio App. 3d 634, 638, 664 N.E.2d 1002, 1004 (1st Dist. 1995); citing *Kurzner v. Sanders*, 89 Ohio App. 3d 674, 627 N.E.2d 564 (1st Dist. 1993) the First District Court of Appeals held that placing the burden of disproving other causes of negligence upon the plaintiff is improper. Trying to claim, without evidence and in the face of the physical facts, that an injury is

the result of a "complication" or "risk" is simply putting the burden of proof of this alternative cause on the plaintiff when the facts are uniquely within the knowledge of the defendant.

> In *Kurzner*, this court discussed a plaintiff's burden in negligence actions involving a multiplicity of possible causes, some attributable to the defendant's negligence and others not. 89 Ohio App. 3d at 682-683, 627 N.E.2d at 569-570. As we noted in *Kurzner*, in such cases a distinction must be drawn between a plaintiff who introduces positive evidence from which the jury can infer a cause attributable to the defendant's negligence and a plaintiff who does not present such evidence. Only in the latter case is it incumbent upon the plaintiff to produce evidence "which will exclude the effectiveness of those causes for which defendant is not legally responsible." *Gedra v. Dallmer Co.*, 153 Ohio St. 258, 91 N.E.2d 256 (1950), paragraph two of the syllabus.

Loura, 105 Ohio App.3d at 638. Even with a proper instruction on proximate cause, forcing the plaintiff to disprove other causes is reversible error. *Id.* Here, the proper instructions, as requested by Appellants, were ignored and not given. The *Loura v. Adler* rule was also violated by placing the burden upon Plaintiffs to disprove the presumption that a "complication or risk of surgery" occurs without negligence.

In the case of a plaintiff who is able to produce positive evidence of the defendant's negligence as a cause for his or her injury, there is no additional burden on the plaintiff to produce evidence to negate other causes. "Where the plaintiff has established facts from which an inference of negligence can properly be drawn, the plaintiff does not have to disprove all other possible causes to prevail. *** [Such a jury instruction] placed an improper burden of proof on the plaintiff and requires a reversal." *Loura*, 105 Ohio App.3d 634, 638-639, quoting *Kurzner,* 89 Ohio App.3d at 683. To "impose on a plaintiff the burden of always effectively eliminating all other possible causes in order to make his case, *** would impose a burden of proof analogous to the burden in criminal cases of proof beyond a reasonable doubt." *Westinghouse Electric Corp. v. Dolly Madison Leasing & Furniture Corp.*, 42 Ohio St.2d 122, 127, 326 N.E.2d 651 (1975). To require every medical negligence plaintiff to disprove allegations of "risk" or "complication" of surgery would be to place

an impossible burden on every medical negligence plaintiff. However, this is what the trial and appellate courts' decisions do. For this reason this case is of public and great general interest.

In the case at bar, Plaintiffs moved the court before trial for an order in limine barring Defense experts and counsel from using the term "recognized complication" while testifying and/or conducting examinations. When the term was used at trial, Plaintiffs objected. (Tr. Vol. 2, p. 161, 355, 362, 364, Vol. 7, p. 1094, Vol. 8, p. 1185-1187, 1202, Vol. 11, p. 1596-1597, Vol. 12, p. 1679, 1767, Vol. 15, p. 2116, 2120-2121, Vol. 16, p. 2294, 2298-2300, 2303-2304, 2336, Vol. 18, p. 2676, Vol. 19, p. 2774, 2813)

The evidence proffered at trial, taken together with the undisputed facts, tipped overwhelmingly in Plaintiffs' favor. While it is obviously impossible to climb into jurors' minds, it is probable that upon hearing words such as "recognized complication" countless times from Dr. Miller, Defense counsel, and Defense experts, that the jury believed that the injury Mrs. Hoke suffered was somehow a natural consequence of the surgery, or that Dr. Miller only took "acceptable risks" during surgery. Those kinds of considerations undeniably distracted the jury from the issue of whether or not Dr. Miller met the standard of care, and they encouraged the jury to find for the Defendants for reasons unrelated to the real legal issues underlying this case.

The error in this case began with this leading examination of the Defendant, Dr. Debra Miller, at the beginning of her defense at her deposition:

> Q. So any vascular injury while during surgery would not be outside the surgical standard of care?
>
> A. A complication during surgery is not outside the standard of care.

Depo. Miller, p. 83. This, of course, is patently erroneous. Thereupon, using a clever interchange of terms, the Defendants blamed this horrific injury solely upon the alleged complete defense of

complication of surgery, risk of surgery, assumption of the risk, unavoidable injury, and other interchangeable terms during the trial. These illegal forms of defense were utilized: in pleadings, in voir dire, in opening statements, in objectionable questions sustained by the trial court, in the testimony of Dr. Miller and the defense experts throughout the trial.

In the case at bar Dr. Miller, and all her experts, and all of Plaintiffs' experts, testified that they had never heard of a surgeon causing damage to the iliac vein in a simple colposuspension procedure, robotic or not, except in the case at bar.[1] Indeed, Dr. Miller quit doing any robotic procedures after the malpractice committed upon Jacqueline Hoke.

The defense disingenuously attempted to equate ordinary bleeding with the horrific injury done to Mrs. Hoke's iliac vein. In this case there was no evidence that injury to the iliac vein occurred in performance of a colposuspension procedure at any measurable rate. Yet the injury was described as a complication of the procedure. If the concept of a recognized complication or risk of surgery is to be useful to the jury, the Defendant must show its relevance and that the fact, in this case, makes negligence less likely. The burden should lie with the Defendant or the evidence should be excluded.

"The defense of unavoidable accident 'merely negatives negligence and may be shown under a general denial.'" *McLain v. Ford,* 115 Ohio App. 69, 72, 184 N.E.2d 530 (5th Dist. 1961).

[1] Andrew Hundley, M.D. Vol. 12, Page 1702 ("I've never had experience treating a patient with a DVT following a colpopexy"); Peter Rosenblatt, M.D., Vol. 17, Page 2370 ("Q.: In your thousands of surgeries and many teachings and with all your residents and teachers, you've never cut a left iliac vein, have you? A.: I have not."); Andrew Huffman, Vol. 18, Page 2540-41: Has never seen a left iliac vein cut in the over 5,000 robotic cases he assisted with.; Debra Miller, M.D., Vol. 16, Page 2220: ("Q.: Had you ever hit the left iliac vein before? A: In 27 years, no. Q: It's the only time? A: Correct."); Earl Pescatore, D.O., Vol. 4, p, 572 ("Doctor, how many sacrocolpopexy robotic surgeries -- in the hundreds that you've done -- you've already told us. How many times have you lacerated the iliac vein? A None."); Steven McCarus, M.D., Vol. 8, p. 1136 ("This is the first time I've ever reviewed a case where the left common iliac vein was injured on a sacrocolpopexy."); Mary DuPont, M.D., Vol. 10, p. 1364.

Thus an allegation that an injury is a "risk" or "complication" of surgery is not a defense to medical negligence. *See Waller v. Aggarwal* (1996), 116 Ohio App.3d 355, 357, 688 N.E.2d 274 ("We can find no law which states that informed consent constitutes an affirmative defense.") Rather, the allegation that an injury is a known risk or complication of a given surgery is only a defense to an informed consent claim, and then only when the risk has been disclosed to the patient. *Id*. For this reason, this case presents a question of what defenses are available in different types of medical malpractice claims, and thus presents a question of public and great general interest.

The other alternative to resolving the issue discussed above, is that an allegation that an injury is a "risk" or "complication" of surgery must be treated as an affirmative defense, and the burden of proof on the issue must rest on the defendant physician. As stated above, a plaintiff cannot be forced to disprove every potential cause of injury. *Westinghouse Electric Corp.*, 42 Ohio St.2d at 127. Thus, if a defendant physician wishes to allege that the plaintiff's injury "just happened" because similar injuries happen during this particular sort of surgery, the defendant must bear the burden of proving that such an injury can and does occur in the absence of negligence. To hold otherwise would be to violate this Supreme Court's holding in *Westinghouse*, *supra*. Thus, for the same reason the above proposition of law presents a question of public or great general interest, this proposition of law does also.

As discussed above, the defense of unavoidable accident is not actually a defense, it is a "negative" of negligence, alleging that the defendant did not breach his or her duty to the plaintiff. *McLain*, 115 Ohio App. at 72. This does not change the fact that the burden of proof for such an allegation rests on the defendant, as the plaintiff cannot be forced to disprove every possible cause of his or her injury. *Westinghouse Electric Corp.*, 42 Ohio St.2d at 127. \

Furthermore, whether a matter is a complication of surgery is only known by the medical

defendant, and medical profession. To refuse to require such a defense to be plead and presented as an affirmative defense stands the burden or proof on its head and requires the plaintiff to rebut matters solely within the knowledge and possession of the medical defendant/defense. The composition of the different complications that are, and are not, within the standard of care are solely in the possession of the surgeon and hospital in the case at bar.

The use of complications as a defense in the case at bar was done so without any definition. The defense just used the naked term as in defined issue for a complete defense and expert opinions in support. The complication issue requires testimony. In the vast majority of cases, like the one before the Court, are complications that result from negligence/malpractice. It would be up to the defense to advise the jury what percentages are recognized as resulting from negligence, and what percentages are not. This was not done in the trial below. The fact is that no expert knew of injury being present in their training, experience and education as being within the standard of care. It was not.

It was up to the defense to quantify what percentage of complications were due to non-negligence (foundation evidence under Evid. R. 703) or other factors than negligent surgery. To place the burden of proof on the plaintiff below as contrary to law. The fundamental mistake was a structural error. The attempt to require the Appellants to disprove the mere complication defense creates structural error. The defense must define its terms and present literature and/or statutes to provide its affirmative defense. "The law is well-settled that a party asserting an affirmative defense bears the burden of proving the defense." *Portfolio Recovery Assoc., LLC v. VanLeeuwen*, 2d Dist. Montgomery No. 26602, 2016-Ohio-2962, ¶ 73, citing *Moffitt v. Litteral*, 2d Dist. Montgomery No. 19154, 2002-Ohio-4973, p. 21; see, also *Dykeman v. Johnson*, 83 Ohio St. 126, 135, 93 N.E. 626, 628 (1910).

In Ohio, such affirmative defenses, honest mistake, error as honest error, or mistake in judgment, consent to negligence have all been rejected as defenses at all, let alone affirmative defenses. *Kurner*, 89 Ohio App. 3d 674; *Lambert v. Shearer*, 84 Ohio App. 3d 266, 616 N.E.2d 965 (10th Dist. 1992); OJI CV 417.01 (2) Comment and (7) Comment. Material risks such as complications will normally include the hazards naturally arising from the proposed procedure. OJI, CV 417.05(4). The concept of a "recognized complication" is akin to these rejected affirmative defenses in that it overrides the evidence that negligence caused the Plaintiff's injuries.

CONCLUSION

Interjection of the concept of a recognized complication or risk of surgery creates a presumption that harm to the plaintiff occurred in the absence of negligence. A plaintiff in a medical negligence suit should not be required to disprove as part of the plaintiff's case in chief that an injury was more than a "risk of surgery" or "complication of Surgery." Where the risk of Surgery" or "complication of surgery" defense is raised, the burden should lie with the defendant in showing that such a circumstance more often than not in the absence of negligence. Otherwise, such evidence is irrelevant and confusing and should be excluded from the jury. For these reasons, and for the reasons discussed above, this case involves a matter of public and great general interest. Appellants requests that this court accept jurisdiction in this case so that the important issue presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served the following counsel of record via regular U.S. Mail on the date of filing same, this 25th day of September 2019:

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