IN THE SUPREME COURT OF MISSOURI

SC 88948

JANICE SIDES and CLYDE SIDES

Appellants,

vs.

ST. ANTHONY'S MEDICAL CENTER, et al.,

Respondents.

APPEAL FROM THE
CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF APPELLANT

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INTERESTS OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a professional organization of approximately 1,400 trial lawyers in Missouri, most of who are engaged in personal injury litigation involving Missouri citizens. Whether this Court adopts the majority rule espoused by other state jurisdictions of allowing medical malpractice cases premised on res ipsa loquitur to proceed when expert testimony is required is of monumental importance to our organization and the people they represent. Injured patients should be afforded an opportunity for legal recourse and wrongdoers must be held accountable for injuries that can only occur when a healthcare provider is negligent. Accordingly, this issue is of considerable interest to MATA and its members.

As discussed herein, MATA supports Appellants' position that the Court adopt the majority rule and allow medical malpractice cases premised on res ipsa loquitur to proceed when expert testimony is required. Adopting this rule would ensure safer healthcare for Missouri citizens. On behalf of the citizens of the State of Missouri, MATA urges this court to overrule the Court of Appeal's decision.

CONSENT OF THE PARTIES

MATA has received written consent from all parties to file this brief. Therefore, MATA is filing this brief pursuant to Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

JURISDICTIONAL STATEMENT

This appeal arises from a judgment dismissing Appellants' cause of action against Respondents. Legal File (hereinafter "LF") at 35. In the trial court below, the Honorable Emmett M. O'Brien of the Circuit Court of St. Louis County entered judgment on February 16, 2007, dismissing Appellants' claims against Respondents. LF at 35. Appellants filed their Notice of Appeal on February 26, 2007. LF at 40. The Court of Appeals affirmed the trial court's dismissal on September 25, 2007. This Court granted transfer on January 22, 2008.

STATEMENT OF FACTS

The relevant facts of this appeal do not appear to be in dispute. For purposes of this brief, the amicus states the following facts. On November 2, 2006, appellants Janice Sides and Clyde Sides filed their Third Amended Petition. LF at 9. In said Petition, Appellants allege medical malpractice against Respondents premised entirely on res ipsa loquitur arising out of appellant Janice Sides contraction with Escherichia coli (hereinafter "E. coli") bacteria during a surgical procedure at St. Anthony's Medical Center. LF at 9-12.

Respondents each filed a Motion to Dismiss Appellants' Third Amended Petition, arguing that Appellants cannot prove their medical malpractice case premised on res ipsa loquitur without the use of expert testimony because it is not within the common knowledge of laypersons that infection with E. coli during surgery does not ordinarily occur in the absence of negligence, and therefore, Appellants' claim should be dismissed. LF at 23-24, 29-34. Respondents' Motions to Dismiss were argued before the Honorable Emmett M. O'Brien on February 16, 2007. LF at 35. On the same day, Judge O'Brien entered his Judgment sustaining Respondents' Motions. LF at 35.

POINT RELIED ON

I. The trial Court erred in dismissing Plaintiffs' Third Amended Petition alleging medical malpractice under a theory of res ipsa loquitur and requiring the use of expert testimony because it should have adopted the majority rule allowing such claim to proceed, in that fairness, public policy, and the safety of Missouri citizens favor that rule's adoption.

Hasemeier v. Smith, 361 S.W.2d 697 (Mo. banc 1962).

Spears v. Capital Region Med. Ctr., Inc., 86 S.W.3d 58 (Mo. App. W.D. 2002).

Washington v. Barnes Hosp., 897 S.W.2d 611, 615 (Mo. banc 1995).

ARGUMENT

STANDARD OF REVIEW

"In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, this standard of review applies: A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Johnson v. Jones*, 67 S.W.3d 702, 705 (Mo. App. W.D. 2002) (*quoting Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993)).

I. The trial Court erred in dismissing Plaintiffs' Third Amended Petition alleging medical malpractice under a theory of res ipsa loquitur and requiring the use of expert testimony because it should have adopted the majority rule allowing such claim to proceed, in that fairness, public policy, and the safety of Missouri citizens favor that rule's adoption.

Appellants urge this Court to adopt the majority view of allowing a medical malpractice case premised on res ipsa loquitur to proceed when expert testimony is required. *App. Br. at 25*. Adoption of this rule is ardently opposed by respondents St. Anthony's Medical Center, Thomas K. Lee, M.D., and Tesson Heights Orthopedic and Arthroscopic Associates, P.C. as well as our fellow amici the Missouri State Medical Association, the Missouri Dental Association, the Missouri Health Care Association, and the Missouri Pharmacy Association (in this brief collectively referred to as "Missouri State Medical Association" or "MSMA"). This Court should adopt the majority view and allow medical malpractice cases premised on res ipsa loquitur to proceed when expert testimony is required because that view is the best policy for Missouri.

In considering whether to adopt the majority rule espoused by Appellants, this Court will consider whether it is a good policy for all Missourians. The MSMA indicated as such in its brief in support of Respondents. *MSMA Br. at 14*. In this brief, MATA will explain why it is good policy for Missouri to allow a medical malpractice claim premised on res ipsa loquitur to proceed when expert testimony is required.

Currently, patients filing a medical malpractice claim against their health care providers face an uneven playing field. These individuals face legal hurdles which other tort claimants do not. In its Brief, the MSMA lists some of these hurdles: "(1) shorten[ed] limitations period, (2) capp[ed] damages, and (3) require[ed] affidavit supporting plaintiff's claims of negligence within 90 days of suing." *MSMA Am. Br. at 16* (citing Mo. Rev. Stat. §§ 516.105, 538.210, 538.225 (2005)). There are more. In certain cases, medical malpractice plaintiffs face immunity of certain physicians and privileged peer review materials. *See State ex rel. Howenstine v. Roper*, 155 S.W.3d 747 (Mo. 2005) and Mo. Rev. Stat. § 537.035 (2005). Also, medical malpractice plaintiffs are prohibited from suing health care providers in strict liability. *Budding v. SSM Healthcare System*, 19 S.W.3d 678 (Mo. banc 2000).

In addition to legal hurdles, medical malpractice plaintiffs face a negative public perception. Before a medical malpractice plaintiff enters the courtroom, he or she is at a disadvantage with the jury. A study by professor Philip G. Peters found that jurors in medical malpractice trials are more likely to side with doctors. Sylvia Hsieh, *Physician Friendly*, 21 M.O.L.W. 489 (May 28, 2007). "Juries in medical malpractice cases side with doctors far more frequently then not, and plaintiffs lose in about 50 percent of cases in which independent experts thought plaintiffs should win." *Id*. Not only does the law create a disadvantage for medical malpractice plaintiffs, public perception does too. Although adopting the

majority view will not change public perception, it might bring medical malpractice plaintiffs one step closer to a level playing field in the eyes of the law.

Respondents and the MSMA put forth the predictable, yet violate argument that adopting the majority view would open Pandora's Box of claims against doctors, drive up liability insurance rates for doctors, and force them out of the state. This is a patently false argument. "Many victims of medical malpractice never take any action or file a lawsuit. Allegations that everyone with a 'boo-boo' runs to the nearest trial lawyer are patently false." Jaclyn Edgar, Student Author, *Doctor v. Attorney: Why are Attorneys and Injured Patients Being Blamed for the Rising Costs of Healthcare? Instead of Tort Reform, Why Medical Reform is a Better Solution*, 73 UMKC L. Rev. 773, 778-779 (2005). Furthermore, "An out-of-control tort system is not to blame for the rising costs of insurance premiums, and the resulting lack of health care and rising health care costs." *Id*. at 786. Nothing is offered to substantiate the "Pandora's Box" arguments of Respondents and the MSMA, and such an argument should not deter this Court from adopting the majority view of allowing medical malpractice cases premised on res ipsa loquitur to proceed when expert testimony is required.

A review of Missouri appellate cases where adoption of the majority rule was attempted gives the Court an idea of just how little the floodgates will be open. Since this Court established the rule prohibiting medical malpractice cases premised on res ipsa loquitur and requiring the use of expert testimony in *Hasemeier v. Smith*, 361 S.W.2d 697 (Mo. banc 1962), there has been only one

attempt to change that law, which did not occur until 2002 (*Spears v. Capital Region Med. Ctr., Inc.*, 86 S.W.3d 58 (Mo. App. W.D. 2002)). If so many people want to sue their doctor by way of res ipsa loquitur and expert testimony, why, in 40 years, had nobody else tried to change the law? The Pandora's Box argument is simply not legitimate.

The truth is adopting the majority view would do nothing more than make healthcare safer for Missourians. As the MSMA points out, holding health care providers accountable for wrongdoing makes Missouri health care safer by forcing providers to be more careful. *MSMA Am. Br. at 14-16* citing *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. banc 1995). Careful medicine acts as a deterrent against bad medical practices. Edgar, 73 UMKC L. Rev. at 779. Here, Appellants allege that Janice Sides' infection with E. coli does not happen without negligence. Should Respondents be held accountable for Ms. Sides' infection, they would take more precaution in sterilizing themselves and their equipment next time.

Respondents and the MSMA, in submitting their "Pandora's Box" arguments, overlook the fact that medical malpractice cases submitted under the theory of res ipsa loquitur, whether requiring the use of expert testimony or not, are still subject to the aforementioned legal and social restrictions on medical malpractice lawsuits. Medical malpractice cases premised on res ipsa loquitur are still restricted by Mo. Rev. Stat. §§ 516.105, 537.035, 538.210, 538.225. It is also doubtful the public's perception of a medical malpractice plaintiff would be any

different if the case were premised on res ipsa loquitur and an expert was allowed to testify that the injury does not occur without negligence.

CONCLUSION

For the reasons stated above, the Court should overrule the opinion of the Court of Appeals and adopt the view of the majority allowing medical malpractice cases premised on res ipsa loquitur to proceed when expert testimony is required because that puts forth the best policy for Missouri.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer diskette containing the full text of the Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Appellants is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 2680 words, as calculated by the Microsoft Word software used to prepare this brief.

_____
Leland F. Dempsey #30756

CERTIFICATE OF SERVICE

A true copy of the foregoing has been served upon all parties by depositing the same in the United States mail, postage pre-paid, this 18th day of March, 2008, as follows: Mr. William Magrath, attorney for defendants/respondents Thomas K. Lee, M.D. and Tesson Heights Orthopedic and Arthroscopic Associates, P.C., 120 S. Central, Suite 1800, St. Louis, MO 63105, Mr. V. Scott Williams, attorney for defendant/respondent St. Anthony's Medical Center, 200 N. Third Street, St. Charles, MO 63301, and Matthew D. Meyerkord, attorney for plaintiffs/appellants Clyde and Janice Sides, 1717 Park Avenue, St. Louis, MO 63104 .

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