No. 84401

IN THE SUPREME COURT OF MISSOURI

GLEN SPEARS

Plaintiff/Appellant,

v.

CAPITAL REGION MEDICAL CENTER, INC.

Defendant/Respondent.

APPEAL FROM THE CIRCUIT COURT OF CALLAWAY COUNTY

Honorable Gene Hamilton

BRIEF OF *AMICUS CURIAE* MISSOURI HEALTH CARE ASSOCIATION IN SUPPORT OF DEFENDANT/RESPONDENT

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JURISDICTIONAL STATEMENT

After opinion by the Court of Appeals, Western 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 *AMICUS CURIAE*

Missouri Health Care Association ("MHCA") is an association of long-term care facilities, headquartered in Jefferson City. Approximately 346 long-term care facilities in the State of Missouri are MHCA members. MHCA represents its members' interests with respect to various matters, including those relating to tort law. MHCA's members authorized it to participate in this action as amicus curiae. Appellant Glen Spears and Respondent Capital Region Medical Center, Inc. consented to MHCA filing this amicus brief. *See* Rule 84.05(f)(2).

Resolution of this case greatly interests MHCA. MHCA members are long-term care providers, with an important perspective on tort issues affecting the health care industry. Long-term care facilities are subject to malpractice claims, including res ipsa loquitur claims. *See*, *e.g.*, *Redfield v. Beverly Health and Rehab. Inc.*, 42 S.W.3d 703, 714-15 (Mo. App. 2001); *Guffey v. Integrated Health Servs.*, 1 S.W.3d 509, 511 (Mo. App. 1999). The Court's resolution of this case will affect the costs of providing long-term care services, and the manner in which services are provided. It could also limit the ability of MHCA members to obtain casualty coverage to provide certain services.

STATEMENT OF FACTS

MHCA adopts the Statement of Facts in Respondent's Brief.

POINT RELIED ON

I. The trial court properly entered summary judgment for Capital Region Medical Center, because Plaintiff did not prove negligence via the res ipsa loquitur doctrine, in that it is not commonly known that the occurrence – contracting Hepatitis C – 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.

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

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)

LEGAL ARGUMENT

I. The trial court properly entered summary judgment for Capital Region Medical Center, because Plaintiff did not prove negligence via the res ipsa loquitur doctrine, in that it is not commonly known that the occurrence – contracting Hepatitis C – 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 trial court entered summary judgment for Capital Region Medical Center. On appeal, this Court's review is essentially de novo. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993).

B. Background

The relevant facts are apparently not disputed. Plaintiff has Hepatitis C, and believes he contracted it as a patient at Capital Region Medical Center. *L.F. at 10, 155-56*. To prove negligence, he relies solely on the res ipsa loquitur doctrine. *L.F. at 10, 156*; *Appellant's Brief at 25*. By Plaintiff's own admission, he cannot show that contracting Hepatitis C is ordinarily caused by negligence without using expert testimony. *L.F. at 11, 156*; *Appellant's Brief at 25.*

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). *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 plaintiff requests, 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 principles of "fairness" – as plaintiff does – only begins the analysis. *Appellant's Brief at 34, 37*. 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, 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 (e.g., 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).

These observations apply forcefully to health care. The public profits from the activities of health care providers. Doctors, nurses, hospitals, and long-term care facilities (like the members of MHCA) provide vital health 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 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 within 90 days of suing. *See* §§ 516.105, 538.210, 538.225, RSMo 2000.

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.[1] 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 Loquitur and Expert Opinion Evidence in Medical Malpractice Cases*, 82 Va. L. Rev.

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[1] 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.

325, 339-41 (1996). Mathematically, this conclusion can be explained with Bayes Theorem.[2] *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 accident 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.

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

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[2] 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.

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 probability of negligence, the probability of injury given reasonable care was used, and the probability of injury given 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 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 Assocs. in Obstetrics and Gynecology, Inc.* (one of plaintiff's 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 (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, there will be no basis 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. 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 such as MHCA's members 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.

Though the common knowledge requirement performs an important function, plaintiff's 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 jury was not competent to evaluate uncommon knowledge claims before, there is no reason 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, there is no need to abandon the common knowledge requirement to obtain the benefit – responsiveness to new conditions – that *Connors* and *Seavers* seek. This Court in 1953 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 664-65. She sued the airline and pilot, invoking res ipsa loquitur. *Id.* at 664. Several passengers, the pilots, and a mechanic who examined the plane testified. *Id.* at 665. 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 to only 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.

Finally, Plaintiff asserts that the prohibition on expert testimony unfairly applies only to malpractice claims. But, the cases he cites do not support his assertion. *See Hale v. American Family Mut. Ins. Co.*, 927 S.W.2d 522, 525, 530 (Mo. App. 1996); *Bonnot v. City of Jefferson City*, 791 S.W.2d 766, 769 (Mo. App. 1990). In *Bonnot*, the court first noted that plaintiff had made a submissible res ipsa loquitur case. 791 S.W.2d at 769. The court then went on to discuss plaintiff's expert evidence supporting other theories. *Id.* In *Hale*, only the dissenting judge discussed plaintiff's expert evidence. 927 S.W.2d at 530 (Hanna, J., dissenting). In reciting the facts, the majority recounted plaintiff's own

testimony, and no expert testimony. *Id.* at 525. Clearly, the propriety of using expert testimony in a res ipsa loquitur case was not considered in either case. *See* Rule 84.13(a) ("allegations of error not briefed or not properly briefed shall not be considered in any civil appeal").

Moreover, the common knowledge requirement – the basis for the prohibition on expert testimony – unquestionably applies to non-health care negligence claims. *See City of Kennett*, 564 S.W.2d at 45; *Cudney*, 254 S.W.2d at 666-67. These Supreme Court cases refute any implication Plaintiff might draw from *Bonnot* and *Hale*.[3]

F. Policy of the State as defined by the General Assembly

In recent times, the General Assembly has consistently made the policy decision of imposing reasonable limits on 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 v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 508 (Mo. banc 1991) (Shangler, Sp.J.) (noting that § 538.225 rationally seeks to preserve "an adequate system of medical care for the citizenry" by controlling

[3] In *City of Kennett*, an expert did testify about certain damage being "the direct and proximate result of the collapse of the tower." 564 S.W.2d at 50. This testimony does not support Plaintiff's argument, because res ipsa loquitur concerns only breach – not causation. *Martin*, 848 S.W.2d at 495.

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 is a good example of legislative policy in this area. It requires a plaintiff to submit an affidavit,

> 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 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.

The Court considered this provision in *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678 (Mo. banc 2000). The plaintiff, a patient, 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.*

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. In deciding this case, the Court should consider the General Assembly's views on provider liability as persuasive.

G. 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.

In his brief, Plaintiff notes that res ipsa loquitur is not actually a different theory of liability, but a different way of proving negligence. *Appellant's Brief at 33-34.* This reasoning, though technically accurate, misses the mark. 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.

Plaintiff tries to minimize the impact of this new class of liability, noting that he has a blood borne pathogen and that liability would not necessarily follow for all health care providers. *Appellant's Brief at 33*. But, courts invariably find that patients are under the health care provider's control, and that the provider has superior access to information. *See, e.g., Goodenough v. Deaconess Hosp.*, 637 S.W.2d 123 (Mo. App. 1982) (res ipsa loquitur applied when a plaintiff was fully conscious, but "unable to observe or appreciate the nurse's omission because of [her] position on the table"). *Cf. Cremeens v. Kree Institute of Electrolysis*, 689 S.W.2d 839, 842 (Mo. App. 1985) (res ipsa loquitur applied when plaintiff was injured during electrolysis to remove hair at a beauty salon). Moreover, 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*, 807 S.W.2d at 508.

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. Furthermore, as claims against health care providers have increased, the availability of insurance to pay those claims has decreased. Broadening res ipsa loquitur liability when casualty coverage is already difficult to obtain will only harm deserving plaintiffs who will find themselves holding judgments against bankrupt providers.

Accordingly, this Court should reaffirm *Hasemeier* and the common knowledge requirement. The Court should not permit inferences that are not based on common knowledge. They are inherently unreliable. Such a decision is fair and pragmatic, and is consistent with the General Assembly's treatment of provider liability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned certifies:

1. That this Brief complies with Rule 84.06(g) of this Court; and

   That this Brief contains 6,834 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

2. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

3. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Brief along with a double-sided, high-density IBM-PC-compatible disk with the text of the Brief were mailed on this _____ day of July, 2002, by U.S. Mail, postage prepaid, to:

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