IN THE SUPREME COURT OF MISSOURI

JANICE F. SIDES, et al. Appellants, vs. ST. ANTHONY'S MEDICAL CENTER, et al. Respondents.	)	Appeal from the Circuit Court of the County of St. Louis, State of Missouri Cause No. 05CC-002569: Div. 11 SC88948

ST. ANTHONY'S MEDICAL CENTER'S SUBSTITUTE RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On June 20, 2005, Janice and Clyde Sides ("Appellants")[1] sued St. Anthony's Medical Center ("SAMC"), Thomas K. Lee, M.D. ("Dr. Lee") and Tesson Heights Orthopaedic & Arthroscopic ("Tesson Heights"). L.F. at 2. Subsequently, on October 14, 2005, Appellants filed their First Amended Petition.[2] L.F. at 2. Therein, Appellants alleged that Mrs. Sides' body was infected with Escherichia coli (E. coli) bacteria during the course of a surgery performed at SAMC's facilities on June 17, 2003. Supp. L.F. at 3-6. Specifically, Appellants alleged the defendants were negligent in that they "failed to take standard operative infection precautions to prevent the E. coli infection." Supp. L.F. at 5. In addition, on November 14, 2005, counsel filed statutory affidavits as to each named Defendant, declaring that he had obtained the written opinion of a medical doctor stating each defendant "provided plaintiff with medical care which fell below the standard of care, and that failure by the defendant[s] to meet the standard of care caused or directly contributed to cause damage to plaintiff contained in plaintiff's petition." Supp. L.F. at 7-12; *see also* Appendix at AIII-AVIII.

[1] Mr. Sides' sole claim was for his alleged loss of consortium.

[2] The original petition was never served on any of the defendants; however, the First Amended Petition was served on all defendants in either late October or early November, 2003. L.F. at 2.

Appellants later filed a Second Amended Petition. Supp. L.F. at 13-19. In this Petition, Appellants continued to allege specific negligence against each Defendant asserting six different theories of specific negligence, including: (1) failure to take standard operative infection precautions by contaminating the surgical equipment, instruments and hardware; (2) failure to take standard operative infection precautions by improperly maintaining surgical asepsis; (3) failure to take standard operative infection precautions by inadequately cleaning the operating room and table; (4) failure to take standard operative infection precautions by perforating the bowel of Janice Sides during surgery; (5) failure to take standard operative infection precautions by inadequately preparing the surgical site of Janice Sides; and (6) failure to take standard operative infection precautions by inadequately preventing post surgical wound contamination. Supp. L.F. at 14-16.

Finally, Appellants filed their Third Amended Petition. L.F. at 9-13. In this petition, Appellants shifted gears entirely, basing their claims only on the doctrine of *res ipsa loquitor*. Id. Appellants now alleged that E. coli infection does not ordinarily happen during surgery if those conducting the surgery use due care, and, consequently, it should be inferred that one or more of the defendants were negligent simply from the fact that Mrs. Sides was treated for E. coli after her June 17 surgery. L.F. at 11.

SAMC filed its Motion to Dismiss Appellants' claims, asserting that the Third Amended Petition failed to state a claim upon which relief could be granted, citing Spears v. Capital Region Medical Center, Inc., 86 S.W.3d 58 (Mo. App. 2002). L.F. at 23. Defendants Dr. Lee and Tesson Heights filed their joint Motion to Dismiss on the same grounds. L.F. at 29-30. On February 16, 2007, the Circuit Court of St. Louis County, the Honorable Emmett M. O'Brien, sustained the defendants' motions. L.F. at 35.

This appeal follows. L.F. at 40.

STANDARD OF REVIEW

The applicable standard of review was set forth by this Court in Nazeri v. Missouri Valley Coll., 860 S.W.2d 303, 306 (Mo. *banc* 1993). A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. Id. The court assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. Id. No attempt is made to weigh the credibility or persuasiveness of facts alleged by the plaintiffs. Instead, the petition is reviewed in an almost academic manner, to determine whether the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. Id.

ARGUMENT

I. The Trial Court Did Not Err In Dismissing Appellants' Third Amended Petition Because Appellants Failed to State a Claim Upon Which Relief Could Be Granted In That Appellants' Claims For Medical Malpractice Were Based Solely on the Doctrine of *Res Ipsa Loquitor*.

In their sole point on appeal, Appellants claim the trial court erred "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 loquitor* now present amongst other state and federal court jurisdictions[.]" Appellants' Brief at 8. Thus, Appellants are requesting that this Court abandon established Missouri law, and expand the authorized use of *res ipsa* in the medical malpractice context. As explained below, not only does Plaintiffs' position run contrary to public policy, it was expressly rejected by the people of Missouri through the enactment and re-enactment of Chapter 538.

A. The *Res Ipsa* Doctrine.

The *res ipsa* rule of evidence generally "permits a jury to draw a rebuttable inference, based on the common knowledge or experience of laymen, that the causes of the occurrence in question do not ordinarily exist in the absence of negligence on the part of the one in control." *See* Spears v. Capital Region Medical Center, Inc., 86 S.W.3d 58, 61 (Mo. App. 2002).

A *res ipsa* plaintiff must demonstrate: (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. Id. *Res ipsa* is incompatible with pleading or proof of specific negligence. Bonnot v. City of Jefferson City, 791 S.W.2d 766, 769 (Mo. App. 1990).

It has been well settled in this State for some time that liability expert testimony is prohibited in *res ipsa* claims (whether or not the action is one for medical negligence). The basis of this principle is that the gravamen of a *res ipsa* claim is that the defendant's negligence is obvious to an ordinary layperson. *See* Watts v. Sechler, 140 S.W.3d 232, 241-42 (Mo. App. 2004) (holding that *res ipsa* was inapplicable in case involving allegation that alfalfa hay poisoned dairy cattle in that "laymen would [not] know, based on their common knowledge or experience, that alfalfa hay will not contain aflatoxin or other toxic substances, unless the person producing and selling the hay was negligent in some way").

B. History of *Res Ipsa* in the Medical Malpractice Context in Missouri.

Res ipsa was first recognized by this Court in the medical malpractice context in the 1962 case styled Hasemeier v. Smith, 361 S.W.2d 697 (Mo. *banc*

1962). Prior to Hasemeier, medical malpractice plaintiffs were always required to prove their case through expert opinion testimony. Id. at 700 (citing Williams v. Chamberlain, Mo., 316 S.W.2d 505, 511). Hasemeier relaxed the expert testimony requirement only in two limited scenarios: (1) surgical cases involving a foreign object left in the operative cavity ("foreign object cases"); and (2) cases involving an unusual injury during surgery to a portion of the body unrelated to the intended treatment ("remote injury cases"). Id. at 700-701.

In 1986, the Missouri Legislature enacted Chapter 538, which dealt solely with malpractice actions against health care providers, commonly referred to as "tort-reform". Of primary significance, § 538.225[3] expressly required every

[3] For purposes of this Brief, considering Appellants' original Petition was filed on June 20, 2005, all references to § 538.225 are to RSMo 2000. It is noteworthy, however, that a second round of tort-reform was adopted in 2005, including an amended version of § 538.225. The affidavit requirement was retained in the 2005 statute, but the legislature restricted the definition of "legally qualified health care providers" who could provide such opinions. Under the 2005 statute, the "legally qualified" provider must be "licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant."

medical malpractice plaintiff to submit an affidavit of merit supporting the plaintiff's negligence claims against each named defendant. The plaintiff or plaintiff's attorney was required to attest to the fact that he or she had obtained an opinion from a qualified expert 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." (Emphasis added.) In other words, every medical malpractice plaintiff was required to verify to the court through an affidavit that he or she had an expert who could testify that ***each*** named defendant was negligent, and ***each*** defendant's negligence directly caused or directly contributed to cause the plaintiff's injuries. Despite Hasemeier's presence on Missouri's legal landscape since 1962, as well as the 1976 adoption of the foreign object exception to the medical malpractice statute of limitations in § 516.105, Section 538.225 contained no exceptions.

Fourteen years after the enactment of § 538.225, this Court had occasion to consider, at least in part, the effect of its statutory affidavit requirement. In 2000 this Court issued its decision in Budding v. SSM Healthcare System, 19 S.W.3d 678 (Mo. *banc* 2000). The Budding plaintiff sued a hospital under a strict products liability theory, claiming the hospital was responsible for injuries attributed to defectively designed temporomandibular joint devices inserted at the hospital. The

hospital asserted that § 538.225 established the standard of proof required in any action against a health care provider, such that it could not be held liable under a products liability theory.

The Budding Court agreed with the defendant hospital. In doing so, this Court recognized that § 538.225 constituted an attempt by the Missouri Legislature to restrict the type of causes of action that may be asserted against health care providers within Missouri. The Court concluded: "[T]he legislature intended to impose specific limitations on the traditional tort causes of action available against a health care provider. Included in these limitations is not only a cap on noneconomic damages, sec. 538.210, and structured settlements of future damages, sec. 538.220, but 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, sec. 538.225." Id. at 680. This Court rejected prior inconsistent holdings from each of the districts of the Court of Appeals, explaining that "[t]o accept an affidavit of a lower standard of care than negligence or a different cause of injury than the defendant health care provider's fault is to rewrite the statute, not construe it." Id. at 682. In fact, this Court expressly noted that "nothing in sec. 538.225 exempts a plaintiff from filing an affidavit who shows that the medical malpractice … is of that

untypical kind that does not require proof of standard of care by expert opinion." Id. at n. 4.

Surprisingly, no Missouri appellate case has addressed the effect of § 538.225 on *res ipsa* claims in the medial malpractice context. However, since 1986 several cases have considered *res ipsa* generally in the context of medical malpractice. *See* Spears, 86 S.W.3d 58 (discussed *supra*); Zumwalt v. Koreckij, 24 S.W.3d 166 (Mo. App. 2000) (*res ipsa* available to plaintiff who sustained injury to her right hand, arm and shoulder during knee replacement surgery); Graham v. Thompson, 854 S.W.2d 797 (Mo. App. 1993) (*res ipsa* available to plaintiff who sustained injuries to the back of her right calf following surgery on the top of her right foot); Deveney v. Smith, 812 S.W.2d 810, 815 (Mo. App. 1991) (*res ipsa* not available to plaintiff who suffered injury to oral nerves while having her wisdom teeth removed); Calvin v. Jewish Hospital of St. Louis, 746 S.W.2d 602 (Mo. App. 1988) (*res ipsa* available to patient who suffered injury to her arm while undergoing back surgery). None of these cases involved a challenge to the use of *res ipsa* based on § 538.225. Thus, the issue presented here, whether § 538.225 prohibits the use of *res ipsa* in medical malpractice cases, is an issue of first impression for this Court.

C. Section 538.225 Prohibits The Use of *Res Ipsa* In Medical Malpractice Actions in Missouri.

Given its clear and unambiguous language, we believe that § 538.225 prohibits reliance on *res ipsa* in medical malpractice actions. In its entirety, §538.225.1 reads as follows:

> In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or his attorney shall file an affidavit with the court stating that he 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 reasonable 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.

In addition, § 538.225.4 requires that "[a] separate affidavit shall be filed for ***each*** defendant named in the petition." (Emphasis added.) Thus, under §538.225 and Budding, all medical malpractice plaintiffs must plead and prove, through expert testimony, that ***each separate*** defendant failed to use such care as a reasonable prudent and careful health care provider would have under similar circumstances, i.e., breached the medical negligence standard of care; ***and*** that this breach directly caused or directly contributed to cause the plaintiff's alleged injuries.

Appellants argue that permissive use of *res ipsa* in medical malpractice actions does not run contrary to § 538.225 and Budding, in that *res ipsa* is not a "strict liability" standard. This argument ignores or misconstrues the legislative mandate contained in § 538.225. Section 538.225 does not simply require proof of negligence; it requires a specific expert opinion of each defendant's specific breach

of the malpractice standard of care, and expert testimony directly connecting that breach with the alleged injuries. In other words, an expert opinion merely averring the injuries suffered by the plaintiff do not "ordinarily happen absent negligence" of some sort by some defendant is insufficient.[4] Simply put, if *res ipsa* is allowed in medical malpractice cases, health care providers would be subject to liability based on an expert's opinion that he or she ***thinks*** that some defendant ***probably*** breached the standard of care because normally the injury in question does not occur in the absence of someone's negligence. This is precisely what § 538.225

[4] The *res ipsa* "does not ordinarily happen" standard is specifically embraced by Appellants in this case as the appropriate *res ipsa* standard in malpractice cases. Appellants repeatedly use that language in their Substitute Brief. *See* Appellant's Brief at 6, 11 and 19 (using the word "normally"). This standard is the polar opposite of the standard imposed by § 538.225, which requires testimony of specific negligence by a specific defendant causing a specific injury that ***would not*** have occurred ***but for*** that specific negligence, rather than the mere possibility that the injury occurred because of some defendant's negligence. *See* Harvey v. Washington, 95 S.W.3d 93, 96 (Mo. *banc* 2003) (citing Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862 (Mo. *banc* 1993) for the proposition that but for causation "is the minimum causation because it merely proves that defendant's conduct is causally connected to the plaintiff's injury").

was designed to prevent – liability based on an inference arising solely from a "bad result".[5]

Appellants also assert that the majority of states considering the question of whether expert medical testimony should be permitted to support negligence claims in medical *res ipsa* actions have permitted such testimony. This alleged majority trend is of little consequence here, considering none of the other states discussed by Appellants have a statute similar to § 538.225. In fact, of the 23 cases cited by Appellants as in the "majority" camp, 12 were decided in 1985 or earlier, well before the national trend to adopt medical malpractice tort reform statutes in

[5] By way of example, in this case, if *res ipsa* is authorized, each of the Defendants could be held liable based solely on expert testimony that normally a patient does not contract an E. coli infection without identification of the at fault person(s) in Mrs. Sides' treatment team. Such testimony cannot establish that ***each*** Defendant breached the standard of care; nor does it establish that any inferred breach by each Defendant directly caused or directly contributed to cause Mrs. Sides to develop an infection. It would permit submission of a *res ipsa* negligence claim against St. Anthony's (or one or more of its nurses or other surgical suite personnel) without any specific evidence of negligent acts by St. Anthony's or its employees. Such a submission would directly contravene the clear and express language of § 538.225.

response to the "health care crisis." Appellants do not identify a single state in the majority view that has adopted their proposed approach in the face of a statutory affidavit requirement similar to § 538.225. Our independent review of the "majority" cases cited by Appellants disclosed ***no case*** involving a similar "statutory affidavit" requirement.

In the case at bar this Court must decide whether expert testimony can be permitted in Missouri to support *res ipsa* claims in medical malpractice actions, ***despite the requirement set forth in § 538.225 that all medical malpractice plaintiffs present expert testimony that each separate defendant breached the standard of care, and that this breach directly caused or directly contributed to cause the plaintiff's alleged injuries.*** In distinction to the alleged common law trend cited by Appellants, a fairly recent case from the Idaho Supreme Court considered and rejected the applicability of *res ipsa* in the face of a statute similar to § 538.225. *See* Kolln v. Saint Luke's Regional Medical Center, 940 P.2d 1142 (Ida. 1997).

In Kolln, the Idaho Supreme Court discussed I.C. § 6-1012. This statute requires that, *inter alia*, in any medical malpractice action the "claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of

health care practice of the community in which such care allegedly was or should have been provided…" I.C. § 6-1012. The Court specifically addressed whether Idaho's statutory requirement of direct expert testimony that the defendant failed to meet the applicable standard of care precluded the use of *res ipsa* in medical malpractice cases. In answering that question in the affirmative, the Court explained that "[r]es ipsa is not direct proof," but instead "replaces direct evidence with a permissive inference of negligence." Kolln, 940 P.2d at 1153. Appellants in this case also invite this Court to adopt a rule that an "inference of negligence" is enough. *See, e.g.,* Appellants' Brief at 10 ("*Res ipsa loquitur* is a rule of evidence allowing a fact finder to infer from circumstantial evidence…without requiring the plaintiff to prove specific acts of negligence"). According to the Kolln Court, *res ipsa* "flies in the face of I.C. § 6-1012's requirement of direct expert testimony." Id. The same conclusion applies to § 538.225.

While the Idaho statute and § 538.225 differ in that § 538.225 pertains to the filing of a pre-trial affidavit, the Budding decision essentially equates the two statutes by extending the affidavit standard to proof adduced at trial. Hence, for the same reasons discussed by the Idaho Supreme Court, this Court should decline

Appellants' invitation to expand *res ipsa* in Missouri, and expressly hold that *res ipsa* is not a viable option in medical malpractice cases.[6]

D. If This Court Determines That *Res Ipsa* is Authorized in Medical Malpractice Actions, Its Application Should Be Limited to The Two Scenarios Previously Recognized by This Court in the Hasemeier Decision.

As recognized by this Court in Budding, the tort-reform provisions passed by the Missouri Legislature are a clear indication of its intent to restrict health care provider liability in Missouri and to define the circumstances under which such

[6] If *res ipsa* is prohibited altogether in medical malpractice actions, foreign body and remote injury plaintiffs will not be without recourse. Instead, they may simply retain an expert and proceed under a specific negligence theory. In fact, in Hasemeier, this Court noted that foreign body cases, although often referred to as *res ipsa* cases, in actuality could be presented as specific negligence cases. 361 S.W.2d at 700. Furthermore, Appellants originally pled this case as a specific negligence case and filed their statutory affidavits in support of the specific negligence claims. *See* Supp. L.F. at 13-19; *see also* Appendix at AIII-AVIII. In light of this reality, Appellants' claim that the unavailability of a *res ipsa* submission in this case would be "unfair," or deprive them of a remedy for the alleged injury, lacks credibility.

cases may be presented. Consequently, should this Court determine that some use of *res ipsa* is authorized in medical malpractice actions, it should limit its application to the two scenarios discussed in Hasemeier: (1) foreign object cases; and (2) remote injury cases. In other words, if *res ipsa* is allowed in medical malpractice actions, it should continue to be limited to factual scenarios that permit jurors to conclude, based on their own common knowledge and experience, "that the causes of the occurrence in question do not ordinarily exist in the absence of negligence on the part of the one in control." Spears, 86 S.W.3d at 61. Clearly, lay jurors do not know and cannot know that E-coli infections do not ordinarily occur in a post-surgical setting absent negligence of one or more care providers.

One glaring flaw in the expansion of *res ipsa* suggested by Appellants is easily recognized when one considers its effect. If *res ipsa* is expanded in the medical malpractice context as suggested by Appellants, the standard for proving negligence against health care providers would be lower than that applied to any other type of professional in Missouri. In other words, it will be easier to submit a malpractice claim against a hospital or physician than an architect or engineer! Thus, in a complicated medical case, with issues of standard of care and causation far beyond the common knowledge of laymen, a physician or hospital could be held liable under *res ipsa*. However, in a complicated building design case, with issues beyond the common knowledge of laymen, an architect or engineer could

only be held liable through expert testimony establishing a specific breach of the applicable standard of care. Regardless of any alleged trend referred to by Appellants, this is not what the Missouri Legislature envisioned when it enacted and re-enacted § 538.225 in 1986 and 2005, respectively.

CONCLUSION

For all the foregoing reasons, Respondent SAMC respectfully requests this Court affirm the trial court's Judgment entered on February 16, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Respondent's Brief complies with the limitations of Supreme Court Rule 84.06(b). This Brief contains 3,916 words in Times New Roman 14 Point Font. The undersigned also certifies that the corresponding floppy disk has been scanned for viruses and that it is virus free.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Respondent's Brief and corresponding Appendix were served this 7th day of March, 2008, by United States mail, postage prepaid; to

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