CASE NO. SC 96901

IN THE SUPREME COURT OF MISSOURI

HEATHER SHALLOW, MICHAEL BISHOP AND TODD BISHOP,
Plaintiffs/Appellants,

v.

RICHARD FOLLWELL, D.O. AND RICHARD O. FOLLWELL, P.C.,
Defendants/Respondents.

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF PLAINTIFFS/APPELLANTS

Appeal from the Circuit Court of Lincoln County, Missouri
45th Judicial Circuit
Honorable Chris Kunza Mennemeyer, Circuit Judge
Case No. 13L6-CC00122

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INTERESTS OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit, professional organization of approximately 1,400 trial lawyers in Missouri, most of whom are engaged in personal injury litigation involving Missouri citizens. For over fifty years, MATA lawyers have worked to advance the interests and protect the rights of individuals across our State. In doing so, MATA's membership strives to promote the administration of justice, preserve the adversary system, and ensure those citizens of our State with a just cause will be afforded access to our courts.

Whether a party to litigation can present needlessly cumulative expert opinions is an important question. The answer to such question affects the vast majority, if not all, of the people who are currently accessing or would seek to access Missouri's civil justice system. Accordingly, this issue is of considerable interest to MATA and its members.

CONSENT OF THE PARTIES

MATA has received consent from counsel for Plaintiffs/Appellants to file this brief. Counsel for Plaintiffs/Appellants sent a request via electronic mail for consent for the filing of this *Brief of Amicus Curiae in Support of Plaintiffs/Appellants* by MATA to counsel for the Defendants/Respondents, on April 10, 2018. Counsel for Defendants/Respondents then agreed to allow MATA to file this brief.

JURISDICTIONAL STATEMENT

MATA hereby adopts the Jurisdictional Statement of Plaintiffs/Appellants.

STATEMENT OF FACTS

MATA hereby adopts the Statement of Facts of Plaintiffs/Appellants.

ARGUMENT AND AUTHORITY

I. Under Missouri Law, Needlessly Cumulative Expert Testimony is Prejudicial and Interferes with the Jury's Ability to Properly Perform Its Duty to Weigh Evidence on Each Side of a Dispute.

Under Missouri law, trial courts may permit expert testimony in any civil case if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue…" § 477.050 RSMo.

However, when multiple experts testify as to the same opinions, such expert testimony may become cumulative evidence such that it no longer assists the trier of fact. "Cumulative evidence is additional evidence of the same kind tending to prove the same point as other evidence already given." *State v. McCabe*, 512 S.W.2d 442, 444 (Mo. App. 1974). "It is typically considered proper to exclude cumulative evidence." *Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228 (Mo. App. E.D. 2003).

Like other categories of evidence, expert testimony must be both logically and legally relevant. *Nolte v. Ford Motor Co.*, 458 S.W.3d 368, 382 (Mo. App. W.D. 2014). "Legal relevance […] is a determination of the balance between the probative and prejudicial effect of the evidence." *Id* This balancing test "requires the trial court weigh the probative value or usefulness, of the evidence against its costs, specifically the dangers of unfair prejudice, confusion of the issues, undue delay, misleading the jury, waste of time, or needless presentation of cumulative evidence." *Id.* (internal quotations omitted). "If the cost outweighs the usefulness, the evidence is not legally relevant and

should be excluded. *Id.* (quoting *Adkins v. Hontz*, 337 S.W.3d 711, 720 (Mo. App. W.D. 2011).

In cases such as the one below, truly cumulative expert testimony fails the balancing test for legal relevance by wasting time, unduly delaying litigation, misleading the jury, and creating unfair prejudice.

Perhaps the most important reason cumulative expert testimony fails the balancing test for legal relevance and must be excluded is the risk that when faced with truly cumulative expert testimony, a jury will side with majority rather than giving consideration to the credibility of each expert's opinion. Indeed, this risk was a driving force behind the Missouri Court of Appeals for the Eastern District's opinion. Specifically the court stated:

> We further find that the court's admission of such cumulative testimony posed a substantial risk of interfering with the jury's ability to properly perform its duty to weigh evidence on each side of this case and thus materially affected the merits of the action and prejudiced the Appellants.
>
> *Shallow v. Follwell*, No. ED103811, at *8 (Mo. App. E.D. 2017)(Fastcase).

The Missouri Court of Appeals for the Eastern District is not the only court to weigh in on such risk. Courts in other jurisdictions have discussed how cumulative evidence is particularly prejudicial when coming from an expert, because juries may be wrongfully swayed by merely counting heads, as recognized in many jurisdictions. *See On Track Innovations Ltd. v. T-Mobile USA, Inc.*, 106 F. Supp. 3d 369, 414 (S.D.N.Y. 2015) ("[m]ultiple expert witnesses expressing the same opinions on a subject is a waste of time and needlessly cumulative. It also raises the unfair possibility that jurors will

resolve competing expert testimony by 'counting heads' rather than evaluating the quality and credibility of the testimony"); *accord., Abbott Point of Care, Inc. v. Epocal, Inc.*, 868 F. Supp. 2d 1310, 1331 (N.D. Ala. 2012); *see also Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240, 243 (7th Cir. 1989) (refrains of "me too" are not helpful).

Such risk may be particularly high in the context of a claim for medical malpractice where often Defendants themselves are capable of giving expert testimony. This scenario is exactly what happened in the trial court below. The Defense was permitted to parade four hired experts with identical opinions on multiple issues and the Defendant himself in front of the jury. There is little doubt that this scenario interfered with the jury's ability to properly evaluate the case when the jury was presented with an overwhelming number of the same expert opinions.

Additionally, permitting needlessly cumulative expert testimony delays litigation and wastes the time of all participants including the parties, the court, and the jury. Examining one expert witness during trial may take several hours, so when a party attempts to use several cumulative expert witnesses, as in the case below, days of trial may be unnecessarily wasted just so a party can parade the same evidence in front of the jury. This is not an efficient use of anyone's time and is one of the reasons why needlessly cumulative expert testimony fails the legal relevance balancing test.

As stated above, needlessly cumulative expert testimony, like the testimony in the case below, fails the legal relevance balancing test under Missouri law. Such testimony carries a high risk of interfering with the jury's ability to properly perform its duty and

wastes the time of all participants to litigation. Therefore, needlessly cumulative expert testimony should be excluded.

II. In a Medical Malpractice Context, Needlessly Cumulative Expert Testimony Negatively Effects Judicial Efficiency and Hinders Litigation.

The admission of needlessly cumulative expert testimony, particularly in the context of a claim for medical malpractice, has the potential to negatively impact the judicial system at large for the same reasons that needlessly cumulative expert testimony may run afoul of the legal relevance balancing test.

The ramifications of permitting needlessly cumulative expert testimony are costly to all participants of litigation. Countless judicial resources may be exhausted as trials drag on for far longer than necessary because a party wishes to parade their cumulative experts in front of a jury. Additionally, parties may incur additional costs as they are forced to react to likely prejudicial, legally irrelevant and cumulative expert testimony (likely by hiring more experts of their own). Furthermore, permitting needlessly cumulative expert testimony wastes the time of our community by forcing jurors away from their daily lives for more time than necessary as they must listen to unnecessarily duplicative testimony.

Moreover, if the admission of needlessly cumulative expert testimony is routinely permitted, litigants may find themselves in a "battle of the resources" as they hire as many experts as their opponent(s) in an attempt to achieve an even playing field. In the context of a claim for medical malpractice, a "battle of the resources" scenario is particularly grim for Plaintiffs, as they are typically individuals (with limited personal

resources) pursuing a claim against insured health care providers (with insurance carriers having near limitless resources in comparison). Such a scenario may begin to discourage access to the judicial system. Should a potential plaintiff know that he/she may have to incur major expenses just to have an even playing field, he/she may be discouraged from seeking justice. Such possibility must be taken seriously as all Missourians have the right to pursue justice through the judicial system.

When trial courts properly evaluate expert testimony and exclude truly cumulative expert testimony, the above issues are prevented and judicial and financial efficiency are promoted.

CONCLUSION

For the reasons stated above, the Court should reverse the trial court's decision to permit cumulative evidence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 1608 words, as calculated by the Microsoft Word software used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed on this 17th day of April, 2018, to:

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