



The Voice

And The Defense Wins

Published 2-11-15 by DRI

Joyce Edelman



DRI member [Joyce Edelman](#), a partner with **Porter Wright Morris & Arthur LLP** in Columbus, Ohio, secured a successful conclusion for the American Red Cross in a personal injury suit.

After victories at trial and in the Sixth Circuit Court of Appeals, the American Red Cross achieved closure when the U.S. Supreme Court denied the plaintiff's petition for writ of *certiorari*. Plaintiff, a blood donor who alleged that the Red Cross was negligent in performing a blood draw, sought U.S. Supreme Court review of the Sixth Circuit's decision in *Ross v. American Red Cross*, Case No. 12-4312, which had affirmed the District Court's rulings and upheld the jury's verdict in favor of the Red Cross. Edelman and her firm served as counsel to the Red Cross in both the trial and appellate court proceedings that lasted six years.

In earlier proceedings, Ross brought a one-count negligence action against the Red Cross in state court in Ohio, and the Red Cross removed the case to the U.S. District Court for the Southern District of Ohio. Ross alleged that the Red Cross was negligent in conjunction with a blood donation and caused a permanent nerve injury.

Ross sought compensatory and punitive damages against the Red Cross during a nine-day jury trial in July 2012. Deliberations lasted less than one hour, with the jury returning a verdict in favor of the Red Cross. The District Court denied Ross's post-trial motion to amend the complaint—premised on the assertion that the parties had tried unpleaded claims during trial—and for a new trial.

Ross appealed to the Sixth Circuit, asserting various assignments of error based on rulings made by the District Court before, during, and after trial. A unanimous Sixth Circuit panel affirmed the District Court's rulings on all counts, thoroughly assessing each assignment in turn in a 31-page decision. The court's most notable rulings related to expert disqualification and the doctrine of *res ipsa loquitur*.

In a matter of first impression in the Sixth Circuit, the panel found that the federal judiciary had inherent power to disqualify an expert if the adversary had a confidential relationship with the expert and had disclosed to the expert confidential information relevant to the litigation. The panel then affirmed the disqualification of a former Red Cross in-house attorney, whom the plaintiff had named as an expert witness.

The Sixth Circuit also found that the trial court did not abuse its discretion by refusing to give a *res ipsa loquitur* jury instruction. Under Ohio law, *res ipsa loquitur* does not apply where there are two equally efficient and probable causes of injury, one of which is not attributable to negligence. The panel observed that the experts at trial had provided conflicting testimony as to whether Ross even had a nerve injury, whether the Red Cross was negligent, and whether Ross was injured as a result of any negligence. Consequently, *res ipsa loquitur* instruction was inappropriate here.

After the panel issued its decision, the Sixth Circuit denied Ross's petition for rehearing *en banc*. In June 2014, the plaintiff filed a petition for writ of *certiorari* to the United States Supreme Court. The Court denied the petition in October 2014.

To learn more about DRI, an international membership organization of attorneys defending the interests of business and individuals in civil litigation, visit www.dri.org.