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 ARTHROSCOPIC ASSOCIATES, P.C.,

Defendants/Respondents

SUBSTITUTE BRIEF OF APPELLANTS

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This appeal arises from a judgment dismissing Appellants' action for medical malpractice against respondents St. Anthony's Medical Center, Thomas K. Lee, M.D., and Tesson Heights Orthopedic and Arthroscopic Associates, P.C.[1] Legal File (hereinafter "LF") at 35. Appellants brought the pending suit in the Circuit Court of St. Louis County, State of Missouri. LF at 7. In the trial court below, the Honorable Emmett M. O'Brien 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.

[1] Rule 74.01(b) of the Missouri Rules of Civil Procedure is not at issue in this instance because Respondents were the only party-defendants to Appellants' underlying cause of action. Mo.R.Civ.Pro. 74.01 (2007).

STATEMENT OF FACTS

On June 17, 2003, appellant Janice Sides underwent a lumbar laminectomy with instrumented postero-lateral spinal fusion with internal fixation. LF at 10, ¶ 4. The surgery was performed by respondent Thomas K. Lee, M.D., (hereinafter "Dr. Lee"), an agent and employee of respondent Tesson Heights Orthopedic and Arthroscopic Associates, P.C. (hereinafter "Tesson Heights") (LF at 10, ¶ 3), at St. Anthony's Medical Center, (hereinafter "St. Anthony's"), also a respondent herein. LF at 10, ¶ 1-4.

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. LF at 9-12. Appellant Janice Sides alleges therein that during the aforementioned surgery, Respondents infected appellant's body at the surgical site with Escherichia coli (hereinafter "E. coli") bacteria. LF at 10, ¶ 5. Appellant Janice Sides further alleges that at the time of and during the surgery, she was unconscious due to the effects of general anesthesia (LF at 11, ¶ 6), that her body and surgical site were under the exclusive control of Respondents (LF at 11, ¶ 7), that Respondents have greater knowledge than does appellant Janice Sides as to the cause of her E. coli infection (LF at 11, ¶ 8), that infection of E. Coli does not ordinarily happen absent negligence (LF at 11, ¶ 9), and that from the fact of appellant Janice Sides' infection with E. coli, the infection was directly caused by the negligence of Respondents (LF at 11, ¶ 10). Appellant Janice Sides also alleges that as a result of said negligence, she was damaged. LF at 11, ¶¶ 11-13.

Appellant Clyde Sides alleges in the Third Amended Petition that he was at all

times relevant the lawful husband of appellant Janice Sides (LF at 12, ¶ 15), and that as a result of the aforementioned negligence of Respondents, he suffered the loss of the support, care, consortium and companionship of his wife (LF at 12, ¶ 16).

Respondents each filed a Motion to Dismiss Appellants' Third Amended Petition. LF at 23-24, 29-30. Respondent St. Anthony's also filed a supporting Memorandum of Law. LF at 31-34. Respondents argue 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, 32-33. In opposition to respondent St. Anthony's Motion, Appellants filed a Memorandum in Opposition. LF at 25. 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 because it did not adopt and adhere to the majority rule allowing the presentation of expert witness testimony in support of a medical malpractice claim premised on res ipsa loquitur now present amongst other state and federal court jurisdictions and recommended for review by the Missouri Court of Appeals for the Western District of Missouri in 2002, in that said majority rule allows such claims to proceed even with the necessary use of expert witness testimony.

Connors v. U. Assoc. in Obstetrics and Gynecology, 4 F.3d 123 (2d Cir. 1993).

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

Seavers v. Methodist Med. Ctr. of Oak Ridge, 9 S.W.3d 86 (Tenn. 1999).

States v. Lourdes Hosp., 792 N.E. 2d 151 (N.Y. 2003).

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. <u>The trial court erred in dismissing Plaintiffs' Third Amended Petition because it did not adopt and adhere to the majority rule allowing the presentation of expert witness testimony in support of a medical malpractice claim premised on res ipsa loquitur now present amongst other state and federal court jurisdictions and recommended for review by the Missouri Court of Appeals for the Western District of Missouri in 2002, in that said majority rule allows such claims to proceed even with the necessary use of expert witness testimony.</u>

"By way of observation, but without advocating a departure from Missouri's common law, it appears the majority view of allowing expert evidence in res ipsa cases involving medical treatment seems most equitable. The Court is urged to revisit this area." *Spears v. Capital Region Med. Ctr., Inc.*, 86 S.W.3d 58, 62 (Mo. App. W.D. 2002).

Res ipsa loquitur is a rule of evidence allowing a fact finder to infer from circumstantial evidence that a loss or injury arose from some negligent act of the defendant, without requiring the plaintiff to prove specific acts of negligence. *Eversole v. Woods Acquisition, Inc.*, 135 S.W.3d 425, 428 (Mo. App. W.D. 2004). A Latin phrase, res ipsa loquitur means nothing more than the "the thing speaks for itself." *Restatement (Second) of Torts* § 328D cmt. a (1965). "It originated in a casual word let fall by Baron Pollock in the course of argument with counsel in Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), where a barrel of flour rolled out of the window of the defendant's warehouse and fell on a passing pedestrian." *Id*.

In the usual case presented under this doctrine, Missouri Courts have said "A

plaintiff can make a submissible case under res ipsa loquitur by demonstrating: 1) the occurrence resulting in injury does not ordinarily happen in the absence of negligence; 2) the instrumentalities that caused the injury are under the care and management of the defendant; and 3) the defendant possesses either superior knowledge of or means of obtaining information about the cause of the occurrence." *Spears*, 86 S.W.3d at 61.

Currently in Missouri, res ipsa loquitur in the context of medical malpractice cases has limited application. In a standard medical malpractice case, where res ipsa loquitur is not alleged, a plaintiff is required to establish: (1) an act or omission by the defendant that was not in keeping with the degree of skill and learning ordinarily used under the same or similar circumstances by members of defendant's profession; and (2) that such negligence or omission caused the plaintiff's injury. *Zumwalt v. Koreckij*, 24 S.W.3d 166, 168 (Mo. App. E.D. 2000). "However, the doctrine of res ipsa loquitur exists to obviate the need for direct proof of negligence, and allows cases submitted under the doctrine to proceed to the jury even in the absence of direct proof of negligence." *Id*. In Missouri, as the law now stands, res ipsa loquitur is only available in medical malpractice cases in the following two scenarios: 1) where a patient received treatment for one problem and incurred an unusual injury or 2) where a surgeon left a foreign object in an operative cavity. *Spears*, 86 S.W.3d at 61-62.

This limited availability of res ipsa loquitur in medical malpractice cases is due to the fact such cases require laypersons know, based upon their common knowledge or experience, that the cause of the plaintiff's injury does not ordinarily exist absent the doctor's negligence. *Zumwalt*, 24 S.W.3d at 169. Missouri currently follows the

minority view of jurisdictions in interpreting this to mean that a plaintiff cannot use expert testimony to establish a res ipsa loquitur case in a medical malpractice action. *Spears*, 86 S.W.3d at 61 (reaffirming *Hasemeier v. Smith*, 361 S.W.2d 697, 700 (Mo. banc 1962)).

The aforementioned *Spears* case is nearly identical to the case at bar, both at the trial court level and with regard to the relief sought on appeal. In *Spears*, the plaintiff brought a medical malpractice claim premised on res ipsa loquitur against Capital Region Medical Center. *Spears*, 86 S.W.3d at 60. There, the plaintiff underwent cardiac bypass surgery under general anesthesia at Capital Region Medical Center and alleged he became infected with Hepatitis C during his hospitalization. *Id*. The Court noted that, "the dispositive issue here is that Spears is unable to identify the person or persons who infected him or explain the manner by which he was infected. More importantly, Spears *therefore requires expert testimony to establish that he was infected with Hepatitis C while a patient at Capital Region*." *Id*. (emphasis in original).

Here, appellant Janice Sides claims that she contracted E. coli at St. Anthony's Medical Center while undergoing a lumbar laminectomy and spinal fusion performed by Dr. Lee under general anesthesia. LF at 10. Janice Sides is also unable to identify the person or persons who infected her or explain the manner by which she was infected. She also, therefore, requires expert testimony to establish that she was infected with E. coli while a patient at St. Anthony's. Such expert testimony will establish that appellant Janice Sides' contracting E. coli in the location of the infection does not occur absent negligence.

In *Spears*, the plaintiff's one point on appeal[2] was that the trial court erred in entering summary judgment in favor of the defendant because he presented evidence supporting a claim for medical malpractice by way of the res ipsa loquitur doctrine and that the court should adopt the majority rule and allow him to present expert testimony in support thereof. *Spears*, 86 S.W.3d at 60-61. "Spears conceded at oral argument his awareness that his appeal in this court would be unsuccessful; his intention is to persuade the Supreme court of Missouri to revisit its 1962 position in *Hasemeier* on the doctrine of *res ipsa loquitur*, given that the prohibition on expert testimony vis-à-vis *res ipsa loquitur* is now the minority rule and is discouraged by the drafters of the Restatement 2d of Torts." *Id*. at 62. The Court affirmed the summary judgment, but said, as recited above, that "it appears the majority view of allowing expert evidence in res ipsa cases involving medical treatment seems most equitable. The Court is urged to revisit this area." *Id*.

Appellants herein make the same concessions and seek the same relief from this Court. The Court of Appeals, pursuant to *Kansas Ass'n of Private Investigators v. Mulvihill*, 35 S.W.3d 425, 432 (Mo. App. 2000), was obligated to follow the precedent set forth by the Supreme Court decision in *Hasemeier, supra*. However, this Court is vested with the power 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. Mo.

[2] The plaintiff raised two points on appeal. However, the court determined the second point was not properly preserved for review and declined to address it. *Spears*, 86 S.W.3d at 62-63.

Const. Art. V, § 10. For the reasons set forth below, Appellants urge this Court to take that step.

Currently, the number of jurisdictions following the majority view and allowing expert testimony in support of a medical malpractice claim sounding in res ipsa loquitur is twenty-three, and the number of jurisdictions following the minority view is six. The jurisdictions following the majority view are California,[3] Illinois,[4] Michigan,[5] New Jersey,[6] New Mexico,[7] Ohio,[8] Pennsylvania,[9] Wisconsin,[10] New York,[11] District of Columbia,[12] Hawaii,[13] Kansas,[14] Louisiana,[15] Rhode Island,[16] South Dakota,[17]

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[3] *Kerr v. Bock*, 5 Cal.3d 321, 324, 95 Cal.Rptr. 788, 486 P.2d 684, 686 (Cal. 1971).

[4] *Walker v. Rumer*, 72 Ill.2d 495, 500, 21 Ill.Dec. 362, 381 N.E.2d 689, 691 (N.E. 1978).

[5] *Jones v. Porretta*, 428 Mich. 132, 154, 405 N.W.2d 863, 874 (Mich. 1987).

[6] *Buckelew v. Grossbard*, 87 N.J. 512, 525-528, 435 A.2d 1150, 1157-1158 (N.J. 1981).

[7] *Mireles v. Broderick*, 117 N.M. 445, 447-449, 872 P.2d 863, 865-867 (N.M. 1994).

[8] *Morgan v. Children's Hosp.*, 18 Ohio St.3d 185, 189, 480 N.E.2d 464, 467 (Ohio 1985).

[9] *Jones v. Harrisburg Polyclinic Hosp.*, 496 Pa. 465, 472-473, 437 A.2d 1134, 1138 (Pa. 1981).

[10] *Hoven v. Kelble*, 79 Wis.2d 444, 452, 256 N.W.2d 379, 383 (Wis. 1977).

[11] *States v. Lourdes Hosp.*, 100 N.Y. 2d 208, 212, 792 N.E. 2d 151, 153-54, 762 N.Y.S.2d 1, 3-4 (N.Y. 2003).

[12] *Gubbins v. Hurson*, 885 A.2d 269, 283 (D.C. App. 2005).

[13] *Medina v. Figuered*, 3 Haw.App. 186, 647 P.2d 292, 294 (Haw. App. 1982).

Washington,[18] Nebraska,[19] Colorado,[20] Tennessee,[21] Vermont (Federal Court),[22] Maryland,[23] Iowa,[24] and Kentucky.[25]

The jurisdictions following the minority view[26] are Idaho,[27] Minnesota,[28] Texas,[29]

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[14] *Savina v. Sterling Drug, Inc.*, 247 Kan. 105, 795 P.2d 915, 935-36 (Kan. 1990).

[15] *Cangelosi v. Our Lady of Lake Regl. Med. Ctr.*, 564 So.2d 654, 664-65 (La. 1989).

[16] *Wilkinson v. Vesey*, 110 R.I. 606, 295 A.2d 676, 691 (R.I. 1972).

[17] *Van Zee v. Sioux Valley Hosp.*, 315 N.W.2d 489, 492 (S.D. 1982).

[18] *Pederson v. Dumouchel*, 72 Wash.2d 73, 431 P.2d 973, 979 (Wash. 1967).

[19] *Keys v. Guthmann*, 267 Neb. 649, 653, 676 N.W.2d 354, 358-59 (Neb. 2004).

[20] *Holmes v. Gamble*, 624 P.2d 905 (Col. App. Div. II 1980).

[21] *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 94 (Tenn. 1999).

[22] *Connors v. U. Assoc. in Obstetrics and Gynecology*, 4 F.3d 123 (2d Cir. 1993).

[23] *Brown v. Meda.*, 74 Md.App. 331, 345, 537 A.2d 635, 642 (Md. App. 1987).

[24] *Perin v. Hayne*, 210 N.W.2d 609, 614-15 (Iowa 1973).

[25] *Green v. Owensboro Med. Health Sys., Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007).

[26] These jurisdictions have not contemplated the arguments herein, instead holding only that the essence of res ipsa loquitur is that a layperson's common knowledge must tell them that the injury bespeaks negligence and the use of expert testimony defeats this. *See Haddock*, 793 S.W.2d at 951.

[27] *LePelley v. Grefenson*, 101 Idaho 422, 426, 614 P.2d 962, 966 (Idaho 1980) (overruled on other grounds in *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (Idaho 1991).

North Dakota,[30] North Carolina,[31] and Florida.[32]

The majority view is also espoused by the drafters of the Restatement (Second) of Torts. Comment d. reads:

> In the usual case the basis of past experience from which this [res ipsa loquitur] conclusion may be drawn is common to the community, and is a matter of general knowledge, which the court recognizes on much the same basis as when it takes judicial notice of facts which everyone knows. It may, however, be supplied by the evidence of the parties; and *expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference. Such testimony may be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion*. On

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[28] *Todd v. Eitel Hosp.*, 306 Minn. 254, 260-261, 237 N.W.2d 357, 361-362 (Minn. 1975).

[29] *Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990).

[30] *Wasem v. Laskowski*, 274 N.W.2d 219, 225 (N. D. 1979).

[31] *Bowlin v. Duke Univ.*, 108 N.C. App. 145, 149-50, 423 S.E.2d 320, 323 (N.C. App. 1992).

[32] *Anderson v. Gordon*, 334 So.2d 107, 109 (Fla. Dist. Ct. App. 1976).

> the other hand there are other kinds of medical malpractice, as where a sponge is left in the plaintiff's abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence.

Restatement (Second) of Torts § 328D cmt. d. (emphasis added).

Why is the majority view "most equitable" according to *Spears*? A review of the case of *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86 (Tenn. 1999),[33] is instructive as to the primary reasons the majority view allowing expert testimony in medical malpractice cases premised on res ipsa loquitur has gained acceptance. There, Berdella and Eddie Seavers brought a medical malpractice action premised on res ipsa loquitur against the defendant for an injury plaintiff Berdella Seavers sustained to the ulnar nerve in her right arm while under heavy sedation for bilateral viral pneumonia at the Methodist Center of Oak Ridge. *Id*. at 88. The plaintiffs asked the Supreme Court of Tennessee to adopt the majority view and allow them to present expert testimony in support of their claim. *Id*.

The court noted:

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[33] Appellants acknowledge that decisions from other states are not binding on this Court, but nevertheless submit such authority for its persuasive value. See *State ex rel. Webster v. Mo. Resource Recovery, Inc.*, 825 S.W.2d 916, 925 (Mo. App. S.D. 1992) (stating: "[Missouri courts] are not bound by the decisions of federal courts or courts of other states . . . .").

> The appellant [Berdella Seavers] acknowledges the restrictive view of res ipsa loquitur, but she requests this Court to reevaluate the existing law and to extend the res ipsa doctrine to medical malpractice cases where expert testimony is required. The appellant's contention strikes a chord that has divided jurisdictions across this country. In a majority of states which have addressed this issue, medical malpractice claimants are allowed to come forward with expert testimony to support a res ipsa inference. In a minority of states, including Tennessee, negligence may not be inferred in medical malpractice cases where expert testimony is required.

Seavers, 9 S.W.3d at 93.

In *Seavers*, the Court adopted the majority view reasoning that it accommodates the increasing complexity of modern medicine and the requirement that most medical malpractice cases, including those sounding in res ipsa loquitur, be supported with expert witness testimony. The Court noted, "As several courts have suggested, the need for expert testimony has become the norm in medical malpractice cases because of new and complex developments in medical science." *Id*. at 95. The court based its reasoning on *Connors, supra*, a United States District Court case interpreting Vermont law and adopting the majority view. In that case, the court held, "In 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*, 4 F.3d at 128.

Agreeing with *Connors* on this issue, the court in *Seavers* held: "The use of expert testimony [in medical malpractice cases premised on res ipsa loquitur] serves to bridge the gap between the jury's common knowledge and the complex subject matter that is 'common' only to experts in a designated field." *Seavers*, 9 S.W.3d at 95. The court in *Connors* further explained this line of reasoning, stating, "These experts can educate the jurors, essentially training them to be twelve new initiates into a different, higher level of common knowledge. The jurors can then determine for themselves whether the expert opinion is credible, after also considering the defendant's experts' opinions that res ipsa does not apply." *Connors*, 4 F.3d at 128-29.

The concept of "bridging the gap" of knowledge falls in line with res ipsa loquitur because, as stated in *Connors*, "Whether the knowledge required to evaluate the likelihood of negligent conduct inferred from an accident comes from common or specialized knowledge, *the key question is still whether that accident would normally occur in the ordinary course of events*." *Id*. at 128 (emphasis added).

Allowing expert testimony in medical malpractice cases premised on res ipsa loquitur also accounts for the fact that patients who suffer malpractice injuries are typically heavily sedated and under the exclusive care of health care providers and their staff. "Claimants often have no knowledge of what happened during the course of medical treatment, aside from the fact that an injury occurred during that time." *Seavers*,

3 S.W.3d at 95. Expert testimony in these cases allows a plaintiff with no ability to show actual negligence the opportunity to prove negligence through inference. *See Connors*, 4 F.3d at 129.

In adopting the majority view, the court in *Seavers* held as follows:

> [W]e believe that the better rule is to allow expert testimony in medical malpractice cases, where otherwise admissible, to assist the parties both in establishing or rebutting the inference of negligence under a theory of res ipsa loquitur. While we agree that res ipsa loquitur is best suited for cases where the nature of the injury lies within the common knowledge of lay persons, we see no reason to continue to preclude the use of the res ipsa doctrine simply because a claimant's injury is more subtle or complex than the leaving of a sponge or a needle in the patient's body. As recognized by the Restatement and a majority of other jurisdictions, the likelihood of negligence necessary to support a charge under res ipsa loquitur may exist even when there is no fund of common knowledge concerning the nature and circumstances of an injury.

Seavers, 9 S.W.3d at 94.

Appellants urge the Court to pay heed to *Seavers* and *Connors* and adopt the majority rule allowing plaintiffs to pursue a medical malpractice claim premised on res

ipsa loquitur and requiring the use of expert testimony because it accommodates the ever-increasing complexity of modern medicine and the inability for patients under anesthesia to comprehend the negligent events, including appellant herein, Janice Sides.

Adopting the majority rule and allowing plaintiffs to use expert testimony in such cases would fall directly in line with Mo. Rev. Stat. § 538.225 (2007) ("Missouri's Health Care Affidavit Statute") and the intentions of that statute as announced in *Budding v. SSM Healthcare System*, 19 S.W.3d 678 (Mo. banc 2000). There, this Court held that in enacting Missouri's Health Care Affidavit Statute, the legislature intended to "impose specific limitations on the traditional tort causes of action available against a health care provider. Included in these limitations … is the requirement that the cause of action be dependent upon an affidavit by a 'legally qualified health care provider' of failure to exercise reasonable care attributable to the defendant health care provider." *Budding*, 19 S.W.3d at 680. This Court went on to say that "in construing [Missouri's Health Care Affidavit Statute], the Court is not to assume the legislature intended an absurd result." *Id*. at 680.

Appellants submit that it is absurd to require a medical malpractice plaintiff proceeding under a theory of res ipsa loquitur to obtain from a legally qualified health care provider an opinion of merit, yet prohibit that plaintiff from using that individual to

provide expert testimony in support of his or her case at trial.[34] This is the predicament Appellants face in light of the law announced in *Hasemeier, supra*. This is yet another reason this Court should allow Appellants to present expert testimony in support of their medical malpractice claim premised on res ipsa loquitur.

It is important for the Court to understand that adopting the majority view does not create an unfair advantage to plaintiffs alleging medical malpractice premised on res ipsa loquitur, including Appellants herein. Plaintiffs in these types of cases are faced with the same burden of proof, with or without expert testimony. "The doctrine [of res ipsa loquitur] does not dispense with the plaintiff's burden of proof…." *Seavers*, 9 S.W.3d at 91. In Missouri res ipsa loquitur cases, "Plaintiff has the burden of proof and must establish by the greater weight of evidence that the loss resulted from defendant's negligence." *Eversole*, 135 S.W.3d at 428.

Furthermore, plaintiffs alleging medical malpractice premised on res ipsa loquitur must still convince the finder of fact of the alleged negligence. In *States v. Lourdes Hosp.*, the New York Court of Appeals noted that, "Notwithstanding the availability of expert testimony to aid a jury in determining whether an event would normally occur in the absence of negligence, expert opinion of course does not negate the jury's ultimate responsibility as finder of fact to draw that necessary conclusion. The purpose of expert

[34] Appellants are not aware of any Missouri case addressing the issue of whether a medical malpractice plaintiff proceeding under a theory of res ipsa loquitur is excused from the requirements of Missouri's Health Care Affidavit Statute.

opinion in this context is to educate the jury, enlarging its understanding of the fact issues it must decide. However, the jury remains free to determine whether its newly-enlarged understanding supports the conclusion it is asked to accept." 792 N.E.2d at 154. Here, should Appellants be allowed to proceed with their medical malpractice claim premised on res ipsa loquitur with the necessary use of expert testimony, Respondents will have every right to present their own expert testimony that appellant Janice Sides' contraction of E. coli does not bespeak negligence.

Regarding fairness, courts adopting the majority view have held that to prevent plaintiffs in medical malpractice cases from introducing expert evidence in support of a res ipsa loquitur claim would be *unfair* to those plaintiffs. For example, in *Connors*, *supra*, the court held that fairness decrees that the plaintiff be able pursue a medical malpractice claim premised on res ipsa and requiring the use of expert testimony. *Connors*, 4 F. 3d at 129. "To find otherwise would place [the plaintiff] in a 'Catch-22,' presenting her with a choice of either introducing expert testimony or foregoing a res ipsa instruction. By making do with only one or the other, however, [the plaintiff's] ability to present her case would have been severely impaired." *Id*. This reasoning bears directly on Appellants herein. If the Court were to prohibit Appellants from pursuing their medical malpractice res ipsa loquitur claim with the necessary use of expert testimony, their ability to present their case will be severely impaired because they would be forced to forego all claims. This is because Appellants could not prove a medical malpractice case without res ipsa loquitur, but could not prove their res ipsa loquitur case without expert testimony.

In cases with multiple defendants, such as the case at bar, the Court should note that plaintiffs are not precluded from proceeding with a res ipsa loquitur claim on account that they are not able to identify the exact person or person causing them injury. They need only show that the defendants had joint control or right of control of the instrumentality or instrumentalities injuring plaintiff. *McGowan v. Tri-County Gas Co.*, 483 S.W.2d 1, 5 (Mo. 1972) (allowing plaintiff to make a claim of res ipsa loquitur against multiple defendants but requiring that plaintiff show the defendants have joint control or right of control of the instrumentality or instrumentalities injuring plaintiff). In *Zumwalt, supra*, a medical malpractice case premised on res ipsa loquitur, the court determined that the plaintiff proved the instrumentalities involved were under the care and management of the multiple defendants, and therefore, the exclusive control element of the plaintiff's res ipsa loquitur claim had been satisfied. *Zumwalt*, 24 S.W.3d at 169 (medical malpractice claim premised on res ipsa loquitur appropriate where plaintiff underwent right total knee replacement and incurred injury to her right hand, arm and shoulder because said injury was an "unusual injury"). Here, although appellant Janice Sides is not able to identify the exact person causing her injury, she will be able to show that Respondents had joint control or right of control over the instrumentalities causing her E. coli infection and that said instrumentalities were under their care and management.

CONCLUSION

Appellants encourage this Court to reevaluate the holding in *Hasemeier, supra*, and allow Appellants to pursue their medical malpractice claim premised on res ipsa loquitur with the use of expert testimony. Said rule is now the majority rule among jurisdictions considering the issue and is espoused by the Restatement (Second) of Torts. It also accommodates the increasing complexity of modern medicine and is the more equitable and fair rule to plaintiffs alleging medical malpractice under the theory of res ipsa loquitur, including Appellants herein.

WHEREFORE, for the reasons set forth herein, appellants Janice Sides and Clyde Sides respectfully request this Court make and enter its Order reversing the Judgment entered by the trial court granting respondents St. Anthony's Medical Center, Thomas K. Lee, M.D., and Tesson Heights Orthopedic and Arthroscopic Associates, P.C.'s Motions to Dismiss and remanding this cause to the Circuit Court of St. Louis County for reinstatement and further proceedings.

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 5,614 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, the signature block, and the Appendix.

The undersigned further certifies that the diskette filed herewith containing the Brief of Appellants in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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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 7th day of February, 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, and Mr. V. Scott Williams, attorney for defendant/respondent St. Anthony's Medical Center, 200 N. Third Street, St. Charles, MO 63301.

MEYERKORD, RINEBERG & GRAHAM, LLC

By: _____

Stephen F. Meyerkord, #25779
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Subscribed and sworn to before me this 7th day of February, 2008.

Notary Public

My commission expires: