No. SC84401

IN THE

SUPREME COURT OF MISSOURI

GLEN SPEARS,

Appellant,

v.

CAPITAL REGION MEDICAL CENTER, INC.,

Respondent.

Appeal from the Circuit Court of Callaway County, Missouri
The Honorable Gene Hamilton, Judge

STATEMENT, BRIEF AND ARGUMENT OF *AMICUS CURIAE* THE MISSOURI HOSPITAL ASSOCIATION IN SUPPORT OF RESPONDENT'S REQUEST FOR THIS COURT TO AFFIRM THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT

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JURISDICTIONAL STATEMENT

This appeal is from an order granting summary judgment in favor of Respondent Capital Region Medical Center, Inc. in the Circuit Court Callaway County, Missouri. The appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction was originally vested in the Missouri Court of Appeals, Eastern District pursuant to Article V, § 3 of the Missouri Constitution (as amended 1982). However, this appeal is properly before this Court because of this Court's May 28, 2000, order of transfer pursuant to Missouri Supreme Court Rule 83.03.

STATEMENT OF FACTS

The *amicus curiae* adopts the statement of facts from Respondent Capital Region Medical Center, Inc.'s Substitute Brief.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT CAPITAL REGION MEDICAL CENTER BECAUSE PUBLIC POLICY SUPPORTS FOLLOWING CURRENT MISSOURI LAW, WHICH PROHIBITS THE PLAINTIFF'S USE OF EXPERT TESTIMONY IN MEDICAL MALPRACTICE CASES BASED ON THE *RES IPSA LOQUITUR* DOCTRINE, IN THAT MISSOURI LAW IS CONSISTENT WITH THE INTENT OF *RES IPSA* CASES AND EXPANSION OF SUCH CASES BY ALLOWING EXPERT TESTIMONY WOULD INCREASE THE COST AND REDUCE THE AVAILABILITY OF HEALTH CARE.

Hasemeier v. Smith, 361 S.W.2d 697 (Mo. banc. 1962);

McDowell v. Southwestern Bell Telephone Co., 546 S.W.2d 160 (Mo.App., St.L.D. 1976);

Seavers v. Methodist Medical Center of Oak Ridge, 9 S.W.3d 86 (Tenn. 1999);

Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992);

Pedora v. Bryant, 677 P.2d 166 (1984);

42 U.S.C. §1320a-7b(b);

Tanya Albert, *Liability insurance crisis: Bigger awards just one factor*, AMERICAN MEDICAL NEWS, April 15, 2002;

Susan Laccetti Meyers, *Hospitals cite malpractice premium rise, Insurance costs called threat*, THE ATLANTA JOURNAL-CONSTITUTION, June 26, 2002;

Christopher S. "Kit" Bond, Editorial: *Congress needs to restore provisions supporting care in the home*, THE ST. LOUIS POST DISPATCH, September 28, 1999;

Laurie McGinley, *Hospitals Feel Sting of Cuts From Insurers*, WALL ST. J., March 16, 2000;

Tom Watson, *BBRA '99 offers limited relief to providers*, 18 HEALTH CARE NEWS 1 (2000).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT CAPITAL REGION MEDICAL CENTER BECAUSE PUBLIC POLICY SUPPORTS FOLLOWING CURRENT MISSOURI LAW, WHICH PROHIBITS THE PLAINTIFF'S USE OF EXPERT TESTIMONY IN MEDICAL MALPRACTICE CASES BASED ON THE *RES IPSA LOQUITUR* DOCTRINE, IN THAT MISSOURI LAW IS CONSISTENT WITH THE INTENT OF *RES IPSA* CASES AND EXPANSION OF SUCH CASES BY ALLOWING EXPERT TESTIMONY WOULD INCREASE THE COST AND REDUCE THE AVAILABILITY OF HEALTH CARE.

The issue in this case is whether a plaintiff in a medical malpractice case based on the *res ipsa loquitur* doctrine should be permitted to use expert testimony to establish the *res ipsa* claim. In the present case, the trial court granted summary judgment to Respondent and disallowed such expert testimony. The court of appeals agreed and affirmed the trial court's order but indicated that Missouri Supreme Court precedent should be reconsidered in light of other jurisdictions permitting expert testimony in medical malpractice *res ipsa* cases. This Court should uphold its precedent and continue to prohibit such expert testimony because it is consistent with the policy behind *res ipsa* cases and with public policy.

Policy Underlying *Res Ipsa Loquitur* Cases

The prohibition of expert testimony in *res ipsa* cases is consistent with the original intent of such cases. "*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." ***Hasemeier v. Smith***, 361 S.W.2d 697, 700 (Mo. banc 1962). This can be done by "showing the fact of an occurrence which, because of its character and circumstances, 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." ***Id***.

The literal translation of the term *res ipsa loquitur* is "the thing speaks for itself." ***McDowell v. Southwestern Bell Telephone Co.***, 546 S.W.2d 160, 164 (Mo.App., St.L.D. 1976). The doctrine is applied as a substitute to proving a specific act of negligence and allows proof of negligence to be shown by circumstantial evidence relating to the unusual nature of the accident. ***Id***. In other words, the situation must be so unusual that it simply could not have occurred without negligence. Thus, the accident speaks for itself to show negligence.

Allowing expert testimony in cases of medical malpractice based on *res ipsa* would be inconsistent with the theory that the thing speaks for itself. If it spoke for itself, there would be no need for expert testimony. If there is a need for such testimony, it is more properly presented in a traditional medical negligence case.

Moreover, the testimony of an expert witness in medical malpractice *res ipsa* cases improperly changes the jury's role in such cases. The jury is supposed to be able to, based on common knowledge and experience, make an inference that the particular injury would not have occurred without negligence on the part of the party in control. When an expert testifies in a medical malpractice case that the injury would not have occurred without negligence, the expert is doing the jury's job — making an inference of negligence from circumstantial evidence. Then the jury's job is reduced to making a credibility determination regarding the conclusion or "verdict" of the expert.

The Appellant is concerned that current Missouri law prohibiting expert testimony in medical malpractice *res ipsa* cases forces a plaintiff to choose between "relying on lay testimony and the *res ipsa* doctrine or proving negligence through expert testimony" (Appellant's Substitute Brief p. 28). What is wrong with that? As the dissenting judge in ***Seavers v. Methodist Medical Center of Oak Ridge***, 9 S.W.3d 86, 97 (Tenn. 1999), pointed out, reliance on the *res ipsa loquitur* doctrine and proving a traditional negligence claim are two mutually exclusive options a plaintiff may choose.

In essence, the Appellant would like this Court to create a "hybrid *res ipsa* case" in which a plaintiff gets the benefit of the *res ipsa* theory but still gets to make an attempt to prove a negligence claim in the traditional way through expert testimony. The end result is that the plaintiff avoids having to prove causation.

Negligence and causation in a *res ipsa* case are proved by presenting circumstantial evidence from which the jury can infer, based on common knowledge and experience, that the injury would not have occurred in the absence of negligence. ***Hasemeier***, 361 S.W.2d at 700. In traditional negligence cases, circumstantial evidence also may be used to prove negligence and causation. ***Id.*** at 702. If negligence and causation cannot be proved, either by the common knowledge *res ipsa* doctrine or by expert testimony in a traditional medical malpractice case, the judgment appropriately should be in favor of the defendant.

Public Policy Impact of this Court's Decision

In addition to being consistent with the policy underlying *res ipsa* cases, Missouri's law prohibiting expert testimony in medical malpractice cases is consistent with public policy. If this Court changes the law to allow expert testimony in such cases, it will have a negative impact on the health care system.

Statutes that limit the ability of individuals to sue in tort have been upheld based on the public policy of preventing an increase in the cost of health care and maintaining the availability of health care. For example, in ***Adams v. Children's Mercy Hospital***, 832 S.W.2d 898 (Mo. banc 1992), this Court reviewed certain tort reform provisions involving causes of action related to the provision of health care services. In ***Adams***, this Court acknowledged that the policy behind the enactment of such tort reform was to preserve affordable health care in the face of a perceived crisis in medical malpractice insurance. ***Id***. at 904-905. Any time a

new class of lawsuits is allowed against hospitals and other such entities, the cost of health care will potentially be increased.

An increase in medical malpractice cases would negatively affect health care in two significant ways. First, it would increase the cost of health care as providers attempt to offset an increased number of malpractice settlements and judgments. This would reduce the availability of affordable health care. Second, it would exacerbate the already pervasive problem of the increasing cost of medical malpractice insurance.

An increase in medical malpractice premiums would have at least two effects. One is that physicians will drop lines of service that cause premiums to increase. For example, general practitioners will avoid obstetrical practice because it tends to increase premiums. This will be particularly problematic in rural areas where access to obstetrical care is ordinarily limited to general practitioners. Second, physicians will tend to practice in larger population centers where they will make enough money to pay the premiums, which also would reduce access to health care in rural areas.

A recent article from *American Medical News* highlighted the problem of the increasing cost of malpractice insurance, indicating that physicians are paying higher liability insurance premiums and some have difficulty finding insurance at all. Tanya Albert, *Liability insurance crisis: Bigger awards just one factor*, AMERICAN MEDICAL NEWS, April 15, 2002. Access to health care is limited by increased costs resulting from increased premiums for medical malpractice

insurance. *See generally*, ***Adams***, 832 S.W.2d at 904-905; and ***Pedora v. Bryant***, 677 P.2d 166, 170 (1984). Indeed, an Atlanta, Georgia newspaper recently reported that the rising cost of medical malpractice insurance is not only affecting physicians but is causing hospitals to seriously consider whether they can afford to stay open. Susan Laccetti Meyers, *Hospitals cite malpractice premium rise, Insurance costs called threat*, THE ATLANTA JOURNAL-CONSTITUTION, June 26, 2002.

Physicians in Missouri have seen significant increases in their medical malpractice premiums. Hospitals, which want to ensure that their physicians are adequately insured, have had to consider self-insuring their physicians or subsidizing the premiums.

There are significant barriers to this. First, hospitals are still dealing with a financial slump caused by the reduction in the amount of reimbursement for treatment of Medicare patients mandated by the Balanced Budget Act of 1997. In fact, budget cuts have had such an impact that several of Missouri Hospital Association member hospitals have been forced to close since July 1999.

The financial impact of the budget cuts was more severe than intended, which resulted in an attempt to legislatively correct the problem. United States Senator Christopher S. "Kit" Bond supported such legislation, noting in an editorial that cuts in Medicare reimbursement have reduced access to home health care due to thousands of home health care providers that have closed as a result of the budget cuts. Christopher S. "Kit" Bond, Editorial: *Congress needs to restore*

provisions supporting care in the home, THE ST. LOUIS POST DISPATCH, September 28, 1999. Since then, Congress passed the Balanced Budget Refinement Act of 1999, which restored the budget cuts by more than $16 billion over a period of five years, $7 billion of which was earmarked for hospitals. *See* Laurie McGinley, *Hospitals Feel Sting of Cuts From Insurers*, WALL ST. J., Mar. 16, 2000, at B2.

The added funds from the Balanced Budget Refinement Act of 1999 unfortunately are not significant enough to make much of an impact on hospitals, many of which have more than 50 percent of their revenue from patient care tied to Medicare payments. In fact, a recent newsletter of the BKD Health Care Group (a part of the Baird, Kurtz & Dobson regional accounting firm) indicated that the so-called "restoration" of payment cuts is in reality only a "freeze in additional cuts scheduled for 2000 to 2002, not actual returns of previous payment reductions." Tom Watson, *BBRA '99 offers limited relief to providers*, 18 HEALTH CARE NEWS 1 (2000). According to the newsletter, absent further legislation, the cuts will continue after a brief delay of one to three years. ***Id***.

A second significant barrier to hospitals self-insuring physicians or subsidizing their premiums is the Medicare Anti-kickback Statute, 42 U.S.C. §1320a-7b(b). That statute prohibits payment of any remuneration if any purpose is to induce referrals. In the health care industry, referrals by physicians to the hospital at which they have medical staff privileges are expected. Thus, any extra payment for insurance to physicians on the medical staff could potentially violate

the anti-kickback statute. There is an exception for employed physicians but most physicians on the medical staff at hospitals are not hospital employees.

In summary, the policy underlying *res ipsa* cases supports this Court continuing to prohibit expert testimony in medical malpractice cases based on *res ipsa loquitur*. Plaintiffs have always had and should continue to have a choice to present their claims under a *res ipsa* theory or a traditional malpractice theory. If they are unable to prove their claims, they lose their case, not unlike any other plaintiff. In addition, general public policy concerns regarding the cost and availability of health care should serve as a reminder to this Court that caution must be exercised before the law is changed in a way that increases the already exceedingly high number of medical malpractice cases.

CONCLUSION

In light of the above, the Missouri Hospital Association as *amicus curiae* requests that this Court affirm the trial court's order granting summary judgment in favor of Respondent Capital Region Medical Center, Inc.

Respectfully submitted,

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I hereby certify that two true and correct copies of the foregoing and a copy of the brief on disk were mailed, postage prepaid, this 8th day of July 2002, to:

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I hereby certify that, pursuant to Special Rule No. 1, the foregoing document is printed in 13-point proportionally-spaced type (Times New Roman), was prepared with Microsoft Word 97 software for Windows, and contains 2,709 words according to this software. In addition, I certify that the computer disk submitted with this document was scanned for viruses and that the disk is virus free.

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