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 REPLY BRIEF OF APPELLANTS

Oral Argument Requested

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POINT RELIED ON

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

Kolln v. St. Luke's Regl. Med. Ctr., 940 P.2d 1142 (Idaho 1997).

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

ARGUMENT

I. The trial court erred in dismissing Plaintiffs' Third Amended Petition because it refused to recognize the long-standing rule allowing medical malpractice actions premised on res ipsa loquitur, whether they require the use of expert testimony or not, in that Plaintiffs' Third Amended Petition, alleging an action against a health care provider premised on res ipsa loquitur, is a negligence action as opposed to a strict liability action and therefore does not fall within the Missouri Supreme Court's abolishment of strict liability actions against health care providers.

In its Substitute Brief, Respondent St. Anthony's Medical Center (hereinafter "St. Anthony's) requests this Court abolish the doctrine of res ipsa loquitur in medical malpractice actions. St. Anthony's misinterprets the authority upon which it rests its argument. Missouri precedent does not advocate the abolishment of the doctrine of res ipsa loquitur in medical malpractice cases, rather, it advocates the position espoused by Appellants in their brief; that plaintiffs in medical malpractice cases premised on res ipsa loquitur be allowed to prove their case with expert testimony.

St. Anthony's offers the Missouri Supreme Court case of *Budding v. SSM Healthcare System*, 19 S.W.3d 678 (Mo. banc 2000), in support of its conclusion that res ipsa loquitur is no longer a viable option in medical malpractice cases in Missouri. A careful look at *Budding* reveals that no such conclusion can be drawn from that case.

In *Budding*, the plaintiff sued the defendant hospital for personal injuries arising

from defectively designed Vitek proplast Teflon temporomandibular joint implants. *Budding*, 19 S.W.3d at 678. The plaintiff had the implants inserted at the defendant's hospital and proceeded on a theory of strict product liability. *Id*. The Missouri Supreme Court held that chapter 538 foreclosed strict products liability claims against health care providers. *Id*. at 682. In so holding, the Court interpreted the legislature's intent in enacting Mo. Rev. Stat. § 538.225 (1994)[1] (hereinafter referred to as "Missouri's Healthcare Affidavit Statute") to be that an affidavit of *negligence* is a condition of proceeding with an action against a health care provider. *Id*. at 680 (emphasis added). Therefore, *negligence* must be proved in order to submit a case to a jury or obtain a judgment. *Id*. (emphasis added). Specifically, the Court held:

> It is true that nothing in [Missouri's Health Care Affidavit Statute] specifically requires the plaintiff to prove negligence or other level of culpability in order to recover. However, in construing the statute, the Court is not to assume the legislature intended an absurd result. It would be an obvious absurdity to require an affidavit of *negligence* as a condition of proceeding with the cause of action even though *negligence* need not be proved in order to submit the case to a jury or to obtain a judgment. On that basis alone, it is

[1] As St. Anthony's noted in its Brief, although the Missouri legislature enacted a new Health Care Affidavit Statute in 2005, the standard set forth therein remain unchanged.

> reasonable to conclude that the legislature intended to eliminate liability of health care providers for *strict liability*.

Id. at 681 (internal citation omitted) (emphasis added).

The Missouri Court of Appeals for the Western District reiterated the Supreme Court's holding in *Budding*, stating, "The Court concluded that it would be absurd to require an affidavit showing a *breach of duty* when a successful strict liability action *requires no breach of duty*." *Henry v. Mylan Pharm., Inc.*, 2005 WL 2101049 *4 (Mo. App. W.D. 2005) (emphasis added). What *Budding* does not hold is that which is espoused by St. Anthony's; that *Budding* dictates that the res ipsa doctrine cannot be applied in medical malpractice cases in Missouri.

On the contrary, res ipsa loquitur is a rule of evidence applicable solely to *negligence* causes of action. In *Spears v. Capital Region Med. Ctr., Inc.*, the Court noted that 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…." 86 S.W.3d 58, 61 (Mo. App. W.D. 2002) (emphasis added). And in *Redfield v. Beverly Health & Rehabilitation Services, Inc.*, the Court held that, "Once a plaintiff establishes the three elements of res ipsa loquitur, an inference of the defendant's *negligence* arises." 42 S.W.3d 703, 714 (Mo. App. E.D. 2001) (emphasis added). Res ipsa loquitur is an inference of a breach of duty, and not a cause of action devoid of a showing of a breach of duty such as strict liability. It therefore does not fall within the abolishment of strict liability claims against health care providers announced in *Budding*. As such, Appellants herein should not be banned from submitting their medical malpractice claim premised

on res ipsa loquitur.

St. Anthony's suggests this Court adopt the reasoning of the Idaho Supreme Court's holding that Idaho Code § 6-1012 (1976) precludes the use of res ipsa loquitur in medical malpractice cases in Idaho. Section 6-1012 states that a medical malpractice plaintiff must, "as an essential part of his of her case in chief, *affirmatively prove by direct expert testimony* and by a preponderance of all competent evidence, that [the health care] defendant then and there negligently failed to meet the applicable standard of health care…" *Id*. (emphasis added). The Idaho Supreme Court held that this statute prohibits the use of res ipsa luquitur in medical malpractice cases because the doctrine's obviation of the need for direct expert testimony conflicts with § 6-1012. *Kolln v. St. Luke's Regl. Med. Ctr.*, 940 P.2d 1142 (Idaho 1997).

St. Anthony's asserts that the *Budding* decision essentially equates Missouri's Health Care Affidavit Statute with Idaho Code § 6-1012 by extending the affidavit standard to proof adduced at trial; meaning that a negligence standard must be required at trial. However, the direct expert testimony requirement in § 6-1012 is not the same as the negligence standard in Missouri's Health Care Affidavit Statute. The Idaho statute speaks to the level of proof required at trial in medical malpractice cases, whereas Missouri's Health Care Affidavit Statute, as interpreted by *Budding*, speaks to the type of cause of action that must be asserted in an affidavit of merit and subsequently at trial.

Furthermore, as discussed above, because res ipsa loquitur is an evidentiary rule falling under the auspices of negligence, it does not offend the holding in *Budding*. If Missouri had a statute similar to the one in Idaho, addressing the level of proof required

in medical malpractice claims, then res ipsa loquitur might not be a viable option. But Missouri has no such statute or any such requirement at common law. St. Anthony's cites a number of cases handed down since enactment of Missouri's Health Care Affidavit Statute that discussed res ipsa loquitur in a medical malpractice context. (Respondent St. Anthony's Substitute Brief, p. 13). This demonstrates that Missouri courts recognize that res ipsa loquitur does not violate Missouri's Health Care Affidavit Statute or any other statutory or common law authority.

Appellants must also address Respondents' contentions that adopting the majority rule and allowing medical malpractice cases premised on res ipsa loquitur and requiring the use of expert testimony will open "Pandora's Box" of medical malpractice claims due to the purported ease by which such plaintiffs will be able to recover money from their health care provider under the majority rule. The effect of this so-called consequence of adopting the majority rule, Respondents allege, is that doctors and other health care providers will be discouraged from practicing medicine. However, the hurdles facing medical malpractice plaintiffs, whether they are allowed to proceed under the majority rule or not, belie this contention. Proceeding with a res ipsa claim under the majority rule, medical malpractice plaintiffs still face a two-year statute of limitations,[2] a cap on non-economic damages,[3] a requirement that they file an affidavit of merit,[4] immunity of

[2] Mo. Rev. Stat. § 516.105 (2005).

[3] Mo. Rev. Stat. § 538.210 (2005).

[4] Mo. Rev. Stat. § 538.225 (2005).

some health care providers,[5] and undiscoverable information due to privilege.[6] As respondents Thomas K. Lee, M.D. ("Lee") and Tesson Heights Orthopedic and Arthroscopic Associates, P.C. ("Tesson Heights") point out, these measures, in part, aim to prevent frivolous lawsuits. (Respondent Lee and Tesson Heights' Substitute Brief at 16 (citing *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. en banc 1991))).

In addition to the measures applicable to medical malpractice actions, many other safeguards exist to help prevent exposure of health care providers to meritless claims. These include summary judgment,[7] dismissal,[8] and directed verdict.[9] Furthermore, medical malpractice plaintiffs proceeding under the majority rule must still meet their burden of proof and convince the trier of fact by a preponderance of evidence that the loss resulted from defendant's negligence. *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 91 (Tenn. 1999); *Eversole v. Woods Acquisition, Inc.*, 135 S.W.3d 425, 428 (Mo. App. W.D. 2004). As noted in *States v. Lourdes Hosp.*, "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

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[5] *See State ex rel. Howenstine v. Roper*, 155 S.W.3d 747 (Mo. 2005).

[6] Mo. Rev. Stat. § 537.035 (2005).

[7] Mo. R. Civ. P. 74.04 (2007).

[8] Mo. R. Civ. P. 55.27 (2007).

[9] *Ryan v. Maddox*, 112 S.W.3d 476, 480 (Mo. App. W.D. 2003).

jury's ultimate responsibility as finder of fact to draw that necessary conclusion." 792 N.E. 2d 151, 154 (N.Y. 2003).

The Pandora's Box argument implies that the majority rule will allow medical malpractice plaintiffs to bypass these measures and entitle them to a free cash handout upon filing of their suit. That is not reality. Pandora's Box will not be opened. Doctors and other health care providers will not give up the practice of medicine or move out of the State. What will happen is a patient will be given legal recourse for an injury that only occurs when the health care provider commits negligence.

Respondents Lee and Tesson Heights' claim that "nothing has transpired in the past five years since *Spears* was decided that would justify disposing of Appellants' case in a manner different from the ultimate disposition of the *Spears* case." (Respondents Lee and Tesson Heights Substitute Brief p. 18). On the contrary, since *Spears* was decided, three jurisdictions have added themselves to the list of those following the majority rule,[10] and none have added themselves to the list of jurisdictions following the minority rule. Respondents' argument that nothing has transpired since *Spears* to justify a different disposition is incorrect.

[10] New York, *States v. Lourdes Hosp.*, 792 N.E. 2d 151, 153-54, (N.Y. 2003); Washington D.C., *Gubbins v. Hurson*, 885 A.2d 269, 283 (D.C. App. 2005); Nebraska, *Keys v. Guthmann*, 676 N.W.2d 354, 358-59 (Neb. 2004).

CONCLUSION

St. Anthony's offers no Missouri authority, and none exists, suggesting that res ipsa loquitur is no longer a viable option in medical malpractice cases in Missouri. The Idaho statute and case law cited by St. Anthony's are too distinct from Missouri's Health Care Affidavit statute and *Budding* to support the suggestion that because Idaho abolished res ipsa loquitur in medical malpractice case, so should Missouri.

Respondents' "Pandora's Box" arguments are not viable. If the majority rule is adopted, doctors will still practice medicine in Missouri because they will continue to enjoy protections against frivolous lawsuits.

To say that nothing has happened since *Spears* to warrant adoption of the majority rule ignores that fact that since *Spears*, three jurisdictions have adopted the majority rule, and non have adopted the minority rule. These decisions indicate that this Court should keep with the trend and adopt the majority rule.

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 2,451 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, the signature block, and the Appendix.

The undersigned further certifies that the CD-ROM filed herewith containing the Reply 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 19th 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, and Mr. V. Scott Williams, attorney for defendant/respondent St. Anthony's Medical Center, 200 N. Third Street, St. Charles, MO 63301.

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Subscribed and sworn to before me this 19th day of March, 2008.

Notary Public

My commission expires: