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• MEDICAL MALPRACTICE DEFENSE IN KANSAS AND MISSOURI •

LEGAL UPDATE

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Res Ipsa Loquitur Theory Allowed in Medical Malpractice Cases in Missouri

***Res Ipsa Loquitur* Theory Allowed in Medical Malpractice Cases in Missouri.**

On an issue of first impression before the Supreme Court of Missouri, the Court held that a plaintiff in a medical malpractice case can proceed on a *res ipsa loquitur* theory where the plaintiff offers a medical expert's opinion that the injury would not have occurred in the absence of a defendant's negligence. *Sides v. St. Anthony's Medical Center*, 258 S.W.3d 811 (Mo. banc 2008).

In *Sides*, the plaintiff had a lumbar laminectomy with spinal fusion at the hospital, and was discharged three days later. At some point thereafter, she was diagnosed with E. coli at the surgery site. She sued the hospital, surgeon and surgeon's employer under a *res ipsa* theory: that an E. coli infection in the surgical site does not occur in the absence of negligence.

Plaintiff conceded that she could not prove a "specific" negligence theory, but argued that her expert testimony supported her *res ipsa* theory that "the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care."

The Court held that it is permissible for medical experts to offer opinions on the issue of negligence in a medical malpractice case brought under a theory of *res ipsa* rather than based on specific or general negligence. In so holding, The Court noted that it is following the "modern trend" to allow both a *res ipsa loquitur* instruction and expert testimony in medical malpractice cases.

On a similar note, the Missouri Court of Appeals recently held that a plaintiff pleading *res ipsa* is not exempt from the health care affidavit requirement. *Gaynor v. Washington University*, 261 S.W.3d 650 (Mo. App. E.D. 2008).

Given this ruling, we may expect to see more *res ipsa* claims in Missouri.

Kansas allows a *res ipsa* theory in a medical malpractice case, but under more limited circumstances. In Kansas, "[t]he doctrine of res ipsa loquitur is available in an appropriate case to a plaintiff alleging medical malpractice based upon negligence," but only where "a layman could find, as a matter of common knowledge, that the patient's condition was such that would ordinarily not have occurred if due care had been exercised." *Butler ex rel. Commerce Bank v. HCA Health Services of Kansas, Inc.*, 6 P.3d 871 (Kan. Ct. App. 1999); *Savina v. Sterling Drug*, 795 P.2d 915 (1990). The doctrine is "seldom applicable" in medical malpractice cases. *Frans v. Gausman*, 6 P.3d 432 (Kan. Ct. App. 2000).

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* *Brown & Ruprecht, PC would like to congratulate Stephen S. Brown and Matthew M. Merrill, co-chairs of the Medical Malpractice Litigation group, for being named "Super Lawyer" and "Rising Star," respectively, for Kansas and Missouri in 2008 by Law & Politics and the publishers of KC Magazine.*