No. SC96901

IN THE SUPREME COURT OF MISSOURI

HEATHER SHALLOW, MICHAEL BISHOP AND TODD BISHOP,

Plaintiffs/Appellants

vs.

RICHARD FOLLWELL, D.O. AND RICHARD O. FOLLWELL, P.C.,

Defendants/Respondents.

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

AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND MISSOURI STATE MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS

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INTEREST OF *AMICI CURIAE*

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Missouri.

The Missouri State Medical Association ("MSMA") is an organization of physicians and medical students. MSMA has approximately 6,000 members and is located in Jefferson City. MSMA serves its members through the promotion of the science and art of medicine, protection of the health of the public, and betterment of the medical profession in Missouri.

The AMA and MSMA join this brief on their own behalves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts. *Amici*'s participation on behalf of their physician memberships will help educate the Court on the potential impact of this case on the practice of medicine in Missouri.

CONSENT OF PARTIES

The parties have consented to the filing of this brief pursuant to Missouri Supreme Court Rule 84.05(f). Therefore, *amici* file this brief pursuant to Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

JURISDICTIONAL STATEMENT

Amici adopt Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Dr. Follwell diagnosed Ms. Beaver with an incisional hernia, a hole or defect in the abdominal wall, and performed a laparoscopic hernia repair surgery. Dr. Follwell testified that he did not encounter her bowel during surgery or observe any indications of a bowel injury during the surgery. After surgery, she complained of certain pain, and he evaluated her and, again, did not find any indications of an injured or perforated bowel. About thirty hours later, she returned to the hospital and was diagnosed with atrial fibrillation, septic shock, metabolic acidosis, and acute kidney failure. She was later diagnosed with, among other things, a perforated bowel. Over the next few days, Ms. Beaver was operated on three times for issues related to the perforated bowel. Unfortunately, she died about six months later.

At trial, Plaintiffs largely relied on a single expert to testify on all key medical issues, including (a) the standard of care for surgery and that Dr. Follwell did not meet that standard of care, (b) that Dr. Follwell caused the perforation in Ms. Beaver's bowel during surgery, (c) ruling out other causes of the perforated bowel, including from atrial fibrillation, (d) the standard of care for the post-surgery care and that Dr. Follwell did not

meet these standards of care, and (e) other issues. To respond to these allegations and explain alternative causes for a hole in a bowel, Dr. Follwell called four expert witnesses to testify in their own areas of expertise: a cardiologist; general surgeon board certified as a critical care specialist; a general surgeon board certified as a vascular surgeon; and a general surgeon board certified as a colorectal surgeon. The jury returned a defense verdict, finding that Dr. Follwell did not cause the perforated bowel or Ms. Beaver's death. The Court of Appeals overturned this verdict. It acknowledged that Defendant's experts were qualified and based their testimony on sound science, but asserted that the cumulative effect of the four experts' testimony prejudiced Plaintiff.

POINTS RELIED ON

I. The Trial Properly Determined that Cases Alleging Medical Negligence Should Be Decided Based on Proper Medical Science, Which Requires Specialized Expertise

State v. Tompkins, 277 S.W.2d 587, 591 (Mo. 1955)
Steele v. Woods, 327 S.W. 2d 187, 199 (Mo. 1959)
RSMo. § 538.225

II. The Court of Appeals Erred In Undermining the Role of the Trial Judges as Being Responsible for Ensuring the Use of Sound Science in Their Courtrooms

RSMo. § 490.065
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

INTRODUCTION AND SUMMARY OF ARGUMENT

The goal of Missouri's civil justice system in medical negligence cases is to compensate wrongfully injured patients. In cases involving complex surgeries, including the laparoscopic hernia repair at issue here, it can be challenging for trial judges to ensure that such justice can be achieved in their courtrooms. Juries must assess surgical

techniques, risks, impacts of pre-existing conditions, and other scientific issues that often are outside of their experiences. They also must make these decisions in the context of sympathetic plaintiffs alleging severe harm, including wrongful death as here. Qualified experts are needed in these cases so that juries can make competent decisions on the key scientific issues, namely whether the physician met the standard of care to the patient and whether the physician factually and legally caused the plaintiff's injuries. Given the highly specialized nature of medicine today, multiple experts may be required to ensure a jury has a proper understanding of the relevant medical science.

For decades, this Court and the Missouri Legislature have charged trial judges with managing plaintiffs' and defendants' experts to ensure they facilitate a jury's ability to focus on the right information and arrive at the right conclusions. While "needless presentation of cumulative evidence" is not permitted, *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992), "[i]t is within the sound judicial discretion of the trial court as to where cumulative testimony shall stop." *State v. Tompkins*, 277 S.W.2d 587, 591 (Mo. 1955). Here, Plaintiff chose to have one expert testify on a broad range of topics, including those seemingly outside of his area of expertise, to explain why he believed Dr. Follwell should be subject to liability for Ms. Beaver's death. In response, Dr. Follwell offered four specialists, each addressing aspects of these allegations from their own areas of expertise—hernia repair and critical care surgery, cardiology, vascular surgery and colorectal surgery. The trial court made sure that each expert "gave their own parts" and instructed the jury not to give weight to the number of experts on either side.

The fact that Dr. Follwell's experts agreed on the main issues, namely that he did not violate the standard of care in his surgical repair of Ms. Beaver's hernia and that the perforation in Ms. Beaver's bowel likely resulted from pre-existing, undiagnosed atrial fibrillation, should not disqualify their testimony—individually or collectively. As the Court of Appeals acknowledged, these experts were highly educated and impeccably credentialed, and it was proper for each expert to testify as he or she did. In cases like the one at bar, given the nature of the surgery and timing of the perforated bowel, there is real concern that the jury would presume causation and not give the physician a fair hearing. Therefore, it was highly relevant and probative for the jury to hear from experts in each area of expertise whether the perforation occurred during surgery or from a previous atrial fibrillation, and whether Dr. Follwell adhered to the proper standard of care in conducting surgery and treating Ms. Beaver afterwards. The jury's agreement with these experts does not mean the jury was prejudiced by them.

For these reasons, as well as those discussed below, *amici* respectfully urge the Court to overturn the ruling by the Court of Appeals and reinstate the trial court's determination that the testimonies of Defendant's experts were useful and not prejudicial to the jury. The Court should ensure that Missouri trial judges are empowered to safeguard the use of sound science in their courtrooms. In cases such as the one at bar, justice requires juries to be properly informed by well-qualified experts in their fields of the standards of care and potential causes of a medical condition so they can properly weigh the facts in accordance with Missouri law.

ARGUMENT

I. The Trial Properly Determined that Cases Alleging Medical Negligence Should Be Decided Based on Proper Medical Science, Which Requires Specialized Expertise

Dr. Follwell's decision to use individual experts to testify on specific areas of expertise should be commended; it should not be the basis for invalidating a jury's finding in his favor. The irony here is that if Ms. Beaver's attorney followed the same path, rather than choosing to have a single expert testify on a broad range of topics, there would have been no basis for this appeal. Dr. Follwell should not be disadvantaged for following longstanding legal public policy, both in Missouri and nationally, that specialists facilitate medical negligence determinations. *See Steele v. Woods*, 327 S.W. 2d 187, 199 (Mo. 1959) ("In a malpractice case which involves the skill and technique exercised by a physician and surgeon it is usually necessary to prove by expert testimony from members of that profession that the skill or technique" did or did not conform to standards of the profession).

The importance of specialists to medical negligence litigation is underscored by the fact that to even bring a medical negligence claim in Missouri, the plaintiff must "[f]ile an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider" to support his or her allegations. RSMo. § 538.225. The statute defines a legally qualified health care provider as one who is licensed in Missouri or any other state in the same profession as the defendant that is also either "actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant." RSMo. § 538.225.2. The Court has

explained that "by enacting section 538.225, the legislature sought to prevent plaintiffs from relying on opinions from health care providers with minimal to no experience in performing the procedure in question." *Spradling v. SSM Health Care St. Louis Id.*, 313 S.W. 3d 683, 690 (Mo. 2010). "The relevant field must be determined . . . by the standards in the field in which the doctor has chosen to practice." *State Bd. of Registration for Healing Arts v. McDonaugh*, 123 S.W.3d 146, 156 (Mo. 2003).

The reliance on medical specialists is necessary in today's medical environment because medicine is highly specialized and requires physicians to continuously learn and develop new skills. The American Board of Medical Specialties now issues certificates in thirty-eight specialties and 130 subspecialties.[1] These certifications, in addition to impacting a physician's "hospital privileges [and] peer and patient recognition," instruct physicians on "the standard of care" that physicians in a particular specialty or subspecialty owe to their patients. John J. Smith, *Legal Implications of Specialty Board Certification*, 17 J. Legal Med. 73, 74-75 (1996); *see also* Restatement (Second) of Torts § 299A, cmt. d (1965) ("A physician who holds himself out as a specialist in certain types of practice is required to have the skill and knowledge" common to similar specialists.). These standards regularly change based on developments in medical science.

Accordingly, the AMA and other medical professional organizations have issued codes of ethics to encourage people to testify only in their areas of specialty to ensure the

[1] *See* ABMS Guide to Medical Specialties 2017, Am. Bd. of Med. Specialties, *at* https://www.abmsdirectory.com/pdf/Resources_guide_physicians.pdf (providing detailed descriptions of each specialty and subspecialty). Approximately 80 to 85 percent of all U.S. licensed physicians are Board Certified by an ABMS Member Board. *See* Better Patient Care is Built on Higher Standards, Am. Bd. of Med. Specialties (2012), at 1, *at* http://www.certificationmatters.org/Portals/0/pdf/ABMSCorpBrochure.pdf.

accuracy of medical negligence litigation. *See* Medical Testimony, Code of Medical Ethics Opinion 9.7.1, Am. Med. Ass'n, at https://www.ama-assn.org/delivering-care/medical-testimony ("As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice."); *see also* Committee on Medical Liability, *Guidelines for Expert Witness Testimony in Medical Malpractice Litigation*, 109 Am. Acad. of Pediatrics 5 (May 2002) ("As members of the physician community, as patient advocates, and as private citizens, [physicians] have ethical and professional obligations to assist in the administration of justice, particularly in matters concerning potential medical malpractice."). The AMA Code further instructs that physicians must testify "only in areas in which they have appropriate training and recent, substantive experience and knowledge" so their testimony will reflect "current scientific thought and standards of care that have gained acceptance among peers in the relevant field." Medical Testimony, Code of Medical Ethics Opinion 9.7.1(h)-(j)(3, Am. Med. Ass'n, at https://www.ama-assn.org/delivering-care/medical-testimony.

Assuring that surgeons and other highly trained medical specialists are adjudged in litigation based on the proper standards of care and by individuals who are also trained and experienced in those standards of care is intended to protect the integrity of medical negligence litigation. The concern in Missouri and elsewhere has been that when physicians testify outside of their areas of specialty it may facilitate "expert shopping," which denigrates the integrity of both the medical profession and the litigation. As Judge Posner of the U.S. Court of Appeals for the Seventh Circuit has explained, when "hired

guns" testify in highly technical and esoteric areas, as with medical procedures, it fuels the "skepticism about expert evidence" because judges and jurors can have difficulty in distinguishing among experts. *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967, 973 (7th Cir. 2001). Thus, having several specialists testify in their areas of specialty, even when they arrive at the same conclusions on the main issues, is not evidence of "needless" repetition. It is the preferred path for facilitating justice.

In cases like the one at bar, such expert testimony can be particularly important in overcoming possible hindsight or negative outcome bias. Studies have shown that when jurors lack proper medical understanding, they may improperly fill the voids by presuming that the surgeon must have caused the patient's alleged harms. *See generally* Michael A. Haskel, *A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases*, 42 Tort & Ins. L. J. 895 (2007). "[T]he existence of these biases suggest that it may be difficult for finders of fact to evaluate fairly." *Id.* at 905. Juries may try to "find someone to blame" for the adverse event and seek to compensate a sympathetic plaintiff whenever possible. David P. Sklar, *Changing the Medical Malpractice System to Align with What We Know About Patient Safety and Quality Improvement*, 92 Acad. Med. 891, 891 (2017). Thus, without hearing from the appropriate experts that Ms. Beaver's perforated bowel was the result of a pre-existing atrial fibrillation, the jury could have presumed that Dr. Follwell caused the perforation merely because it occurred around the same time as the surgery.

Further, even if evidence suggested Dr. Follwell injured Ms. Beaver's bowel, such evidence would still not be conclusive of medical negligence. Injuring or perforating a

bowel inter-operatively is a known risk or complication of certain surgeries that occur even when a surgeon meets the proper standard of care. In these situations, specialists in the subspecialties may be needed to help juries "differentiate between adverse events and medical errors." David Sohn, *Negligence, Genuine Error, and Litigation*, 6 Int'l J. Gen. Med. 49, 50 (2013). According to a Harvard Public Health Study, only about 27 percent of adverse events are caused by negligence. *See* T. A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 13 Qual. Saf. Health Care 145, 146 (2004). Physicians must not face liability simply because a patient experiences an adverse event. Otherwise, the resulting strict liability will create "a chilling effect on treating complex conditions or performing difficult procedures." Sohn, *supra*, at 50.

In many cases, only specialists can provide the level of knowledge that justice requires. Here, having individual experts provide their specialized understanding of the risks, standards of care and alternative causes of Ms. Beaver's perforated bowel was necessary to educate the jury about other explanations for her death. Their testimony was proper and accurate, even if there was overlap in their testimonies on the standard of care, and helped prevent hindsight or negative outcome bias. The trial court's decision to allow their testimony, individually and collectively, should be upheld. In order for the civil justice system to work properly, juries must find a physician liable for a patient's harm only when the physician wrongfully caused the patient's injury.

II. The Court of Appeals Erred In Undermining the Role of the Trial Judges as Being Responsible for Ensuring the Use of Sound Science in Their Courtrooms

The Court should also overturn the Court of Appeals ruling here to reinforce the

responsibility of trial judges for making sure that juries are presented with well-qualified, accurate expert testimony that can assist juries in deciding cases involving complex or technical matters. As indicated, the trial judge made sure that Dr. Follwell's witnesses were all highly educated, impeccably credentialed, and testified on matters solely within their own areas of expertise. Further, as this Court has long held, it is "within the sound judicial discretion of the trial court as to where cumulative testimony" becomes needlessly repetitive. *Tompkins*, 277 S.W.2d at 591. Allowing the Court of Appeals to reject the trial judge's expert evidence rulings, therefore, undermines the role of trial judges to manage each trial in a manner that produces a proper scientific outcome.

Last year, the Missouri Legislature passed legislation enhancing the responsibility of the trial judge as the gatekeeper for sound science in the courtroom. *See* RSMo. § 490.065; *Polski v. Quigley Corp.*, 538 F.3d 836, 838 (8th Cir. 2008) (explaining that under such rules, "the trial judge acts as a 'gatekeeper' screening evidence for relevance and reliability."). The most important effect of this new law is to have the trial judge remain the focal point for improving the quality and reliability of expert testimony, eliminating questionable science, and conserving resources of the court and party litigants. Under the new version of Mo. Rev. Stat. § 490.065, trial judges must evaluate the facts and data an expert relies upon, the expert's methodology and principles, and the reliability of the application of those principles and methods to the facts of the case. *See id*; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). Missouri judges must make certain that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). Making sure that experts testify within their own areas of expertise, even when doing so requires multiple experts to cover the various topics at issue, fulfills the very goals of this reform.

In fact, during the public discussion on the legislation, this exact concern was raised with regard to trends in product liability cases in Missouri after a May 2015 trial in St. Louis against Abbott Laboratories resulted in a $38 million verdict ($15 million compensatory, $23 million punitive). *See* Samantha Liss, *Minnesota Girl Awarded $23M In Punitive Damages in Depakote Suit*, St. Louis Post-Dispatch, May 27, 2015; Michael Carroll, *Missouri Legislature Advances Tort Reform Measures*, St. Louis Record, Mar. 9, 2017 *available at* https://stlrecord.com/stories/511084792-missouri-legislature-advances-tort-reform-measures. In that case, a Minnesota girl alleged she experienced birth defects from her mother taking Depakote, an anti-epileptic drug, during pregnancy. *See id*. Meanwhile, an Ohio jury reached a defense verdict in a similar case after the judge there, applying *Daubert*, ruled that the plaintiffs' experts could testify only within their areas of expertise. *See* Cara Salvatore, *Abbott Tells 6th Circ. Depakote Testimony Correctly Limited*, Law 360, July 5, 2016. The Legislature recognized that when awards of liability are obtained in Missouri although similar cases are dismissed or result in defense verdicts in other courts, it hurts the reputation of Missouri's civil justice system. It also discourages businesses and physicians from locating in Missouri.

In addition, this "gatekeeper" approach was intended to create greater consistency among trial courts, which should reduce forum shopping and provide greater fairness to litigants. *See* Bruce Kaufman, *Missouri's New Expert Witness Standards Take Effect*,

Bloomberg Law, Aug. 30, 2017 *available at* https://www.bna. com/missouris-new-expert-n73014464033/. Such efforts are particularly welcome in litigation over medical negligence, where studies have shown that a patient's decision to sue for medical negligence often has to do with other factors than whether negligence actually occurred. *See* Barry F. Schwartz & Geraldine M. Donohue, *Communication Is Crucial in Practicing Medicine in Difficult Times: Protecting Physicians from Malpractice Litigation* 47, 69 (Jones & Bartlett Publishers, 2009). Nationally, about two-thirds of medical negligence claims are ultimately dropped, withdrawn, or dismissed without any payment. *See* Jose R. Guardado, *Professional Liability Insurance Indemnity Payments, Expenses, Claim Disposition, and Policy Limits, 2003-12*, Pol'y Research Perspectives No. 2013-3, at 9 (Am. Med. Ass'n, 2013). Further, the average expense of defending against a medical negligence claim, regardless of outcome, is $50,000. *Id.* at 7. Therefore, increasing the accuracy of the science used to determine liability will help reduce allegations not supported by medical science and facilitate affordable care.

Finally, when liability is not grounded in sound science, more than just false compensation is at stake. A fundamental purpose of civil litigation is to force defendants to change their liability-creating conduct. Changing medical standards of care, for example, based entirely on inaccurate facts or false assumptions could do more harm than good. Patients may be subject to more tests, which could have risks and costs, without any corresponding benefit. Similarly, manufacturers, such as the pharmaceutical manufacturer in the Abbot Laboratories case discussed above, may have to re-design useful products or strengthen warnings that could lead to some people not receiving the

important benefits of these products. Missouri's liability system should advance proper care, not hinder it.

The trial judge here took commendable steps in that direction, and her rulings allowing individual experts to testify as to their own areas of expertise should be upheld. As this Court expressed more than a half century ago, when expert evidence tends to prove one's case, it should be allowed "even if it were cumulative." *Tompkins*, 277 S.W.2d at 591.

CONCLUSION

For these reasons, this Court should affirm the trial court's decision to allow Defendant's experts to testify and overrule the Court of Appeals ruling below.

Respectfully submitted,

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Dated: April 16, 2018

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the requirements contained in Mo. R. Civ. P. 81.18 and 84.06; and (3) contains 4,230 words.

Respectfully Submitted,

__/s/ Jon R. Gray_____
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Dated: April 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2018, a true and correct copy of this brief was served via the Missouri Courts E-filing System upon the following counsel:

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