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STATEMENT OF FACTS

On November 17, 1993, Rosemary Schmidt presented herself to the Lafayette Regional Health Center Emergency Department in Lafayette County, Missouri complaining of a headache. L.F. 1, 16, 33. The staff nurse on duty questioned Schmidt about her symptoms, took a history and checked her vital signs. L.F. 73-74. Schmidt was then seen and treated by a physician, who refused Schmidt's request for a narcotic because Schmidt was suspected of abusing narcotic drugs. L.F. 77. Instead, the physician instructed the nurse to give Schmidt five milligrams of Compazine, a non-narcotic drug, to treat her headache. L.F. 16, 25, 33. Schmidt told the nurse that she had someone to drive her home. L.F. 74.

After receiving the Compazine, Schmidt simply walked out of the emergency department without waiting to be discharged. L.F. 16, 33. Standard operating procedure is to advise the patient at the time of discharge both orally and in writing about any medication the patient receives. L.F. 53. Part of this discharge process also involves checking the patient for side effects and determine whether the medication provided the intended relief. L.F. 53. Because Schmidt left before being discharged, she did not receive this warning and was not checked for side effects to make sure that the Compazine was relieving the pain that it was designed to treat. L.F. 53, 73.

After Schmidt left the hospital, as she was driving southbound on Missouri Highway 13, her vehicle crossed the center line and struck the vehicle being driven by plaintiff/appellant Felicia Robinson. L.F. 16, 33. Schmidt claims not to recall anything about the accident. L.F. 16. An investigating police officer found an empty beer container in Schmidt's car after the accident. L.F. 16, 33. Schmidt admitted to drinking before the accident. L.F. 16, 33.

Felicia Robinson sued respondent Health Midwest Development Group d/b/a Lafayette Regional Health Center ("LRHC") for negligence in rendering medical treatment to Schmidt. L.F. 6. Neither Schmidt nor the physician who treated and ordered the drugs to be given to her was a party to this lawsuit. L.F. 6. Robinson alleged that her "cause of action arose from medical treatment, or the lack of proper medical treatment, rendered to ... Schmidt ..." and that LRHC "failed to exercise that degree of care in the providing of medical care that a health care provider and/or hospital would ordinarily use under the same or similar circumstances ..." L.F. 7, 8.

The case was tried to a jury in July 1999 but the jury was unable to reach a verdict and the court declared a mistrial. L.F. 3. Before the second trial began, LRHC filed a motion for summary judgment on the basis that it did not owe a duty to Robinson as a matter of law. L.F. 15. None of the uncontroverted facts in LRHC's motion were controverted by Robinson. L.F. 33.

The trial court granted LRHC's motion for summary judgment, and in addition, the court held that "in the alternative, upon review of this cause of action, the Court now questions whether plaintiff presented a submissible case against defendant, and it is the finding of the Court that defendant's Motion for Directed Verdict at the close of plaintiff's case and again at the close of all of the evidence should have been sustained." L.F. 154.

Robinson appealed the court's Judgment to the Missouri Court of Appeals, Western District. L.F. 155. The Western District handed down its Opinion on March 6, 2001, but modified it on May 1, 2001. This Court then sustained LRHC's application for transfer and ordered the Western District to transfer the case to this Court.

POINTS RELIED ON

I. The Trial Court Did Not Err in Granting Summary Judgment to LRHC Because LRHC Did Not Owe a Duty to Felicia Robinson In That LRHC Did Not Have a Physician/Patient Relationship with Ms. Robinson and Health Care Providers Do Not Owe a Duty to the General Public In the Care and Treatment of a Patient

Matt v. Burrell, Inc., 892 S.W.2d 796 (Mo. App. 1995)

Millard v. Corrado, 14 S.W.3d 42 (Mo. App. 1999)

Sherrill v. Wilson, 653 S.W.2d 661 (Mo. banc 1983)

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Bradley v. Ray, 904 S.W.2d 302, 312 (Mo. App. 1995)

Bunker v. Association of Missouri Elec. Coops.,

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Werner v. Warner, Stafford & Seaman, 659 So.2d 1308 (Fla. App. 1995)

Wilson v. Lockwood, 711 S.W.2d 545, 571 (Mo. App. 1986)

§ 516.105, R.S. Mo.

§ 516.120, R.S. Mo.

§ 537.053, R.S. Mo.

§ 538.205, R.S. Mo.

II. The Trial Court Did Not Err in Granting Summary Judgment to LRHC For The Separate Reason That Felicia Robinson Could Not Prove Causation As a Matter of Law In That Schmidt's Own Conduct Constituted an Independent and Intervening Cause of Robinson's Injuries

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993)

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854 S.W.2d 371 (Mo. banc 1993)

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Millard v. Corrado, 14 S.W.3d 42 (Mo. App. 1999)

Vann v. Town Topic, Inc., 780 S.W.2d 659 (Mo. App. 1989)

§ 537.053.1, R.S. Mo.

ARGUMENT

I. The Trial Court Did Not Err in Granting Summary Judgment to LRHC Because LRHC Did Not Owe a Duty to Felicia Robinson in That LRHC Did Not Have a Physician/Patient Relationship with Ms. Robinson and Health Care Providers Do Not Owe a Duty to the General Public In the Care and Treatment of a Patient

The trial court correctly granted summary judgment to LRHC because there is no basis for a medical negligence claim here in that Felicia Robinson did not have a physician/patient relationship with LRHC and thus it did not owe her a duty as a matter of law. Robinson did not plead general negligence, but even if she had, there is also no basis for a general negligence claim here because Missouri law does not support a duty by a health care provider to the general public. Because no duty exists as a matter of law, the trial court's entry of summary judgment should be affirmed.

A. Standard of Review

Review of a summary judgment order entered in a court-tried case is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "Summary judgment proceeds from an analytical predicate that, where the facts are not in dispute, a prevailing party can be determined as a matter of law." *Id.* Summary judgment is proper where there is

no genuine dispute as to any material fact, and the moving party has shown that it is entitled to judgment as a matter of law. *Id.*; Rule 74.04(c)(3). The parties do not dispute any of the material facts relevant to this appeal.

B. There Is No Basis For a Medical Negligence Claim Here

A negligence action cannot state a claim unless some duty was owed by the defendant to the plaintiff. Missouri courts have held that “the existence of a duty owed by the defendant to the plaintiff is the cornerstone of any negligence action.” *Snelling v. Middleton*, 706 S.W.2d 891, 892 (Mo. App. 1986). The existence of a duty is a matter of law to be determined by the Court. *Burns v. Black & Veatch Architects, Inc.*, 854 S.W.2d 450, 453 (Mo. App. 1993). For a duty to exist, the plaintiff must show “the existence of a relationship between the plaintiff and defendant that the law recognizes as the basis of a duty of care.” *Bunker v. Association of Missouri Elec. Coops.*, 839 S.W.2d 608, 611 (Mo. App. 1992). “In order to maintain a cause of action in tort against a doctor, *appellant[] must first establish a physician/patient relationship.* The physician/patient relationship gives rise to the duty of care.” *Richardson v. Rohrbaugh*, 857 S.W.2d 415, 417-18 (Mo. App. 1993) (emphasis added) (citations omitted).

In this case, there was no physician/patient relationship between Felicia Robinson and LRHC to give rise to a duty to support a medical negligence claim. Robinson does not even contend that LRHC owed her a duty arising out of a

physician/patient relationship. Because a physician/patient relationship is necessary to assert a medical negligence claim, and because that relationship is absent here, there is no basis in Missouri law for Robinson to assert a medical negligence claim against LRHC.

C. There Is No Basis For a General Negligence Claim Here

Recognizing that Missouri law does not support the claim pleaded in her petition, Robinson now seeks to change the nature of her claim from medical negligence to general negligence. Because she now acknowledges that no medical negligence claim exists, Robinson relies on the alleged foreseeability of this accident in requesting the Court to create a duty to the general public based on a public policy exception. This argument must fail for three reasons: (1) Robinson did not plead a general negligence claim, only medical negligence; (2) general negligence principles cannot give rise to a duty to the public at large for acts involving the medical care and treatment of a patient; and (3) regardless, public policy does not support imposing a duty here.

1. Robinson Did Not Plead General Negligence

Robinson's petition against LRHC contains only one count. The allegations of that sole count set forth specific allegations of medical negligence. As described in Robinson's Appellant's Brief, "Schmidt was given treatment by defendant's employees and agents, but such treatment was negligently administered"

Appellant's Br., p. 3. The petition itself states that Robinson's "cause of action arose from medical treatment, or the lack of proper medical treatment, rendered to ... Schmidt ..." and that LRHC "failed to exercise that degree of care in the providing of medical care that a health care provider and/or hospital would ordinarily use under the same or similar circumstances" L.F. 7, 8.

A claim based on the negligent care and treatment of a patient is a medical negligence claim, not a general negligence claim. Even if a health care provider can, in some circumstances, owe a duty to a person other than the patient, such a claim is still a medical negligence claim if it is based on the medical care or treatment rendered to a patient.

Whether a claim such as the one in this case is treated as a medical negligence claim or a general negligence claim carries very significant consequences. Under § 538.205 *et seq.*, R.S. Mo., medical malpractice claims are subject to a two-year as opposed to a five-year statute of limitations and the amount of recoverable damages is capped. The overall significance of a change in the statute of limitations and the existence of a damage cap will be an immediate issue for all health care providers in determining proper insurance coverage.

The distinction between a medical negligence claim and a general negligence claim is not insignificant. For example, a medical negligence claim must be supported by a medical expert affidavit filed within 90 days of filing the petition.

§ 538.225. Robinson obviously intended to assert medical negligence because she filed this expert affidavit, setting forth a purported expert medical opinion that LRHC did not meet the standard of care in the treatment of a patient. Medical negligence claims are also subject to a shorter statute of limitations than general negligence claims. *Cf.* § 516.105 (2 years for medical negligence claims) with § 516.120 (five years for general negligence claims). Medical negligence claims are also subject to a statutory damages cap that does not apply to general negligence claims. § 538.210. Sections 538.205 *et seq.* contain other provisions that only apply to medical negligence claims, all of which apply to Robinson's claim for negligent treatment or negligent failure to treat Schmidt.

Nothing in Robinson's pleading put LRHC on notice of any general negligence claim. As shown by the critical distinctions between a medical negligence and general negligence claim, Robinson should not be allowed to pursue a general negligence claim.

2. General Negligence Does Not Apply to Acts Involving the Medical Care and Treatment of a Patient

Robinson argues on appeal that under a general negligence theory she can establish a duty on the part of LRHC to the general public. Robinson argues that because it was allegedly foreseeable that Schmidt would be unfit to drive after receiving medication that could make her drowsy and because the public policy of

the state is to prevent people from driving who are unfit to do so, the duty to warn a patient of the effects of medication should run not just to the patient, but also to the public at large. Missouri courts, including this one, have repeatedly rejected similar arguments.

In the first such case, this Court held that “physicians should not be held liable for even foreseeable civil damages simply because they might be found to have exercised negligent professional judgment” because “an ‘actual holding of liability would have worse consequences than the possibility of actual mistake.’” *Sherrill v. Wilson*, 653 S.W.2d 661, 667 (Mo. banc 1993). There, the plaintiff was attempting to hold physicians at a state mental institution liable for allowing a dangerous patient to leave on a weekend pass who, after not returning from leave, murdered the plaintiff’s son. *Id.* at 662. For purposes of its decision, the Court assumed that the physicians were grossly negligent in allowing the patient to leave on pass and that the patient’s presence in the general public was dangerous to the public at large. *Id.* at 663-64. The issue on appeal was the same as the issue here—“whether the treating physicians owed such a duty to the general public ... as to give rise to a civil action by a member of the general public for negligent exercise of judgment.” *Id.* at 664.

In deciding this issue, the Court analyzed similar cases from other jurisdictions. The Court concluded that there was an important distinction in such

cases between releasing a patient “who is known to pose a threat to ‘a foreseeable or readily identifiable target’ and one who is alleged to be dangerous to the public generally.” *Id.* at 666 (citations omitted). The Court was unwilling to impose liability when the danger was to the public generally, stating “It would probably not be difficult in many cases to make a case for the jury as to the foreseeability of injury, but this is not sufficient to establish a duty to the public at large.” *Id.* at 668.

This issue next arose in *Matt v. Burrell, Inc.*, 892 S.W.2d 796 (Mo. App. 1995). There, a patient presented herself to a psychiatric rehabilitation center and told the doctor and mental health professionals who were treating her that she was going to leave the facility and kill herself by wrecking her car. *Id.* at 798. The patient then left the facility in her car and collided with and killed another person. The decedent’s family sued the center, the doctor and the mental health professionals in a wrongful death action for negligently discharging the patient and/or failing to restrain her from leaving. *Id.* at 797-98. The court rejected a “narrow” reading of *Sherrill* that it simply involved “official immunity issues” involving a state hospital and state employees and instead reaffirmed that health care providers do not owe a duty to the general public. *Id.* at 801 (citing *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443 (Mo. banc 1986) (*Sherrill* held “that treating physicians owed no tort duty to members of the general public regarding the decision to release a mental patient under involuntary commitment.”))).

LRHC does not contest that under Missouri law a physician (though not a hospital¹) has a duty to warn a patient about the effects of medical care and treatment. But that duty does not extend to the public at large. At most, a duty to warn can only run to a readily identifiable person or a discrete class of persons. *Bradley v. Ray*, 904 S.W.2d 302, 312 (Mo. App. 1995) (a psychologist owed a duty to warn a “readily identifiable victim” that a patient intended to harm the intended victim); *see also Werner v. Warner, Stafford & Seaman*, 659 So. 2d 1308 (Fla. App. 1995) (under similar facts as this case found that physician owed no duty to “driving public at large”). *Bradley* provides no assistance to Robinson, however, because she

¹ It is only the physician, not the hospital, who owes the duty to inform/warn because it requires the exercise of medical judgment reserved to the physician. “The hospital has no duty to inform the patient of the risks involved in surgery and the possible alternative methods of treatment merely because it furnishes the patient with the consent form. ... The duty to inform rests with the physician and requires the exercise of delicate medical judgment. The hospital is not required to interfere with the physician-patient relationship.” *Ackerman v. Lerwick*, 676 S.W.2d 318, 320-21 (Mo. App. 1984) (emphasis added) (citing *Roberson v. Menorah Med. Ctr.*, 588 S.W.2d 134 (Mo. App. 1979) (duty belongs to physician, not to hospital); *see also Wilson v. Lockwood*, 711 S.W.2d 545, 571 (Mo. App. 1986) (same).

was not a readily identifiable person or discrete class of people whom Robinson might have harmed by her erratic driving.

In finding a duty to the public as a whole, the Court of Appeals below relied on *Gooden v. Tips*, 651 S.W.2d 364 (Tex. App. 1983), which found a duty to the general public on similar facts. The continuing validity of *Gooden*, however, is questionable at best. The Texas Supreme Court subsequently refused to apply *Gooden* and declined to extend a physician's duty to the general public based on its analysis of Texas's version of Missouri's 6-factor test (discussed *infra*) for imposing a duty based on public policy. *Praesel v. Johnson*, 967 S.W.2d 391, 397-98 (Tex. 1998). Part of the Texas Supreme Court's analysis was a criticism of *Gooden* for relying on an Iowa case, *Freese v. Lemmon*, 210 N.W.2d 576 (Iowa 1973) (which was also relied on by the Court of Appeals below in this case), which the Texas court found merely decided a pleading issue and did not actually find that a duty existed. 967 S.W.2d at 397. Further, the concurring opinion in *Praesel* stated, "When stripped of its duty-to-warn language, *Gooden* simply holds that a physician owes a duty to a third party to not negligently treat a patient. In light of our holdings in *Edinburg* and *Bird*, *Gooden* cannot be good authority and we should make that clear to the courts of this state." *Id.* at 399.

The only case holding that a physician can owe a duty to the general public involves allegations of general negligence rather than medical negligence. Two

years ago the Missouri Court of Appeals, Eastern District, held that “*when the physician’s allegedly negligent acts or omissions do not involve a matter of medical science*, a duty may also exist when public policy favors the recognition of a duty or when the harm is particularly foreseeable.” *Millard v. Corrado*, 14 S.W.3d 42, 47 (Mo. App. 1999) (emphasis added). *Millard* has no application here.

In *Millard*, the defendant doctor worked at a hospital that held itself out to the public as a hospital that always had a general surgeon “on call.” The defendant scheduled himself one day as the only general surgeon “on call” at the hospital, but then went out of town without finding a general surgeon to take his place. *Id.* at 44-45. Unfortunately, a patient in need of general surgery was taken to the hospital while the doctor was out of town, and died due to an alleged lack of treatment. While there was a dispute as to whether the doctor established a physician/patient relationship with the decedent, the duty issue was addressed under the general negligence claim, not the medical negligence claim. The court distinguished the medical negligence claim and the general negligence claim by noting that the general negligence claim did “not involve a matter of medical science.” *Id.* at 47.

Robinson’s purported general negligence claim must fail because her claim rests on allegations involving matters of medical science—that LRHC did not meet the proper standard of care in rendering medical treatment to Schmidt. In fact, Robinson’s petition shows a clear intent to rely on medical negligence claims. *See*,

e.g., L.F. 8, ¶9 (“the medical treatment rendered to Verlea R. Schmidt or the lack of proper medical treatment rendered to her by the Defendant’s employees ... was the direct cause or a substantial factor in and the proximate cause for [the accident]”); L.F. 8, ¶10 (LRHC “failed to exercise that degree of care in the providing of medical care that a health care provider and/or hospital would ordinarily use under the same or similar circumstances”). These allegations are typical medical negligence allegations involving matters of medical science and thus *Millard*, by its own terms, does not apply here.

Robinson has suggested that one of her allegations—the failure to prevent Schmidt from leaving the hospital under medication—does not involve an issue of medical science. This suggestion is inaccurate because the allegation still involves the medical care and treatment of a patient, and the medical evaluations that go along with that care and treatment (including the evaluation of Schmidt as a flight risk). But even if Robinson were correct, Missouri law still does not allow the creation of a duty here because a health care provider does not owe a duty to the general public to restrain a patient nor are they under a duty to enlist the help of law enforcement to confine a patient. *Matt*, 892 S.W.2d 796; *Sherrill*, 653 S.W.2d 661.

Not only does a health care provider not have a duty to restrain a patient from leaving, it does not have a legal right to do so because the patient can always choose to terminate the physician/patient relationship. Every patient with the capacity to

reason who is admitted to a hospital has the constitutional right to decline treatment or discontinue the services being provided. *Cruzan v. Director, Mo. Health Dept.*, 497 U.S. 261, 278 (1990). This Court cannot impose a duty on hospitals to violate their patients' constitutional rights. Even assuming the hospital had seen Schmidt leaving the hospital and asked her not to leave yet, the hospital had no right to force her to stay. The legal theory that Robinson advocates cannot be reconciled with this settled law. Robinson's claim that LRHC failed to monitor Schmidt sufficiently to prevent her from leaving the emergency department thus fails to create a duty owed to the public at large in this case.

3. Regardless, Public Policy Does Not Support Imposing A Duty Here

Even if Robinson had pleaded a claim for general negligence, and even if general negligence could extend to actions related to the medical care and treatment of a patient, public policy simply does not support opening up health care providers to liability from the public at large. As shown in § 538.205 *et seq.*, the public policy of this state is to limit the scope of liability faced by health care providers. This case presents no justification to alter that long-standing policy.

In *Millard*, the Eastern District created a duty to the general public for general negligence purposes based on public policy. LRHC respectfully suggests that existing Missouri law concerning negligent misrepresentation was a sufficient basis

to establish a duty in *Millard* due to the on-going nature of the representation to the public that the hospital had a general surgeon “on call” at all times. LRHC would thus describe *Millard* as a case of right result/wrong reason.

Nevertheless, the *Millard* court’s public policy analysis does not lead to the same conclusion here. In *Millard*, the court held that public policy supported the imposition of a duty to the general public based on an analysis of the following factors:

(1) the social consensus that the interest is worth protecting, (2) the foreseeability of harm and the degree of certainty that the protection person suffered the injury, (3) the moral blame society attaches to the conduct, (4) the prevention of future harm, (5) the consideration of cost and ability to spread the risk of loss, and (6) the economic burden upon the actor and the community.

Millard, 14 S.W.3d at 47 (citing *Hoover’s Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 431-32 (Mo. banc 1985)). Under the facts of this case, these factors weigh against the creation of a new duty.

a. The Social Consensus That the Interest Is Worth Protecting

The first factor—whether there is a social consensus that the interest is worth protecting—does not support the creation of a new duty here. The “interest” here is

ensuring that physicians adequately warn/inform their patients about the effects of medical treatment rendered to the patient. This interest is certainly worth protecting, but is already protected by an existing duty to the patient. There is no evidence of any “social consensus” that a new duty to the general public needs to be created to ensure that the duty to warn/inform patients is adequately carried out.

Robinson’s brief can be read to argue that Missouri’s adoption of dramshop liability establishes this social consensus. She is wrong. In *Sherrill*, this Court cited with approval *Massengill v. Yuma County*, 456 P.2d 376 (Ariz. 1969), which held that a sheriff could not be held liable for failing to arrest a driver whom he knew to be drunk. 653 S.W.2d at 669. The Court’s approval of *Massengill* was plainly based on its reluctance to create a duty to the public at large rather than to a specific person. *Id.* Further, the State’s public policy against dramshop liability shows a clear absence of a “social consensus” in favor of imposing a duty to the general public. § 537.053.1, R.S. Mo.² (“it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, R.S. Mo., to prohibit dram shop liability and to follow the common law rule that furnishing

² Contrary to Robinson’s assertion, *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000) does not question the validity of subsection 1 but instead struck down subsection 3 on the “open courts” provision in the Missouri Constitution.

alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons”); *see also Elliot v. Kesler*, 799 S.W.2d 97, 100 (Mo. App. 1990) (“The common law rule is that a tavern owner can not be held liable for injuries to third persons which were caused by an intoxicated person.”). Even if recent judicial decisions have attempted to create a common law cause of action for dramshop liability, such a cause of action is clearly contrary to the state’s public policy and the “common law” of this state.

**b. Foreseeability of Harm and the Degree of Certainty
That the Protected Person Suffered the Injury**

Missouri courts have recognized that even when the harm is foreseeable, and it often is, the liability of physicians is still based on a duty owed to the patient, or at most, to a reasonably identifiable person. *Sherrill*, 653 S.W.2d at 666-67; *Bradley*, 904 S.W.2d at 312. Here, the purpose of the duty to inform/warn patients is to protect the patient. Because a breach of this duty already subjects the offending physician to liability to the patient, there is no reason to believe that extending potential liability to members of the general public who may be harmed by the patient will further protect patients.

c. The Moral Blame Society Attaches to the Conduct

Society attaches moral blame to a physician’s failure to fulfill his duty to inform/warn his patient of the effects of medical treatment—which is why a duty

exists and liability attaches for breach of this duty to the patient. But again, there is no reason that this factor demands that the duty be expanded to run toward the public at large in addition to the patient. Here, no blame exists because Schmidt fled before being discharged.

d. Prevention of Future Harm

The fourth factor, the prevention of future harm, is also not furthered by expanding the existing duty to warn/inform beyond the patient to the general public. Without any evidence that this additional duty to the general public will have any more deterrent effect on physicians than the existing duty to the patient, there is no reason to believe that this expanded duty will prevent *any* future harm.

e. The Consideration of Cost and Ability to Spread the Risk of Loss and the Economic Burden on the Actor and the Community

Factors five and six, the consideration of cost and ability to spread the risk of loss, and the economic burden on the actor and the community, are competing interests as they apply to this case. The cost of an expanded duty is an increased cost of malpractice insurance for physicians. Such insurance will allow the physician to spread the risk of loss by imposing an economic burden on the community through the higher cost of medical care. Going back to factor one, it is

difficult to imagine that any social consensus exists to expand the existing duty to warn/inform when the cost of this option is increased medical costs.

Given that current law would have permitted Robinson to sue Schmidt, and Schmidt to sue LRHC and/or the physician who prescribed the medication, the duty to inform/warn as it currently exists adequately protects the public interests involved. Accordingly, this Court should not expand existing Missouri law and thereby creation an exception that would greatly increase litigation against health care providers to test and further expand the limits of health care provider liability.

II. The Trial Court Did Not Err in Granting Summary Judgment to LRHC For the Separate Reason That Robinson Could Not Prove Causation As a Matter of Law In That Schmidt's Own Conduct Constituted an Independent and Intervening Cause of Robinson's Injuries

The trial court found, after hearing all the evidence and observing a hung jury, that Robinson did not present sufficient evidence to preclude a motion for directed verdict. Even if Robinson could establish that LRHC owed a duty to the public at large contrary to the cases set forth in Point I, her claim nevertheless fails because she cannot establish as a matter of law that LRHC's alleged negligence was the proximate cause of her injuries. Instead, Schmidt's numerous intervening acts preclude proximate cause from ever becoming a fact issue because no reasonable jury could find that proximate cause exists here other than by pure speculation. Because any verdict in Robinson's favor would be based on pure speculation, causation is lacking here as a matter of law.

A. Standard of Review

Review of a summary judgment order entered in a court-tried case is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "Summary judgment proceeds from an analytical predicate that, where the facts are not in dispute, a prevailing party can be determined as a matter of law." *Id.* Summary judgment is proper where there is

no genuine dispute as to any material fact, and the moving party has shown that it is entitled to judgment as a matter of law. *Id.*; Rule 74.04(c)(3). The parties do not dispute any of the material facts relevant to this appeal.

B. Schmidt's Actions Constituted An Independent and Intervening Cause of Robinson's Injuries

To make a submissible case, plaintiff must prove that her injury would not have occurred but for the negligence of defendant. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862-63 (Mo. banc 1993). "But for" causation is necessary, but not sufficient, to make a submissible case; plaintiff must prove that the defendant's conduct was not only the cause in fact, but also the proximate, or legal, cause of the plaintiffs' injury. *Williams v. Van Biber*, 886 S.W.2d 10, 14 (Mo. App. 1994). "Proximate cause is such cause as operates to produce a particular consequence without the intervention of an independent cause, in the absence of which the injuries would not have been inflicted." *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661 (Mo. App. 1989). *Proximate cause is a question of law for the court* "when the evidence reveals the existence of an intervening cause which eclipses the role the defendant's conduct played in the plaintiff's injury." *Tompkins v. Cervantes*, 917 S.W.2d 186, 190 (Mo. App. 1996) (emphasis added).

Robinson cannot show proximate causation as a matter of law. None of LRHC's actions produced Robinson's injuries "without the intervention of an

independent cause.” *Vann*, 780 S.W.2d at 661. Schmidt’s own actions were an independent cause. First, she left before being discharged and receiving a warning about the effects of her medication. Second, she chose to drive (and drink), despite telling the nurse that she had a ride home. Third, she drove across the center line for reasons she does not recall. Each of these acts was necessary to cause the accident.

Schmidt’s actions in this case constituted an intervening, superseding cause. An intervening cause is a new and independent force that so interrupts the chain of events it becomes the responsible, direct, proximate, and immediate cause of the injury. *Buck v. Union Elec. Co.*, 887 S.W.2d 430, 434 (Mo. App. 1994). Where a prior and remote cause does nothing more than give rise to an occasion by which an injury is made possible, a negligence action does not lie, even though the “but for” test is satisfied. *Clymer v. Tennison*, 384 S.W.2d 829, 835 (Mo. App. 1964). LRHC’s failure to monitor Schmidt from leaving the hospital before being discharged and receiving the proper warning about the effects of her medication is at best a prior and remote cause that could have done nothing more than give rise to an occasion for an accident to occur. *See Tompkins*, 917 S.W.2d 186 (failure to treat for suicidal tendencies did not cause potentially suicidal car crash). Consequently, LRHC’s alleged negligence was not the proximate cause of Robinson’s alleged injuries.

Robinson argues that proximate cause is a question for the jury because the jury could have inferred from the evidence that the medication that LRHC administered to Schmidt would likely have caused her to be in an impaired condition at the time of the collision. Even if this were true, Schmidt's conduct still constitutes an intervening, superseding cause of Robinson's injuries because Schmidt independently chose to flee the emergency room before being discharged and receiving the proper warnings, independently chose to drive after telling the nurse she had a ride home, and then crossed the center line for reasons she does not recall. Nothing LRHC did would have caused the accident without these acts.

Robinson's reliance on *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995), is misplaced. In *McHaffie*, the court held that evidence of erratic driving coupled with evidence of alcohol consumption was sufficient to create an inference of the driver's condition. *Id.* at 830-31. That same inference is permissible here, but an inference that Schmidt was impaired due to either medication or alcohol, or both, does not establish proximate causation because Robinson would also need the jury to infer that not only was Schmidt impaired because of the medication, but that LRHC's failure to monitor her before being properly discharged directly caused the accident here.

The evidence simply does not establish that the alleged failure to warn or monitor Schmidt proximately caused the accident resulting in Robinson's injuries.

Because Schmidt's acts constitute intervening cause, proximate cause is an issue of law and this Court can declare that it is lacking. *Majors v. Butner*, 702 S.W.2d 539, 544 (Mo. App. 1985).

The trial court correctly determined that LRHC was entitled to judgment as a matter of law. Any doubts about whether Robinson could have made a submissible case are easily resolved by the trial court's order alternatively finding that, after further review of this case and briefing by the parties, it should have granted LRHC's motion for directed verdict at the close of plaintiff's evidence and at the close of all the evidence in the trial that resulted in a hung jury.

Because the undisputed facts in this case establish that Robinson cannot show proximate causation as a matter of law, the trial court correctly entered summary judgment on this alternative ground.

CONCLUSION

For the foregoing reasons, respondent Health Midwest Development Group d/b/a Lafayette Regional Health Center requests this Court to affirm the judgment of the trial court in all respects.

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CERTIFICATE OF COMPLIANCE

As required by Missouri Rule of Civil Procedure 84.06(b), I certify that this brief is proportionally spaced and contains 6,136 words. I relied on my word processor to obtain the count and it is Microsoft Word 2000.

Attorney for Respondent

**CERTIFICATE THAT DISKETTE
HAS BEEN SCANNED AND IS VIRUS-FREE**

I, Richard M. Paul III, certify that the computer diskette accompanying Brief of Respondents and filed concurrently herewith was scanned for viruses and is virus free.

Attorney for Respondent

Certificate of Mailing

I hereby certify that one copy and a diskette of the above and foregoing were mailed, postage prepaid, this 6th day of August, 2001, to:

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