IN THE SUPREME COURT OF MISSOURI

JANICE SIDES, et al.	)	
	)	
Appellants,	)	
	)	
v.	)	No. SC88948
	)	
ST. ANTHONY'S MEDICAL CENTER, et al.	)	
	)	
	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

Honorable Emmett M. O'Brien

BRIEF OF AMICI CURIAE MISSOURI STATE MEDICAL ASSOCIATION, MISSOURI PHARMACY ASSOCIATION, MISSOURI HEALTH CARE ASSOCIATION, and MISSOURI DENTAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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JURISDICTIONAL STATEMENT

After opinion by the Court of Appeals, Eastern District, the Missouri Supreme Court granted transfer of this case. *See* Mo. Const. art. V, § 10; Rule 83.04. This Court has jurisdiction to finally determine the case the same as on original appeal. Mo. Const. art. V, § 10; Rule 83.09. If this Court determines that transfer was improvidently granted, it may retransfer the case to the Court of Appeals. Rule 83.09.

INTEREST OF *AMICI CURIAE*

The Missouri State Medical Association ("MSMA") is an organization of physicians and medical students. MSMA serves its members through the promotion of the science and art of medicine, protection of the health of the public, and betterment of the medical profession in Missouri. MSMA has approximately 6,000 members and is located in Jefferson City.

The Missouri Dental Association ("MDA) is an organization of approximately 2,300 individual dentists and dental students. MDA is committed to providing the highest quality of care to the public and serves as a resource for advocacy, education, communication, information, and fellowship. MDA is headquartered in Jefferson City.

The Missouri Health Care Association ("MHCA") is an association of long-term care facilities, headquartered in Jefferson City. MHCA is the largest long-term care trade association in Missouri and represents over 300 long-term care facilities. MHCA assists its members in government and regulatory affairs, convention and education seminars, and through management of a host of programs and services critical to success in the field.

The Missouri Pharmacy Association ("MPA") is a professional society representing Missouri pharmacists, united to improve public health and patient care, enhance professional development, and advocate for the interests of the profession. MPA has approximately 1,200 members and is located in Jefferson City.

Appellants Janice and Clyde Sides and Respondents St. Anthony's Medical Center, Dr. Thomas K. Lee, and Tesson Heights Orthopedic and Arthroscopic Associates, P.C. consented to the filing of this amici brief. *See* Rule 84.05(f)(2).

The MSMA, MDA, MHCA, and MPA (collectively, the "Health Associations") represent their members' interests with respect to various matters, including those relating to tort law. Resolution of this case greatly interests the Health Associations. The members of the Health Associations are physicians, dentists, long term care providers, and pharmacists, each with an important perspective on tort issues affecting the health care industry. The Court's resolution of this case will affect the costs of providing various health care services, as well as the manner in which services are provided. It could also limit the ability of the Health Associations' members to obtain casualty coverage to provide certain services.

In fact, when this Court previously accepted transfer of a similar case in 2002, MHCA submitted an amicus curiae brief. *See Spears. v. Capital Region Med. Ctr., Inc.*, 86 S.W.3d 58 (Mo.App. W.D. 2002). After briefing and oral argument, the Court retransferred the case to the Court of Appeals, and declined to change Missouri's longstanding law. *Spears. v. Capital Region Med. Ctr., Inc.*, Missouri Supreme Court Case No. 84401, Docket entry (Oct. 22, 2002). Missouri's law continues to strike the proper balance in res ipsa loquitur cases. The Health Associations have an interest in ensuring that Missouri law is not changed in a way that would adversely affect health care providers specifically or the delivery of health care generally.

STATEMENT OF FACTS

The relevant facts are apparently not in dispute. Appellants' Third Amended Petition alleges that Janice Sides was infected with Escherichia coli ("E. coli") during a surgery performed at Respondent St. Anthony's Medical Center ("SAMC") on June 17, 2003. *L.F. at 9-13*. She was discharged three days later. *L.F. at 10.* In the previous two versions of their Petition, Plaintiffs alleged that the health care providers committed specific acts of negligence either during pre-operation preparation, surgery, or post-surgical wound care. *Supp. L.F. at 4-5; 14-15*.

Plaintiffs then filed their Third Amended Petition in which they abandoned their claims that the health care providers had committed specific acts of negligence, and instead alleged that E. coli infection does not ordinarily occur during surgery if those conducting the surgery use due care. *L.F. at 9-13*. Plaintiffs assert that it should be inferred that one or more of the defendants were negligent. *L.F. at 9-13*. To prove negligence, Plaintiffs rely solely on the res ipsa loquitur doctrine. *L.F. at 9-13*; *App. Br. at 12*. By Plaintiffs' own admission, they are unable to show that contracting E. coli is ordinarily caused by negligence without using expert testimony. *L.F. at 9-13*; *App. Br. at 12.*

The health care providers moved to dismiss the Third Amended Petition, asserting that Plaintiffs failed to state a claim upon which relief could be granted. *L.F. at 23, 29-30.* On February 16, 2007, the Circuit Court of St. Louis County sustained the defendants' motions to dismiss. *L.F. at 35.* Plaintiffs appealed to the Missouri Court of Appeals for the Western District, which affirmed the decision of the Circuit Court. *L.F.*

at 40. On January 22, 2008, this Court accepted transfer of the case. *Transfer Order (Jan. 22, 2008)*.

POINTS RELIED ON

I. The Circuit Court properly dismissed the Third Amended Petition because the Petition did not allege a specific act of negligence or facts sufficient to establish a res ipsa loquitur claim in that it is not commonly known that the occurrence – contracting Escherichia coli – is ordinarily caused by negligence. The common knowledge component of res ipsa loquitur – a longstanding component of Missouri case law – serves an important role in ensuring that the res ipsa loquitur doctrine is used fairly and pragmatically, and this Court should not discard it

City of Kennett v. Akers, 564 S.W.2d 41 (Mo. banc 1978)

Cudney v. Midcontinent Airlines, Inc., 254 S.W.2d 662 (Mo. banc 1953)

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

II. The Circuit Court properly dismissed the Third Amended Petition because the use of expert testimony to establish a res ipsa loquitur claim is inconsistent with Missouri law in that Section 538.225, RSMo, requires a plaintiff asserting damages claims against health care providers to submit affidavits stating the each defendant health care provider was at fault.

Budding v. SSM Healthcare Sys., 19 S.W.3d 678 (Mo. banc 2000)

Section 538.225, RSMo. Supp. 2007

ARGUMENT

I. The Circuit Court properly dismissed the Third Amended Petition because the Petition did not allege a specific act of negligence or facts sufficient to establish a res ipsa loquitur claim in that it is not commonly known that the occurrence – contracting Escherichia coli – is ordinarily caused by negligence. The common knowledge component of res ipsa loquitur – a longstanding component of Missouri case law – serves an important role in ensuring that the res ipsa loquitur doctrine is used fairly and pragmatically, and this Court should not discard it

A. Standard of Review

The Circuit Court sustained the Respondent health care providers' motions to dismiss Plaintiffs' Third Amended Petition. A motion to dismiss for failure to state a cause of action solely tests the adequacy of the petition. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993). The Court assumes that all of plaintiffs' averments are true, and liberally grants to plaintiffs all reasonable inferences therefrom. *Id.* The petition is reviewed 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. *Id.*[1]

[1] This standard of review also applies to the second Point Relied On of the Amici Curiae's Brief.

B. Background

Appellants rely on res ipsa loquitur to prove negligence. But, they cannot prove their res ipsa loquitur case relying on common knowledge. *L.F. at 9-13*; *App. Br. at 12.* The issue is: can the res ipsa loquitur doctrine be used if it is not commonly known that a certain type of injury does not ordinarily occur without negligence? Under current Missouri law, it cannot. *See City of Kennett v. Akers*, 564 S.W.2d 41, 45 (Mo. banc 1978) (judges must apply "their common experience in life" to determine whether an injury ordinarily results from negligence); *Hasemeier v. Smith*, 361 S.W.2d 697, 700-01 (Mo. banc 1962) (res ipsa loquitur can be used only if, "based on the common knowledge or experience of laymen," the occurrences do not happen without negligence); *Cudney v. Midcontinent Airlines*, 254 S.W.2d 662, 666-67 (Mo. banc 1953) (court must determine whether it is accepted, through the "common experience of mankind," that such occurrences do not happen without negligence); *Spears*, 86 S.W.3d at 62 (holding that "laypersons must 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"); *See also Swope v. Printz*, 468 S.W.2d 34, 39 (Mo. 1971) (res ipsa loquitur does not generally apply in malpractice cases); *Williams v. Chamberlain*, 316 S.W.2d 505, 511 (Mo. 1958) (same).

As a corollary to the common knowledge requirement, expert testimony – which, by definition, is evidence that goes beyond common knowledge – cannot be the basis for res ipsa loquitur. *Hasemeier*, 361 S.W.2d at 700-01; *Harp v. Illinois Cent. Railroad Co.*, 370 S.W.2d 387, 391 (Mo. 1963) (expert cannot testify about common knowledge, which

is the province of the jury); *Bone v. General Motors Corp.*, 322 S.W.2d 916, 924 (Mo. 1959) ("common knowledge" is that knowledge possessed by every informed individual). *See also* § 490.065, RSMo 2000 (expert evidence statute). The parties focus on this corollary. Since the corollary derives from the common knowledge requirement, the real issue is whether the common knowledge requirement should be retained. To change the law to allow expert testimony as Appellants request, the Court must abandon the common knowledge requirement.

Res ipsa loquitur is a court-made rule. In reconsidering this state policy, the Court performs a role akin to the General Assembly's legislative role. The Court must determine the best policy for all Missourians. *See generally* Mo. Const. art. I, §§ 1-3. Thus, to invoke the general principles of "fairness" – as Appellants do – only begins the analysis. *App. Br. at 10*. In deciding this case, the Court should consider the fairness, justice, economy, and any other effect of the rule adopted on *all* Missourians, including plaintiffs, health care providers, doctors, dentists , pharmacists, and health care consumers. *See* Mo. Const. art. I, § 1 (government "is instituted solely for the good of the whole").

C. Negligence law

The law of negligence determines who bears the costs of accidents. Generally, people who fail to exercise reasonable care are liable for damages incurred by third parties. *See, e.g., Steggall v. Morris*, 258 S.W.2d 577, 579 (Mo. banc 1953) (courts can compel negligent tortfeasors to compensate the persons they injure). Other formulations are possible. For example, people could be liable for damages for any harm caused by

their acts, regardless of fault. By hinging liability on the absence of reasonable care, negligence law encourages activity undertaken with reasonable care.

Oliver Wendell Holmes, Jr., explained the underlying policy:

> [T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.
>
> . . . Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

Oliver Wendell Holmes, Jr., *The Common Law* 95-96 (41st prtg. 1948).

The policy favoring economic activity by shifting the cost of accidents only where a lack of reasonable care is proven permeates negligence law. In general, plaintiffs can recover damages only if they prove a specific, unreasonable act. *See*, *e.g.*, *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 155-56 (Mo. banc 2000); *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. banc 1976).

This principle applies forcefully to health care. The public profits from the activities of health care providers. Doctors, dentists, pharmacists, nurses, long-term care facilities, and hospitals provide vital health care services that benefit all Missourians. To

ensure the availability and affordability of these services, the costs of health care accidents (like any other accident) are shifted to providers only when they fail to use reasonable care. *See Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. banc 1995); *Swope*, 468 S.W.2d at 39.

Reflecting this policy, Missouri has adopted rules specific to negligence claims against health care providers. Negligence must be proved with expert testimony. *Swope*, 468 S.W.2d at 39. *But see id.* (noting an exception where negligence can be proved with common knowledge). This Court frequently reminds that negligence cannot be presumed from an adverse result. *See, e.g., id.*; *Hart v. Steele*, 416 S.W.2d 927, 931 (Mo. 1967); *Hasemeier*, 361 S.W.2d at 700. Further, the General Assembly has limited negligence claims against health care providers by (1) shortening the limitations period, (2) capping damages, and (3) requiring an affidavit supporting plaintiff's claims of negligence within 90 days of suing. *See* §§ 516.105, 538.210, 538.225, RSMo Supp. 2007.

D. Res ipsa loquitur

Ordinarily, negligence cannot be inferred from the mere fact of injury. *See, e.g., Swope*, 468 S.W.2d at 39. Permitting recovery based on injury alone (without evidence that specific conduct was actually unreasonable) would discourage publicly profitable activity. Therefore, plaintiffs are generally required to prove a specific act of negligence to recover damages. *See Semler v. Kansas City Public Serv. Co.*, 196 S.W.2d 197, 199 (Mo. 1946). But, for a limited class of cases, an exception – res ipsa loquitur – exists. *Id.* Res ipsa loquitur is premised on the "doctrine of probabilities." *Frazier v. Ford Motor Co.*, 276 S.W.2d 95, 98 (Mo. banc 1955), *cited in Martin v. City of Washington*, 848

S.W.2d 487, 495 (Mo. banc 1993); *Myers v. City of Independence*, 189 S.W. 816, 822 (Mo. 1916) (res ipsa loquitur "owes its efficacy to the probability that acts flow from their usual and natural causes, and produce their usual and natural results, and are therefore evidence of the existence of such cause or result"). If, based on common knowledge, the occurrence is ordinarily caused by negligence, res ipsa loquitur lets the jury *infer* negligence from the circumstances of the accident. *See Hasemeier*, 361 S.W.2d at 700-01; *Cudney*, 254 S.W.2d at 666-67. Res ipsa loquitur does not shift the burden of proof. *Frazier*, 276 S.W.2d at 98-99; *McCloskey v. Koplar*, 46 S.W.2d 557, 561-64 (Mo. banc 1932).

In practical terms, res ipsa loquitur is a rule of evidence. *See, e.g.*, *Martin*, 848 S.W.2d at 495; *Hasemeier*, 361 S.W.2d at 700. Res ipsa loquitur declares certain circumstantial evidence sufficient to withstand a motion for directed verdict as a matter of law. *Frazier*, 276 S.W.2d at 98 (quoting *Harke v. Hasse*, 75 S.W.2d 1001, 1003 (Mo. 1934)). If the doctrine applies, the jury can infer negligence based on the evidence, and is so instructed. *See Martin*, 848 S.W.2d at 495 (res ipsa loquitur applies to the breach element of negligence, but not causation); MAI 31.02(3) (6th ed.).

Res ipsa loquitur is often described as consisting of three elements. *See, e.g., Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. banc 1983) (Wasserstrom, Sp.J.). This description, however, oversimplifies. In fact, res ipsa loquitur operates in two steps. First, the judge applies the classic three-element test and determines whether (1) based on common knowledge, the occurrence resulting in injury is ordinarily caused by negligence, (2) defendant has superior knowledge or access to information about the

cause of the occurrence, and (3) defendant controlled the instrumentalities involved. *See, e.g.*, *Bass*, 646 S.W.2d at 768; *City of Kennett*, 564 S.W.2d at 45. The first and second determinations are pure questions of law, which are not submitted to the jury. *Niman v. Plaza House, Inc.*, 471 S.W.2d 207, 212-14 (Mo. banc 1971); *Parlow v. Dan Hamm Drayage Co.*, 391 S.W.2d 315, 323-24 (Mo. 1965). *See also* MAI 31.02(3) & Comm. Cmt.

Second, if the judge determines that res ipsa loquitur should apply, the jury receives a special res ipsa loquitur instruction. The instruction tells the jury to decide for plaintiff if they believe (1) defendant controlled, had a right to control, or managed the instrumentality involved, (2) the circumstances of the accident, (3) based on inferences from the circumstances, defendant was negligent, and (4) defendant's negligence directly caused damage to plaintiff. MAI 31.02(3).

Thus, in this two-step process, the judge screens claims to determine whether they should be submitted with a res ipsa loquitur instruction. If the instruction is submitted, the jury is explicitly permitted to infer negligence from the fact of injury. *See* MAI 31.02(3). But, the jury will only be permitted to make this inference for occurrences that, based on common knowledge, are ordinarily caused by negligence. *See, e.g.*, *Niman*, 471 S.W.2d 212-14; *Hasemeier*, 361 S.W.2d at 700.

Properly understood, as a limited exception to the specific negligence requirement, res ipsa loquitur is an important component of tort law, allowing plaintiffs to recover damages when defendants were very likely negligent. But, substantial risks accompany the use of inferences. Without direct proof of negligence, the costs of non-negligent

health care accidents may be shifted to providers, improvidently reducing the availability and affordability of health care services.

E. The common knowledge requirement

This case focuses on the first element of res ipsa loquitur.[2] The element has two components: (1) a probability [that the occurrence must ordinarily be caused by negligence] (2) determined from a bounded set of information [common knowledge]. *See City of Kennett*, 564 S.W.2d at 45; *Hasemeier*, 361 S.W.2d at 700; *Cudney*, 254 S.W.2d at 666-67.

Missouri courts have not consistently articulated the probability standard. For example, in *Bass*, the Court said res ipsa loquitur applies if "the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care." 646 S.W.2d at 768. *See also*, *e.g.*, *McCloskey*, 46 S.W.2d at 559. This standard wrongly focuses on the likelihood of the occurrence when due care is used. Even if an occurrence ordinarily does not happen when due care is used, it does not logically follow that the cause of the occurrence is usually negligence. *See* Karyn K. Ablin, Note, *Res Ipsa*

[2] The judge must also determine whether defendant controlled the instrumentalities and has superior knowledge. *Bass*, 646 S.W.2d at 768. These limitations are important, because they show that, even if negligence is probable, an inference of negligence is proper only if plaintiff faces additional extenuating circumstances in proving the specific act of negligence. These determinations confirm that res ipsa loquitur is a *limited* exception to the specific negligence rule. *See Semler*, 196 S.W.2d at 199.

Loquitur and Expert Opinion Evidence in Medical Malpractice Cases, 82 Va. L. Rev. 325, 339-41 (1996). Mathematically, this conclusion can be explained with Bayes Theorem.[3] *Id.* at 340-41.

But the answer is also intuitive. The universe of all accident-causing occurrences can be divided into instances of negligence and reasonable care. Accidents occur when people are negligent, but also occur when people exercise reasonable care. Normally, the *rate* of accidents will be higher when people are negligent. But, accidents still occur when people exercise reasonable care. People exercise reasonable care most of the time and negligence is rare. Thus, instances of reasonable care predominate. It is more likely that any given injury resulted from reasonable care than negligence, even though the *rate* of injury for instances of negligence is higher. Thus, the *Bass* standard wrongly focuses on the probability of negligence when due care is used, which is not the same as the probability that negligence caused a particular occurrence. *See* Ablin, 82 Va. L. Rev. at 339-41.

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[3] Bayes Theorem is:

$$P(N \mid I) = P(N) * P(I \mid N) / \\ P(N) * P(I \mid N) + (1 - P(N)) * P(I \mid R)$$

where P indicates probability; N indicates negligence; I indicates injury; R indicates reasonable care; and the bar, "|", indicates conditional probability. *See* Ablin, 82 Va. L. Rev. at 341.

By way of contrast, in *City of Kennett*, the Court said "[t]he event must be an unusual occurrence of a character which ordinarily results from negligence." 564 S.W.2d at 45. This standard properly focuses on the likelihood that negligence caused the occurrence, and is consistent with the purpose of res ipsa loquitur – to permit recovery when negligence most likely caused an occurrence. *See, e.g.*, *Frazier*, 276 S.W.2d at 98 (res ipsa loquitur is based on the doctrine of probabilities).

The confusion in this area is not surprising. The probability that an outcome was the result of a particular cause (here, negligence) among multiple possible causes can only be determined using Bayes Theorem, which relates the probability that negligence caused a given injury to the overall probability of negligence, the probability of injury given that reasonable care was used, and the probability of injury given that someone was negligent. *See* Ablin, 82 Va. L. Rev. at 341. The Theorem shows that, even if the probability standard is clarified, the determination that an occurrence was most likely caused by negligence requires knowledge of various other probabilities, and the relationship between them. *Id.*

Certainly, in res ipsa loquitur cases, jurors and judges do not explicitly apply Bayes Theorem. Nor should they. *Cf. Parlow*, 391 S.W.2d at 326 ("To attempt to instruct a jury on the intricacies of the res ipsa loquitur doctrine could do nothing more than add to the already existent confusion regarding the scope, application and effect of the doctrine."). But its implications are still relevant. Inferring negligence is not a simple matter of addition. A filter is needed to determine when inferences are reliable. The common knowledge requirement performs this function.

"Common knowledge" is often described in the law. It identifies facts that can be judicially noticed, and defines the province of the jury which experts should not invade. *See, e.g.*, *Endicott v. St. Regis Inv. Co.*, 443 S.W.2d 122, 126 (Mo. 1969) (facts are judicially noticeable if they are common knowledge); *Harp*, 370 S.W.2d at 391 (an expert witness may express an opinion when "the subject matter is not of such common knowledge to invade the province of the jury"). It is the knowledge that all informed persons possess. *Bone*, 322 S.W.2d at 924. Despite these straightforward meanings, the court in *Connors v. University Associates in Obstetrics and Gynecology, Inc.* (one of plaintiffs' main authorities) attempted to redefine common knowledge, reasoning that jurors can be trained as "new initiates into a different, higher level of common knowledge." 4 F.3d 123, 128-29 (2d Cir. 1993); *see also Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 94-95 (Tenn. 1999).

This statement is specious. Common knowledge is the antithesis of expert knowledge. *See, e.g.*, *Endicott*, 443 S.W.2d at 126; *Harp*, 370 S.W.2d at 391. Expert testimony concerns "peculiar" knowledge, beyond the ordinary experience of laymen. *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 208 (Mo. banc 1991) (citing *Hamre v. Conger*, 209 S.W.2d 242, 248 (Mo. 1948)). "Common knowledge," by contrast, is the knowledge of "every person of ordinary understanding and intelligence." *Endicott*, 443 S.W.2d at 122; *English v. Old American Ins. Co.*, 426 S.W.2d 33, 40-41 (Mo. 1968). Experts should not testify about matters of common knowledge – the province of the jury. *Harp*, 370 S.W.2d at 391; *Capra v. Phillips Inv. Co.*, 302 S.W.2d 924, 930 (Mo.

banc 1957). Because common knowledge and expert knowledge are fundamentally incompatible, allowing expert testimony abolishes the common knowledge requirement.

The common knowledge requirement ensures that res ipsa loquitur operates fairly and reliably. It limits the doctrine to fact scenarios where judges and jurors intuitively understand the possible causes and other factors involved. In the realm of common knowledge, judges and jurors are competent to infer causation from a result. *See*, *e.g.*, *Cudney*, 254 S.W.2d at 666-67 (thoughtfully applying the common knowledge requirement). Though they do not explicitly or consciously apply Bayes Theorem, judges and jurors do intuitively compare probabilities and their inter-relationships. When a barrel falls on a passerby from a second-story shop or a sponge is left in a patient's body during surgery, they intuitively consider the likely causes of these accidents, and determine whether negligence should be inferred. They may not articulate the mathematical chain of reasoning, but life's common experiences give them a reasonable basis for ultimately determining the likelihood of negligence.

But, if the common knowledge requirement is discarded, no basis will exist for judges or jurors to evaluate the likelihood of negligence. By definition, they do not have "uncommon" expert knowledge, much less an intuitive understanding of that knowledge. Perhaps they can speculate, surmise, or hypothesize about the likelihood of negligence based on expert testimony, but they cannot use their common knowledge to intuitively reason to a reliable determination. As such, without a common knowledge limitation, judges and jurors set sail on the sea of res ipsa loquitur without a map or compass.

Health care providers, including members of the Health Associations, would be disproportionately affected by the arbitrariness and unreliability of this process. These health care providers treat people who are already sick. That some of these people will not be cured or may have undesirable side-effects is a necessary risk accompanying the possibility of cure or respite. For claims beyond their common knowledge, judges and juries have no basis for intuiting whether a particular outcome was a risk of the procedure, or caused by negligence. Thus, any bad result may become the basis for a res ipsa loquitur claim, as would any previously or subsequently contracted illness.

Though the common knowledge requirement performs an important function, plaintiffs' leading cases forsake it, offering various reasons. *See Connors*, 4 F.3d at 128; *Seavers*, 9 S.W.3d at 95. Both courts quoted the district court opinion in *Connors*, which stated:

> [I]n this era of constantly developing medical science, cases in which injuries bespeak negligence to the average person occur less and less and complex cases predominate. If courts refuse to allow experts to testify to what is common knowledge within their fields, then they are not being responsive to new conditions nor are they keeping abreast of changes in society.

Connors v. University Assocs. in Obstetrics & Gynecology, Inc., 769 F. Supp. 578, 585 (D.Vt. 1991), *aff'd*, 4 F.3d 123, 128 (2d Cir. 1993). *See Connors*, 4 F.3d at 128; *Seavers*, 9 S.W.3d at 95.

As a justification for broadening res ipsa loquitur liability, this reasoning is flawed. Surely, courts should not impose *more* liability for health care providers that adopt progressive medical techniques to *reduce* the incidence of obvious negligence. Also, if the jurors were not competent to evaluate uncommon knowledge claims before, no reason exists that they should now. Technology changes – not jurors. Jurors today – like jurors 20, 50, and 100 years ago – still have no basis outside of their common knowledge for inferring negligence.

Moreover, this Court need not abandon the common knowledge requirement to obtain the benefit – responsiveness to new conditions – that *Connors* seek. In 1953, this Court established a better response to progress. *Cudney v. Midcontinent Airlines, Inc.*, 254 S.W.2d 662 (Mo. banc 1953). Plaintiff, an airline passenger, was thrown from her seat and injured, when the plane experienced a severe jolt. *Id.* at 663-64. She sued the airline and pilot, invoking res ipsa loquitur. *Id.* at 663. Several passengers, the pilots, and a mechanic who examined the plane testified. *Id.* at 664. No expert testimony was presented. *Id.*

The Court considered whether, in "the common experience of mankind," airplanes experience severe jolts without someone being negligent. *Id.* at 666. By analogy, the Court noted that res ipsa loquitur applies to sudden or violent jolts on streetcars and buses, because in the common experience of mankind they do not ordinarily occur unless someone is negligent. *Id.* But, in *Cudney*, the Court refused to let the plaintiff use res ipsa loquitur. *Id.* at 667. It concluded:

> In short, it is not possible at this date, as it may be in another day, to say that it is the common experience of mankind that commercial airliners do not lurch and drop for some distance except for negligence in the operation of the plane and, therefore, it is not now possible to confidently apply the doctrine of res ipsa loquitur to the mere occurrence in the circumstances relied upon by [plaintiff], as it is in the instance of certain crashes, — there is now no such balance of probabilities.

Id.

Thus, *Cudney* recognized that the "common knowledge" of mankind is not a static body of information, but a dynamic collection of experiences. As common knowledge changes, circumstances warranting use of res ipsa loquitur may also change. The Court did not solicit expert evidence or survey trade journals to determine the state of the art. It pragmatically assessed the common knowledge of mankind as it then existed, concluded that the occurrence is not ordinarily attributable to negligence, and therefore rejected res ipsa loquitur for that occurrence.

This approach recognizes the importance of the common knowledge requirement. But it also accommodates changes wrought by time. At some point, certain facts become so accepted that they cross from the domain of expert knowledge to common knowledge. *See, e.g.*, *State v. Summers*, 489 S.W.2d 225, 229 (Mo. App. 1972) (court can take judicial notice of "scientific" facts that are matters of common knowledge). When this happens, this "new" common knowledge can serve as the basis for a res ipsa loquitur claim. Thus, Missouri is not exposed to the criticism that its law does not change with

the times. *Cudney* shows that, for almost 50 years, Missouri has accommodated progress by constantly re-evaluating the common knowledge of mankind.

Ultimately, both *Seavers* and *Connors* conclude that the common knowledge requirement should be discarded because some negligently-injured plaintiffs cannot recover when res ipsa loquitur is limited to common knowledge. *Connors*, 4 F.3d at 129; *Seavers*, 9 S.W.3d at 95. Though well-meaning, their concept of fairness (compensation for all injuries) is too limited. Tort law does not seek only to compensate negligently-injured parties. It also recognizes that activities that benefit the public should be encouraged and not penalized. *See Steggall*, 258 S.W.2d at 579 (courts can compel *negligent* tortfeasors to compensate the persons they injure); Holmes, *The Common Law* at 95-96. The law's goal is to identify negligent conduct without sweeping too broadly and ensnaring non-negligent conduct. Admittedly, some injured parties may not be compensated if the Court retains the common knowledge requirement. But, many rules have this effect. Statutes of limitation, proximate cause, and duty are well-established and accepted limits on plaintiffs' ability to recover damages caused by defendants' negligence. The Court must balance the recovery interest of negligently-injured plaintiffs, against the negative effects an overbroad rule has on health care providers and their ability to provide affordable health care services. The common knowledge requirement achieves the right balance.

F. Conclusion

The Court should clarify the probability standard, and reaffirm Missouri's commitment to the common knowledge requirement. The common knowledge

requirement is the foundation that supports the practice of inferring negligence. If the requirement is abolished, judges and juries will be asked to infer negligence for fact circumstances completely foreign to their experience. Their decisions will be arbitrary and unreliable. This Court should refuse to extend the doctrine to cases where judges and juries have no reliable means of inferring negligence.

As a practical matter, allowing expert testimony as a basis for res ipsa loquitur exposes health care providers to a new class of liability when plaintiffs cannot offer direct evidence or inferences based on common knowledge, but can offer expert inferences to support their claims of negligence. A national market in testifying experts flourishes. *See Gridley v. Johnson*, 476 S.W.2d 475, 482-83 (Mo. 1972) (abolishing the locality rule in Missouri). If this Court overrules *Hasemeier*, plaintiffs will have little trouble employing experts who will testify that a particular unexpected outcome ordinarily does not occur without negligence. Therefore, it is hard to imagine a medical case where res ipsa loquitur will not apply.

As Missouri law now stands, trial courts can screen out res ipsa loquitur claims when, based on common knowledge, the occurrence is not ordinarily caused by negligence. *See, e.g.*, *City of Kennett*, 564 S.W.2d at 45; *Hasemeier*, 361 S.W.2d at 700. But, if *Hasemeier* is overruled, trial courts will be forced to admit expert testimony regarding the probability of negligence. Since both sides will employ sharply conflicting experts, trial courts will be faced with a credibility determination, and no objective basis for resolving it. Without the common knowledge requirement, the judicial screening role will be destroyed.

The end result will be that juries will be able to infer negligence in most medical cases. As this brief has explained, jurors cannot fairly and reliably infer negligence when the occurrence is outside of their common knowledge. Plaintiffs will be able to use this uncertainty and the litigation costs faced by health care providers to extract unjustified settlements. *Cf. Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 508 (Mo. banc 1991). Health care providers offer valuable services to all Missourians, and they should not be compelled to bear the cost of health care accidents without proof of negligence. Shifting these costs to health care providers will decrease the availability and affordability of health care services for Missourians.

II. The Circuit Court properly dismissed the Third Amended Petition because the use of expert testimony to establish a res ipsa loquitur claim is inconsistent with Missouri law in that Section 538.225, RSMo, requires a plaintiff asserting damages claims against health care providers to submit affidavits stating the each defendant health care provider was at fault.

Since 1986, the people of Missouri – acting through the General Assembly – have consistently chosen to limit the liability exposure of health care providers, thus promoting the availability and affordability of health care services for Missourians. *See Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 904-05 (Mo. banc 1992) (concluding that, by enacting chapter 538, the legislature rationally sought to maintain "generally affordable health care costs"); *Mahoney*, 807 S.W.2d at 508 (Shangler, Sp.J.) (noting that § 538.225 rationally seeks to preserve "an adequate system of medical care for the citizenry" by controlling ungrounded medical malpractice claims). These limits include a shorter

limitations period, a cap on damages, and an affidavit requirement. *See* §§ 516.105, 538.210, 538.225.

Section 538.225 requires a plaintiff to submit an affidavit in any action against a health care provider:

> stating that he or she has obtained the written opinion of a legally qualified health care provider which states that *the defendant health care provider* failed to use *such care* as a reasonably prudent and careful health care provider would have under similar circumstances and that *such failure to use such reasonable care* directly caused or directly contributed to cause the damages claimed in the petition.

Section 538.225 (emphasis added).

This Court previously considered this provision in *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678 (Mo. banc 2000). There, the plaintiff claimed a hospital was strictly liable for inserting defectively designed implants. *Id*. at 679. The Court concluded that strict liability claims cannot be asserted against health care providers, relying on the plain language of § 538.225. *Id.* at 680-81. The Court noted that it would be absurd for the legislature to require an affidavit affirming negligence for strict liability claims where culpability is not at issue. *Id.* at 681. Thus, it was clear that the legislature intended to "eliminate liability of health care providers for strict liability." *Id.*

Section 538.225 generally reflects the General Assembly's intent to limit claims against providers. To proceed, a plaintiff must obtain an expert opinion that each defendant health care provider named in the lawsuit was at fault, and that such fault

caused the damages at issue in the Petition. § 538.225. In the traditional res ipsa loquitur claim, this requirement may be easily complied with. For example, when a sponge is left in a body, the surgeon, nurse, or other individual responsible for counting sponges to ensure that they are removed is at fault. The patient or his expert may not be able to identify the specific way in which the negligence manifested itself, but the fact that the responsible person breached the standard of care is manifest.

By way of contrast, in this case, the Third Amended Petition does not and cannot assign fault to a specific health care provider. By their previous pleadings, Plaintiffs have identified at least three different points during the patient's three day hospital stay at which the infection may have been contracted: during the pre-operation preparation, during the surgery, or during post-operative wound treatment. *Supp. L.F. 4-5; 14-15.* Of course, it is also entirely possible that the patient contracted the infection after leaving the hospital. If the common knowledge requirement were abolished and experts were allowed to generally testify that some, unidentified act of negligence likely occurred on the part of some individual over the course of a three day hospital stay in which the patient received care from numerous health care providers (as Plaintiffs propose to do in this case), health care providers would be subjected to suit and potential liability based solely on the fact that they were involved in the care of a patient with a bad outcome during or subsequent to receiving treatment. Such broadened liability effectively shifts the burden of persuasion to health care providers to *disprove* that they were negligent and conflicts with the requirement in § 538.225 that the plaintiff must obtain the opinion of an

expert specifically attributing fault to each health care provider who is sued. *Budding*, 19 S.W.3 at 680-81.

In addition to specifically conflicting with the health care affidavit requirement, broadening res ipsa loquitor liability would be inconsistent with the general policy that chapter 538 and other statutes evidence. Since 1962 when *Hasemeier* was decided, the General Assembly has addressed health care provider liability in different statutes, always assuming that *Hasemeier* was good law and that a jury could not infer the negligence of a provider based on expert testimony. *See* § 516.105 (enacted in 1976); chapter 538 (enacted in 1986); *Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000) (courts presume that the legislature is aware of state law). In doing so, the legislature has not changed the *Hasemeier* rule. Instead, the General Assembly has further constricted provider liability. *See, e.g.*, *Budding*, 19 S.W.3d at 681.

The *Hasemeier* rule pragmatically and fairly limits the application of res ipsa loquitor to cases in which judges and jurors may infer negligence based on their common knowledge. This Court should not overrule the settled precedent on which the health care provider community and the General Assembly have relied. Changing Missouri law to allow expert testimony in support of res ipsa loquitor claims would specifically conflict with the § 538.225 affidavit requirement and would be inconsistent with the general policy of the State as evidenced by chapter 538, RSMo.

CONCLUSION

Accordingly, the Health Associations respectfully request that this Court AFFIRM the Circuit Court's judgment or, in the alternative, re-transfer this case to the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief

(1) Contains the information required by Rule 55.03;

(2) Complies with the limitations contained in Rule 84.06(b); and

(3) Contains 7,271 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2003 SP-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

CERTIFICATE OF SERVICE

I certify that two copies of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United Stated mail, postage paid, on this 3rd day of March, 2008, to:

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