IN THE SUPREME COURT OF MISSOURI

No. SC88948

JANICE SIDES AND CLYDE SIDES,

Plaintiffs/Appellants,

-vs-

ST. ANTHONY'S MEDICAL CENTER, THOMAS K. LEE, M.D., and TESSON HEIGHTS ORTHOPEDIC AND ARTHOSCOPIC ASSOCIATES, P.C.,

Defendants/Respondents.

SUBSTITUTE BRIEF OF RESPONDENTS THOMAS K. LEE, M.D. AND TESSON HEIGHTS ORTHOPEDIC AND ARTHROSCOPIC ASSOCIATES, P.C.

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ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' THIRD AMENDED PETITION WHICH ASSERTED A CLAIM FOR MEDICAL MALPRACTICE PREMISED ON RES IPSA LOQUITUR ARISING FROM PLAINTIFF JANICE SIDES HAVING CONTRACTED AN ESCHERICHIA COLI (E.COLI) INFECTION SINCE PLAINTIFFS COULD NOT PREVAIL WITHOUT THE INTRODUCTION OF EXPERT TESTIMONY ON THE SUBJECT OF DEFENDANTS' NEGLIGENCE AND SUCH EXPERT TESTIMONY IS NOT ALLOWED IN AN ACTION PREMISED ON RES IPSA LOQUITUR.

Appellants are looking to undo forty-six years of Missouri precedent. This Court is being asked to reverse previous decisions of this tribunal, as well as numerous appellate decisions, on the use of expert testimony in a medical negligence case that is based upon the res ipsa loquitur doctrine. The application of res ipsa loquitur in medical malpractice cases has historically been very limited in Missouri – and with good reason since it exempts a plaintiff from having to prove the specific negligent act of the health care provider that allegedly resulted in his/her injury. Appellants are requesting this Court to unlock Pandora's Box and allow plaintiffs to greatly expand the use of res ipsa loquitur in the medical negligence context. This request most assuredly should be denied.

Appellants seek to recover for damages which they assert as a result of Appellant Janice Sides having contracted an Escherichia coli (E.coli) infection. Appellants maintain that the onset of this infection coincided with the performance of back surgery upon Janice Sides by Respondent Dr. Thomas K. Lee ("Dr. Lee") at St. Anthony's Medical Center ("St. Anthony's") on June 17, 2003. (L.F. 10).

Appellants have made no effort to allege specific negligent acts on the part of Dr. Lee or of Respondent Tesson Heights Orthopedic and Arthroscopic Associates, P.C. ("Tesson Heights"), with whom Dr. Lee is affiliated, or on the part of St. Anthony's for that matter. The absence of such specific allegations of negligence is consistent with a negligence action brought under the doctrine of res ispa loquitur. Appellants do allege that Respondents were in exclusive control of Janice Sides' body and the surgical site during the surgery; that Respondents have greater knowledge than does Janice Sides as to the cause of the E.coli infection which she contracted; and finally "that infection with Escherichia coli (E.coli) does not ordinarily happen during surgery when those in charge and performing such surgery use due care." (L.F. 11). It is this latter element that is most vexing to Appellants since they admit that they cannot carry their burden of proof thereon without the introduction of expert testimony. (Appellants' Substitute Brief, p. 12). It is on this point that Appellants run afoul of existing Missouri law.

In 1962, the Missouri Supreme Court decided the case of Hasemeier v. Smith, 361 S.W. 2d 697 (Mo. en banc. 1962). Mr. Hasemeier filed a wrongful death action against a physician as a result of the death of Mr. Hasemeier's wife during the performance of a Caesarian section. The trial court dismissed Mr. Hasemeier's petition.

Mr. Hasemeier appealed on the basis that his petition was sufficient to state a claim under the res ispa loquitur doctrine and that in any event, his petition stated a claim for relief as a result of the allegations of general negligence contained therein. Id. at 699.

In rejecting the application of the res ipsa loquitur doctrine to the facts as presented in Mr. Hasemeier's petition, the Missouri Supreme Court declared as follows:

> Res ipsa loquitur is a rule of evidence whereby a submissible issue of negligence may be made by adducing a particular kind of circumstantial evidence, viz., by showing the fact of an occurrence which, because of its character and circumstances, permits a jury to draw a rebuttable inference, based on the common knowledge or experience of laymen, that the causes of the occurrence in question do not ordinarily exist in the absence of negligence on the part of the one in control. Id. at 700.

Ms. Hasemeier died while giving birth by Caesarian section. For the doctrine of res ipsa loquitur to apply, the Court would have had to find that laymen know, based on their common knowledge or experience, that a Caesarian section ordinarily does not lead to the death of the patient unless her attending physician is negligent. Id. at 701. Understandably, the Court could not reach that conclusion and therefore concluded that the doctrine of res ipsa loquitur was not applicable to the occurrence giving rise to Mr. Hasemeier's claim. Id.

In its discussion of the doctrine of res ispa loquitur in the context of medical malpractice cases, the Missouri Supreme Court noted that "[g]enerally, the doctrine of res ispa loquitur is not applicable in malpractice cases; and only in unusual circumstances may a physician or surgeon be found guilty of a failure to exercise the requisite degree of care in the absence of expert medical testimony tending to so prove." Id. at 700 *quoting* Williams v. Chamberlain, 316 S.W. 2d 505, 511 (Mo. 1958). The Court did note that there are two lines of cases wherein res ispa loquitur was deemed applicable in a medical negligence action. Those cases involve either an "unusual injury," that is, an injury to a portion of the body different than the location of the surgical site or treatment, or a situation where a physician or surgeon has left a foreign object inside of his patient. Id. at 700. Obviously, neither of those circumstances existed in Hasemeier – nor in the case at bar.

The decision in Hasemeier has remained unaffected by subsequent rulings of the Missouri Supreme Court during the past forty-six years. Its preeminence on the issue of the application of the res ispa loquitur doctrine in medical malpractice cases was recognized in Spears v. Capital Region Medical Center, Inc., 86 S.W. 3d 58 (Mo. App. 2002). In Spears, a patient alleged that he contracted Hepatitis C during his hospitalization for a cardiac bypass surgery. Since Mr. Spears was unable to identify how and by whom he contracted this infection during the course of his hospitalization, he filed his action under the doctrine of res ispa loquitur. The hospital filed a motion for summary judgment which was granted.

In affirming the trial court's ruling, the appellate court acknowledged that "Hasemeier is Missouri's seminal case on *res ispa loquitur* in medical negligence cases." Id. at 61. The court further noted that since the Missouri Supreme Court has limited the application of the res ispa loquitur doctrine to those situations where a patient receiving treatment to one part of his body sustains an unusual injury to another part or where a health care provider has left a foreign object inside of the patient, res ipsa loquitur is only applicable when laypersons would know, "based on their common knowledge or experience, that the cause of the plaintiff's injury does not ordinarily exist but for negligence of the one in control." Id. at 62. Consequently, "in Missouri, a plaintiff cannot use expert testimony to establish a res ispa loquitur case in a medical malpractice action." Id.

Hasemeier therefore is the law in Missouri. As such, a Missouri appellate court "is constitutionally bound to follow precedent set forth by the most recent Supreme Court of Missouri decision." Kansas Ass'n of Private Investigators v. Mulvihill, 35 S.W. 3d 425, 432 (Mo. App. W.D. 2000). The court in Spears certainly recognized its obligation to follow the ruling in Hasemeier. When Mr. Spears conceded that he could not establish his res ispa loquitur claim without the use of expert testimony, the Spears court declared that "this court must affirm the summary judgment. To do otherwise would be in violation of this court's constitutional obligation to follow precedent set forth by the most recent Supreme Court of Missouri decision." Spears, 86 S.W. 3d at 62. It is this very rule that compelled the appellate court to reject Appellants' argument in the case at bar. Indeed, the trial court in the instant case also had no choice but to

follow the ruling in Hasemeier since it was equally bound by the precedent set forth by the Missouri Supreme Court in that opinion. Botanicals on the Park, Inc. v. Microcode Corp., 7 S.W. 3d 465, 470 (Mo. App. E.D. 1999).

The trial court was confronted with Appellants' Third Amended Petition which alleged that Janice Sides' exposure to the E.coli infection "does not ordinarily happen during surgery when those in charge and performing such surgery use due care." (L.F. 11). To have allowed this pleading to survive the motions to dismiss filed by all Respondents, the trial court would have had to conclude that a person undergoing surgery does not ordinarily contract E.coli unless an attending health care provider is negligent. Although the res ispa loquitur doctrine is a rule of evidence, the party asserting the applicability of the doctrine must still plead "the injury and such attendant circumstances as will support an inference of negligence which the jury must find." Watts v. Sechler, 140 S.W. 3d 232, 241 (Mo. App. S.D. 2004). It is up to the trial court to decide if the facts alleged in the petition are sufficient to invoke the doctrine since the sufficiency of the allegations is a question of law. Id. It is a question that "is answered when the court can take judicial notice, based on common knowledge and experience, that such an injury probably would not have occurred but for negligence in some form." Id. *quoting* Epps v. Ragsdale, 429 S.W. 2d 798, 800 (Mo. App. 1968).

It is readily apparent, based upon the standard enunciated in Watts and Ragsdale, why the motions to dismiss Appellants' Third Amended Petition were granted since the contracting of an E.coli infection clearly does not fall within the extremely narrow range of events which have been recognized as a basis for applying res ipsa loquitur in a

medical malpractice context. Furthermore, in considering whether to allow the petition to stand, the trial judge had to answer this question: Would a judge (and ultimately a jury of ordinary laymen) know, within their common knowledge and experience, that Janice Sides would not have contracted E.coli but for the negligence of one or more of the Respondents? In reality, this is a question answered by Appellants themselves when they acknowledged that they would require expert testimony to establish that fact. (Appellants' Substitute Brief, p. 12). Consequently, Plaintiffs' negligence claim against these Respondents based upon res ipsa loquitur must fail since expert testimony is not allowed for purposes of providing the necessary inference of negligence to the jury. Spears, 86 S.W. 3d at 62.

In their "Point Relied On", Appellants claim that the trial court erred when it failed to "adopt and adhere" to non-Missouri law which allows expert testimony to provide the requisite inference of negligence in a res ipsa loquitur case. (Appellants' Substitute Brief, pp. 8 and 10). Of course, the trial court had no ability to take such a course of action, considering its obligation to follow the opinion rendered in Hasemeier. Furthermore, Appellants concede that the court of appeals was also obliged to follow the precedent established by this Court (Appellants' Substitute Brief, p. 13). Appellants now call upon this Court "to alter the law it established in Hasemeier and allow the use of expert testimony to prove a medical negligence case premised on res ipsa loquitur." (Appellants' Substitute Brief, p. 13). Such a request is totally contrary to the very reason that res ipsa loquitur exists and to the long-standing public policy that recognizes

the benefit of insulating health care providers from lawsuits that do not arise from their specific acts of negligence.

It is important to not lose sight of the fact that the doctrine of res ipsa loquitur has generally not been applicable in malpractice cases. Williams v. Chamberlain, 316 S.W. 2d at 511. As noted by the Missouri Supreme Court in Williams, "[a] plaintiff in a malpractice action assumes a very heavy burden where the bais (sic) of recovery is predicated on an attack on the technique and skill exercised by an operating surgeon or on a charge that he failed to exercise reasonable judgment. In the absence of most unusual circumstances it is a burden that cannot be discharged in normal course by lay testimony." Id. *quoting* Hopkins v. United States, 152 F. Supp. 473 (W.D. Mo. 1957). In fact, "[s]o long as the physician properly exercises his skill and the requisite degree of care, he is not liable for an honest error of judgment. (citations omitted) Nor, having so acted, is he liable merely for a bad result." (citations omitted) Williams, 316 S.W. 2d at 510-511. There is certainly good reason why the burden on a plaintiff in a malpractice action is "very heavy" for surely "if a failure to cure or a bad result were held to be evidence of negligence, then, '… few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all of the 'ills that flesh is heir to.'" Id, at 511 *quoting* Ewing v. Goode, 78 F. 442, 443 (C.C. S.D. Ohio 1897).

Nevertheless, res ipsa loquitur is given limited application in Missouri in those "unusual circumstances" where the injury itself provides the inference of negligence by its very nature. When applicable, res ipsa loquitur relieves the plaintiff of its obligation

to prove the specific negligent act of the health care provider – a burden that otherwise exists in traditional medical malpractice cases. Deveney v. Smith, 812 S.W. 2d 810, 815 (Mo. App. W.D. 1991). As such, "[t]he doctrine of res ipsa loquitur is only applicable in malpractice case when a physician or surgeon may be found to have failed to exercise the requisite degree of care in the absence of expert medical testimony tending to so prove." Id. *citing* Hasemeier, 361 S.W. 2d at 900 (emphasis added). Indeed, "the doctrine of res ipsa loquitur exists to obviate the need for direct proof of negligence." Zumwalt v. Koreckij, 24 S.W. 3d 166, 168 (Mo. App. E.D. 2000). It is for this reason that the res ipsa loquitur is considered to be a rule of evidence since it "allows the claimant to make a prima facie case of negligence without direct proof." Deveney v. Smith, 812 S.W. 2d 810 at 815.

The recognition by the Missouri Supreme Court that only in unusual circumstances, such as an injury to a part of the body unaffected by a surgical procedure or the situation where a foreign object is left in an operative cavity, should the doctrine of res ipsa loquitur be available to a plaintiff is entirely consistent with the very meaning of that Latin phrase, which is "the thing speaks for itself." McDowell v. Southwestern Bell Tel. Co., 546 S.W. 2d 160, 164 (Mo. App. 1976). When the alleged act of malpractice is not within the common knowledge of the lay jury, then clearly "the thing does not speak for itself" and res ipsa loquitur is therefore no longer a viable doctrine in such an instance. To find otherwise is to disregard the very essence of the doctrine.

Appellants cite to various case authority from other jurisdictions in support of their contention that the longstanding recognition in Missouri of the limited use of the

res ipsa loquitur doctrine in medical malpractice cases should be cast aside. (Appellants' Substitute Brief, p. 14-16). In so doing, Appellants contend that those jurisdictions (including the District of Columbia) that allow expert testimony in a res ipsa case exceed those that do not by a margin of approximately four to one (twenty-three to six, excluding Missouri). (Appellants' Substitute Brief, p. 14-15). In fact, the ratio is less than two to one. There are thirty jurisdictions that allow expert testimony in a res ipsa case[1] and twenty-one that either do not allow such testimony[2] or simply do not

[1] Listed here are those jurisdictions not cited by Appellants that allow expert testimony in a res ipsa loquitur case: **Arizona**: Faris v. Doctors Hosp., Inc., 501 P.2d 440, 444 (Ariz. Ct. App. 1972); **Arkansas**: Schmidt v. Gibbs, 807 S.W.2d 928, 930-32 (Ark. 1991); **Connecticut**: Gilliam v. Thomas, 1997 WL 746384, *2 (Conn. Super. 1997) (unpublished opinion); **Indiana**: Syfu v. Quinn, 826 N.E.2d 699, 704 (Ind. Ct. App. 2005); **Massachussetts**: Edwards v. Boland, 670 N.E.2d 404, 406 (Mass Ct. App. 1996); **New Hampshire**: *See* Durocher v. Rochester Equine Clinic, 629 A.2d 827, 830 (N.H. 1993); Cowan v. Tyrolean Ski Area, Inc., 506 A.2d 690, 693 (N.H.1985); **Oklahoma**: Sisson v. Elkins, 801 P.2d 722, 724 (Okla. 1990); **Oregon**: Mayor v. Dowsett, 400 P.2d 234, 243-44 (Or. 1965); **Utah**: *See* Ballow v. Monroe, 699 P.2d 719, 722 (Utah 1985); Talbot v. Dr. W.H. Groves' Latter-Day Saints Hospital, 440 P.2d 872, 873-74 (Utah 1968).

[2] Listed here are those jurisdictions not cited by Appellants that do not allow expert testimony in a res ipsa loquitur case: **Delaware**: Williams v. Dyer, 1992 WL 240477, *2 (Del. Super. Ct. 1992) (unpublished opinion); *see also* Lacy v. G.D. Serrill, 484 A.2d 527, 530 (Del. Super. Ct. 1984); **Hawaii** (this case was cited by Appellants in support of their position, however

recognize the use of res ipsa loquitur at all in medical malpractice cases[3]. Furthermore, Respondents would take issue with Appellants' conclusion that Hawaii and Kansas have definitively determined that expert testimony is permissible in a res ipsa loquitur case. See, Medina v. Figuered, 647 P. 2d 292 (Haw. App. 1982) and Tatro v. Lueken, 512 P. 2d 529 (Kan. 1973). Respondents have therefore included those jurisdictions among the twenty-one that do not support Appellants' position.

Respondents contend this case puts Hawaii in line with Missouri law): Medina v. Figuered, 647 P.2d 292, 294 (Haw. Ct. App. 1982); **Kansas**: Tatro v. Lueken, 512 P. 2d 529, 534-36 (Kan. 1973) **Maine**: Caron v. Pratt, 336 A.2d 856, 860 (Me. 1975) (Caron even cites to Hasemeier v. Smith, 361 S.W.2d 697 (Mo. banc 1962)); **Mississippi**: Holt v. Summers, 942 So.2d 284 (Miss. Ct. App. 2006); **Missouri**: Hasemeier v. Smith, 361 S.W.2d 697 (Mo. banc 1962); **Montana**: Smith v. Hull, 1998 WL 543834, *2 (Mont. 1998); **Nevada**: *See* Banks ex rel. Banks v. Sunrise Hosp., 102 P.3d 52, 59 (Nev. 2004); N.R.S. 41A.100(1); **West Virginia**: *See* Farley v. Meadows, 404 S.E.2d 537, 539 (W.Va. 1991); **Wyoming**: Keller v. Anderson, 554 P.2d 1253, 1260-61 (Wyo. 1976).

[3] Listed here are those jurisdictions that do not allow the use of res ipsa loquitur at all in medical malpractice cases: **Alabama**: Baker v. Chastain, 389 So.2d 932, 935 (Ala. 1980); **Alaska**: D.P. v. Wrangell General Hosp., 5 P.3d 225, 234 (Alaska 2000); **Georgia**: Oakes v. Magat, 587 S.E.2d 150, 152 (Ga. Ct. App. 2003); **South Carolina**: Chaney v. Burgess, 143 S.E.2d 521, 523 (S.C. 1965); **Virginia**: Speelman v. Browning, 2001 WL 34038809, *5 (Va. Cir. Ct. 2001) (unpublished opinion).

The foreign case authority that does justify the expansion of the res ipsa loquitur doctrine by the use of expert testimony does so on the premise that modern medical science is more complex than ever such that it is necessary for the use of expert testimony in order to "bridge the gap" between the jury's common knowledge of what would constitute medical negligence and the common knowledge of experts in the medical profession. (Appellants' Substitute Brief, p. 19). By allowing expert testimony in cases based on the doctrine of res ipsa loquitur "[t]hese experts can educate the jurors, essentially training them to be twelve new initiates into a different, higher level of common knowledge." (Appellants' Substitute Brief, p. 19 *citing* Connors v. University Associates in Obstetrics and Gynecology, Inc., 4 F. 3d 123, 128 [2nd Cir. 1993]).

Appellants also cite Connors for the proposition that "[t]he concept of 'bridging the gap' of knowledge falls in line with res ipsa loquitur" since the jury will still have to decide whether the event causing injury would normally occur but for the negligence of the health care provider. (Appellants' Substitute Brief, p. 19). This rationalization for allowing expert testimony to provide the inference of negligence ignores the severely limited application of that doctrine in medical negligence cases. The "heavy burden" that a plaintiff normally assumes when attacking the technique and skill of a health care provider, a burden that implicates the need for expert testimony, is lifted from the plaintiff only in those rare occasions when the res ipsa loquitur doctrine is applicable since the circumstances giving rise to the plaintiff's claim are sufficiently extraordinary that a lay jury can identify from its own experience that such a result does not ordinarily take place without negligence on the part of the defendant.

Appellants, on the other hand, would dramatically expand the application of the res ipsa loquitur doctrine to encompass circumstances well beyond the limited circumstances to which the doctrine is now applicable and in so doing render the phrase "the thing speaks for itself" meaningless. Indeed, when experts are allowed to testify in order to convince the jury that the facts "speak for themselves" the result is that "the experts are speaking for the facts." *Karyn K. Ablan, Note, Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases*, 82 Va. L. Rev. 325, 346.

In the absence of reliance upon the res ipsa loquitur doctrine, Appellants, in order to make a submissible case against either Dr. Lee or Tesson Heights, would have the burden of proving, *inter alia*, that the introduction of the E.coli infection was the result of an act or omission that was negligently performed by Dr. Lee and that his performance failed to meet the requisite medical standard of care. Deveney v. Smith, 812 S.W. 2d at 815. By asserting a claim based upon res ipsa loquitur, Plaintiffs were spared the requirement of proving Dr. Lee's medical negligence, provided "the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care." Id. Appellants would advocate that this critical component of a claim based upon res ipsa loquitur can be provided by expert testimony even though it is the stated rule in Missouri that

> [t]he doctrine of res ipsa loquitur is only applicable in a malpractice case when a physician or surgeon may be found to have failed to exercise the requisite degree of care in the absence of expert medical testimony tending to so prove.

> Hasemeier v. Smith, 361 S.W. 2d 697, 700 (Mo. en banc. 1962). In other words, for res ipsa loquitur to apply in a malpractice action, laymen must be able to find, based on their common knowledge or experience, without the aid of expert testimony, that a given result would not have occurred but for the physician's negligence. Id. at 701. Deveney, 812 S.W. 2d at 815.

Appellants suggest that jurors can obtain from an expert witness the training necessary to convert them to "twelve new initiates into a different, higher level of common knowledge." (Appellants' Substitute Brief, p. 19 *quoting* Connors, 4 F. 3d at 128). Obviously, Appellants suggestion would give a whole different meaning to the concept of "common knowledge" held by lay jurors and would undermine the very meaning of the term "res ipsa loquitur." A jury is not made up of twelve physicians -- it is made up of twelve ordinary citizens. It is for this reason that res ipsa loquitur has generally not been available in medical malpractice cases in Missouri "because in most instances, the intricacies of medical treatment and negligence are not within the common knowledge of lay persons." Norman v. United States of America, 2006 WL 335510 * 3 (E.D. Mo.).

Appellants contend that the current advances in medical science necessitate the evisceration of the res ipsa loquitur doctrine as it applies to medical malpractice cases in Missouri. On the contrary, "the intricacies of medical treatment and negligence" have

long been recognized in Missouri and it is that very recognition of the complexities of medical science that has limited the use of res ipsa loquitur in medical negligence cases.

Appellants further suggest that expert testimony should be allowed in medical malpractice cases which are premised on the res ipsa loquitur doctrine since a patient is usually heavily sedated during the surgical procedure and thus has no knowledge of what took place while under sedation. (Appellants' Substitute Brief, p. 19). Suffice to say that patients who bring traditional medical malpractice actions against health care providers for medical negligence during the course of a surgical procedure are also generally "heavily sedated" during the surgical procedure and this fact does not preclude them from bringing an action alleging specific negligence. Again, the fact that a patient may be unconscious during a surgical procedure does not justify overturning the well-established limitations on the use of res ipsa loquitur that have been established and followed in this state for almost a half century.

Finally, Appellants suggest that the affidavit requirements of §538.225 RSMo. compel this Court to reverse the long-standing prohibition on the use of expert testimony in res ipsa loquitur cases since it is "absurd" to require a plaintiff (or plaintiff's attorney) to submit an affidavit confirming that he or she has obtained the written opinion of a health care provider which states that defendant has deviated from the requisite standard of care and thereby caused plaintiff's injury, yet not allow that health care provider to testify for plaintiff. (Appellants' Substitute Brief, pp. 21-22). Appellants come to this conclusion by relying on this Court's decision in Budding v. SSM Healthcare System, 19 S.W. 3d 678 (Mo. en banc 2000). In Budding, it was

declared that a claim premised upon strict liability could not be brought against a physician since the legislature, by the passage of §538.225 RSMo., required "an affidavit of negligence" as a condition of proceeding forward against a health care provider. Id. at 681. Since negligence is not an element of a claim based upon strict liability, it would be "an obvious absurdity" to subject a physician to such claims. Id. While this Court's conclusion relative to a strict liability claim, in light of the "affidavit of negligence" requirement, is certainly logical, Appellants' reliance upon Budding is not.

The Court in Budding recognized that the legislature's intent in enacting §538.225 RSMo. was "to impose specific limitations on the traditional tort causes of action available against a health care provider." Id. at 680. In an earlier opinion rendered by this Court in Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W. 2d 503, 507 (Mo. en banc 1991) this Court spoke more expansively on this issue: "The effect intended for §538.225…is to cull at an early stage of litigation suits for negligence damages against healthcare providers that lack even color of merit, and so to protect the public and litigants from the cost of ungrounded medical malpractice claims." The Court further noted that "[t]he affidavit condition of §538.225 is a reasonable means to hinder a plaintiff whose medical malpractice petition is groundless from misuse of the judicial process in order to wrest a settlement from the adversary by the threat of the exaggerated cost of defense this species of litigation entails." Id. at 508.

It is patently obvious that the purpose of the "affidavit of negligence" requirement is to deter the prosecution of frivolous claims against health care providers.

This purpose is hardly compromised by the current prohibition on the admission of expert testimony in a res ipsa loquitur case. In fact, quite the opposite is true since in a res ipsa case the inference of negligence arises from the occurrence itself. Consequently, it should not be terribly difficult to obtain a written opinion that leaving a sponge in a surgical patient's body cavity is negligence.

Appellants, of course, do not present a case that falls within the traditional realm of res ipsa loquitur. As such, their real goal is not just to allow expert testimony in res ipsa cases but to fundamentally alter the scope of cases that may be brought under that doctrine.

What is truly "absurd" is Appellants' contention that expanding res ipsa loquitur into areas that require expert testimony to convince a lay jury of a physician's negligence "does not create an unfair advantage to plaintiffs alleging medical malpractice premised on res ipsa loquitur, including Appellants herein." (Appellants' Substitute Brief, p. 22). How can Appellants seriously argue that allowing them to forego their burden of proving the specific acts of negligence on the part of Respondents that caused Janice Sides to contract E.coli does not create an unfair advantage? How can Appellants possibly believe that allowing an expert witness to provide the inference of negligence that otherwise flows from the injury itself in a traditional res ipsa loquitur case does not essentially do away with the very underpinning of a true res ipsa claim?

Appellants have aligned themselves with the plaintiff in Spears v. Capital Region Medical Center, Inc., 86 S.W. 3d 58 (Mo. App. W.D. 2002) in that they make the same concession as did Mr. Spears that they cannot prove their claim of negligence without

the introduction of expert testimony. Appellants, much like Mr. Spears, request that this Court "alter the law it established in Hasemeier and allow the use of expert testimony to prove a medical negligence case premised on res ipsa loquitur." (Appellants' Substitute Brief, pp. 12-13). As this Court is well aware, it initially accepted transfer of Spears but ultimately sent the case back to the court of appeals whereupon the original opinion of the court of appeals was readopted. Spears, 85 S.W. 3d at 58. Nothing has transpired in the past six years since Spears was decided that would justify disposing of Appellants' case in a manner different from the ultimate disposition of the Spears case.

In Missouri, res ipsa loquitur has always had limited application in medical negligence cases. Indeed, this Court in 1958 acknowledged that "[g]enerally, the doctrine of res ipsa loquitur is not applicable in malpractice cases." Williams v. Chamberlain, 316, S.W. 2d at 511. Williams recognized that leaving "foreign objects in operative cavities fall into an entirely different class" such that the fact alone of such occurrence is sufficient "to establish a prima facie case of negligence." Id. This Court in Hasemeier further recognized that res ipsa loquitur was also available to a plaintiff who suffered an injury to a part of the body unconnected to that part upon which treatment or an operation was performed. Hasemeier, 361 S.W. 2d at 700. Perhaps other injuries may fall into that special category reserved for "an occurrence which, because of its character and circumstances permits a jury to draw a rebuttable inference, based on the common knowledge and experience of laymen, that the causes of the occurrence in question do not ordinarily exist in the absence of negligence on the part of

the one in control." Id. Janice Sides' E.coli infection, by Appellants' own admission, is not one of those occurrences.

Appellants know that their case does not present the "essential prerequisite to the application of the doctrine (of res ipsa loquitur) that laymen know, based on their common knowledge or experience" that an E.coli infection is not ordinarily contracted in the absence of negligence. Id. Their reaction to that indisputable truth is to recast res ipsa loquitur into something entirely different than what it is. To paraphrase Ms. Ablan, when the experts are speaking for the facts, the facts are no longer speaking for themselves.

CONCLUSION

Based upon the foregoing, Respondents, Thomas K. Lee, M.D. and Tesson Heights Orthopedic and Arthroscopic Associates, P.C. respectfully submit that the Court of Appeals acted correctly in affirming the trial court's order dismissing Appellants' Third Amended Petition. Consequently, Respondents respectfully request that this Court retransfer this case to the Court of Appeals with directions to readopt its Opinion dated September 25, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of the foregoing, along with a disk, were mailed, U.S. Mail, postage pre-paid, this 29th day of February 2008, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Substitute Brief of Respondents Thomas K. Lee, M.D. and Tesson Heights Orthopedic and Arthroscopic Associates, P.C. includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in the Substitute Brief of Respondents is 5,948 exclusive of the cover, signature block and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Substitute Brief of Respondents was scanned for viruses and was found virus-free through the McAfee Virus Scan anti-virus program.

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John E. Hilton