IN THE SUPREME COURT

STATE OF ARIZONA

MICHELLE SAMPSON, on behalf of herself and other statutory beneficiaries of AMARE' BURKS, deceased, Plaintiff/Appellant, v. SURGERY CENTER OF PEORIA, LLC, a foreign limited liability company doing business as SURGERY CENTER OF PEORIA; GEORGE GUIDO, M.D.; VALLEY ANESTHESIOLOGY CONSULTANTS, LTD., an Arizona corporation, Defendants/Appellees.	No. CV-20-0024-PR Arizona Court of Appeals Division One No. 1 CA-CV 18-0113 Maricopa County Superior Court No. CV2013-015707

AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND ARIZONA MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW (FILED WITH WRITTEN CONSENT)

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The bedrock requirement in medical negligence cases that a qualified expert testify that a patient's injury was proximately caused by a breach of an applicable standard of care is of utmost importance to the American Medical Association (AMA) and Arizona Medical Association (ArMA). The AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policymaking process. The AMA, founded in 1847, promotes the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including Arizona, and every medical specialty.

The ArMA is a voluntary membership organization for all Arizona physicians. It currently represents 4,000 members, including physicians, physician assistants, resident physicians, and medical students from all specialties and practice settings. ArMA's vision is to make Arizona the best place to practice medicine and receive care. It has become the foremost advocate and resource in the state for economically sustainable medical practices, the freedom to deliver care in the best interests of patients, and health for all Arizonans.

The AMA and ArMA appear on their own behalves and as representatives of the AMA Litigation Center. The Litigation Center is a coalition among the AMA and medical societies of every state. The Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts. It brings lawsuits, files *amicus* briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

ISSUE FOR REVIEW ADDRESSED BY THIS *AMICI* BRIEF

Did the Court of Appeals err in holding that Plaintiff was not required to introduce expert testimony to establish proximate causation of death—and the jury could instead infer causation—if Plaintiff's medical causation expert established the standard of care was breached?

STATEMENT OF THE FACTS AND CASE

This Petition arises out of a medical negligence claim by Ms. Sampson, who brought a wrongful death lawsuit for her deceased four-year-old son, Amare'. As detailed in the Court of Appeals ruling, Amare' underwent a scheduled tonsillectomy and adenoidectomy to address his obstructive sleep apnea. His surgery lasted from 8:36 a.m. to 8:54 a.m., and he was discharged to the post-operative anesthesia care unit (PACU) at 9:29 a.m. At 10:30 a.m., a nurse discharged him to Ms. Sampson's care. The nurse's notes showed that Amare' had

an eight-of-eight score on the post-anesthesia discharge test. About two hours later, when Amare' was sleeping at home, Ms. Sampson discovered that he had stopped breathing and emergency personnel were unable to resuscitate him.

After discovery, the trial court determined Ms. Sampson, though her counsel and expert depositions, failed to make the required causal connection between any failure to keep Amare' at the surgery center for more time and his death. Petitioner points out that at oral argument on its summary judgment motion, the court asked Ms. Sampson's counsel to point to any such evidence. He could not because there was no such evidence. Accordingly, the court ruled in favor of Defendant's Motion for Summary Judgment. It stated that the issues of medical causation in the case "are matters committed to the expertise of medical practitioners, and well beyond the ken of the average juror."

The Court of Appeals reversed this ruling. It found her expert's deposition testimony, despite its "deficits and contraindications," provided "sufficient [information] to permit a reasonable jury to conclude that the standard of care required Amare' to be kept in the PACU for a longer period." It then held without foundation that expert testimony would not be needed on causation, stating: "if a jury were to agree that the standard of care was breached as to time, then no expert evidence would be needed to permit it to *infer* that a discharge in violation of that

standard was the probable cause of a death that occurred within the time the child should have been observed under the standard of care." (emphasis added).

Petitioner is seeking review of the critically important question of whether expert testimony is needed to establish causation in this medical negligence claim. *Amici* also adopt and incorporate Petitioner's Statement of the Material Facts to the extent needed for the arguments stated herein.

ARGUMENT

This Petition goes to the heart of the ability of the Arizona civil justice system to ensure justice in medical negligence claims. Arizona, like other states, has long required that plaintiffs provide expert testimony on each element of a claim, including causation, to ensure the medical and scientific veracity of each lawsuit. Such expert testimony is critical for providing jurors with the proper basis for determining both whether a medical professional took the proper steps in evaluating and treating a patient, and whether any failure to adhere to a standard of care caused the alleged harms. Permitting juries to evaluate complex medical causation issues based on their own *inference*, as the Court of Appeals' decision allows, is a recipe for imposing liability for harm that a hospital or physician did not cause and could not have prevented based on the accepted standards of care.

This Court has made clear that expert testimony is integral to courts' ability to ensure that juries hear only "meritorious medical malpractice claims." *Baker v.*

Univ. Physicians Healthcare, 231 Ariz. 379, 389 (2013). As discussed herein, the filing of a medical negligence claim historically is not a good indication of whether malpractice actually occurred. A patient, often understandably, will file a claim when experiencing severe complications or a negative outcome, as in the death of a child in the case at bar. Jurors in such cases must determine complex issues of medical science outside of their experiences, making the testimony of qualified experts on both the standard of care and causation essential to a fair trial. The only exception to this rule is when causation is "readily apparent." *Rasor v. Northwest Hosp., LLC*, 243 Ariz. 160, 166 (2017) (referencing this standard). Here, the Court of Appeals neither applied this standard nor made any finding that causation was readily apparent in allowing a jury to "infer" causation.

As the trial court found, causation is not readily apparent. A jury has to determine the impact of anesthesia on a four-year-old boy in the context of a mother suing because he died hours after undergoing anesthesia. How long a child should be kept under observation, what tests the child should have to pass before being released into the care of his mother, what other causes could have led to his death, and whether the failure to adhere to any standard of care caused his death are all issues of medical science. If Ms. Sampson's own expert could not provide causation testimony after repeated requests from the court, a lay jury cannot be expected to accurately and dispassionately "infer" whether such causation exists.

Petitioner must not be subject to liability when Ms. Sampson's own expert cannot causally connect the breach of care alleged to the harm at issue in the case.

Amici respectfully urge the Court to grant this Petition and overturn the ruling below. Arizona patients and physicians must be able to rely on the state's courts to follow sound law and produce just outcomes, even in difficult situations. Failing to present expert testimony on causation does not excuse that obligation.

I. THE COURT MUST ENSURE THAT EXPERT EVIDENCE REMAINS THE FOUNDATION OF PROVING A MEDICAL NEGLIGENCE CLAIM IN ARIZONA

In this case, consistent with all medical negligence cases, Ms. Sampson must show that the health care provider, in breaching the appropriate standard of care, caused the injury alleged. *See Baker*, 231 Ariz. at 384. Thus, for her claim to proceed to trial, she must present evidence at the close of discovery that the Surgery Center's failure to "exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession . . . acting in the same or similar circumstances" could have proximately caused Amare's death. A.R.S. § 12-563. Because she had not presented such evidence, the trial court properly granted Defendant's Motion for Summary Judgment.

In reversing the trial court's ruling, the Court of Appeals violated this Court's longstanding requirement that a plaintiff cannot meet this evidentiary burden "absent expert testimony." *Seisenger v. Siebel*, 220 Ariz. 85, 94 (2009).

As this Court has explained:

> Our decisions requiring expert physician testimony . . . teach that a plaintiff cannot satisfy the burden of proving a required element of the tort in the absence of a very specific kind of evidence. . . . We therefore conclude that the requirement of expert testimony in a medical malpractice action is a substantive component of the common law governing this tort action.

Id. at 95.

The importance of expert testimony to medical negligence claims such as the one at bar is underscored by the fact that even to bring a medical negligence claim in Arizona, the State Legislature requires a plaintiff to serve a preliminary expert opinion affidavit supporting each allegation; this includes the manner in which the health care provider "caused or contributed to the damages" alleged. A.R.S. § 12-2602. This reliance on experts, particularly early in the process, helps ensure the "prompt resolution of meritless cases without wasting time or resources" of the court or parties. *Rasor*, 243 Ariz. at 164-65. About half of the states have enacted similar affidavit or certificate of merit requirements to avoid the costs of unwarranted litigation. *See* Am. Med. Ass'n, State Laws Chart II: Liability Reforms (2017); Nat'l Conf. of State Legislatures, Medical Liability/Malpractice Merit Affidavits and Expert Witnesses (2014). The State Legislature has further required that experts who testify at a trial in favor of the plaintiff must be active in the same specialty as the defendant against whom they

are testifying. *See* A.R.S. § 12-2604(A).

Unlike in the case at bar, Arizona courts have largely applied the requirement for expert causation testimony properly, finding that the State Legislature intended that "experts have sufficient expertise to truly assist the fact-finder on . . . proximate causation." *Cornerstone Hosp. of Southeast Arizona, L.L.C v. Marner*, 231 Ariz. 67, 72 (App. 2012) (internal quotation omitted). As this Court further explained, the plaintiff's expert must testify that the breach in the standard of care was "the probable and not merely the possible cause of death" or other harm, which requires a showing that the defendant at least increased the risk of harm. *Thompson v. Sun City Cmty. Hosp., Inc.*, 141 Ariz. 597, 605 (1984). Here, Ms. Sampson's experts put forth no evidence that failure to keep Amare' longer caused or increased his risk of death. When the plaintiff's expert "leav[es] causation to the jury's speculation," as occurred here, the court may dismiss the case. *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546 (1990). Thus, the trial court acted properly in granting the summary judgment motion.

The only exception to the expert causation testimony requirement is in the narrow set of cases when it is readily apparent through common knowledge "that the injury would not ordinarily have occurred if due care had been exercised." *Seisenger*, 220 Ariz. at 94; *cf. Phen v. All American Bus Lines*, 56 Ariz 567, 570 (1941) (stating only when "the rule of *res ipsa loquitur*" applies is the jury

"permitted to infer" causation). Courts in other jurisdictions have explained that *res ipsa loquitur* is highly limited in medical liability cases. *See*, *e.g.*, *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1149 (Pa. 2003) ("*Res ipsa loquitur* must be carefully limited, for to say whether a particular error on the part of a physician reflects negligence demands a complete understanding of the procedure the doctor is performing and the responsibilities upon him at the moment of injury."). These courts have held that plaintiffs cannot rely on *res ipsa loquitur* in medical liability actions merely because, like here, they had difficulty securing expert testimony supporting their claims. *See* O.C. Adamson, II, *Medical Malpractice; Misuse of Res Ipsa Loquitur*, 46 Minn. L. Rev. 1043, 1051 (1962) (observing that this situation may indicate there was no malpractice). It has long been understood that when courts misapply this standard, providers become liable "for a bad result unless the jury" chooses to exonerate them. *Id*. at 1055.

Here, the impact of anesthesia on a child, how long a child should be kept for observation, what other causes could have led to death, and whether death could have been avoided are not "readily apparent" matters of common knowledge. To the contrary, the record shows that the trial court found these matters to be "well beyond the ken of the average juror." (ROA 236) The Court should grant the Petition to reinforce the need for expert causation testimony in medical negligence cases. It also should ensure that a court cannot invoke the

"readily apparent" or *res ipsa loquitur* exception without a finding that causation in that case can be a matter of actual "common knowledge." As indicated, the trial court found just the opposite here.

II. IT HAS BEEN WIDELY ACKNOWLEDGED THAT EXPERT CAUSATION TESTIMONY IS NEEDED TO ENSURE THE INTEGRITY OF MEDICAL NEGLIGENCE LITIGATION

Because medical negligence cases involve complex issues of medicine and science, a medical expert is often needed to distinguish a complication or adverse event from medical negligence. This is particularly true when, as here, other potential causes exist. *See* Pet. at 4 (stating one such alternative cause is Ms. Sampson giving cough medicine with codeine to Amare' upon returning home). Commentators have appreciated that one of the most difficult tasks for jurors is to "differentiate between adverse events and medical errors." David Sohn, *Negligence, Genuine Error, and Litigation*, 6 Int'l J. Gen. Med. 49, 50 (2013).

Numerous studies over the years have shown that the filing of a lawsuit alleging malpractice is, in fact, a poor indicator of whether malpractice has actually occurred. *See*, *e.g.*, Barry F. Schwartz & Geraldine M. Donohue, *Practicing Medicine in Difficult Times: Protecting Physicians from Malpractice Litigation* 47, 49 (Jones & Bartlett Publishers, 2009) (concluding communication is the largest factor as to whether a patient will sue). 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). More than two thirds of medical negligence claims (68.2%) nationally end up being dropped, dismissed, or withdrawn without any payment. *See* José R. Guardado, Medical *Professional Liability Insurance Indemnity Payments, Expenses, and Claim Disposition, 2006-2015*, at 3 (Am. Med. Ass'n, 2018).

Amici have also long recognized their members' responsibility to help ensure the integrity of medical negligence claims, including on behalf of plaintiffs. The AMA's Code of Medical Ethics strongly encourages physicians to provide expert testimony because it facilitates the fair administration of justice. *See* Medical Testimony, Code of Medical Ethics Opinion 9.7.1, Am. Med. Ass'n ("As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice."). Consistent with Arizona law, the AMA Code further instructs physicians to 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." *Id.* at 9.7.1(h)-(j)(3).

The concern is that without such on-point expert testimony, juries would be predisposed in cases such as this one to hindsight bias. *See* Eric J. Thomas &

Laura A. Petersen, *Measuring Errors and Adverse Events in Health Care*, 18 J. Gen. Intern Med. 61, 63 (2003) (recognizing hindsight bias in medical liability claims); Hal R. Arkes, *The Consequences of the Hindsight Bias in Medical Decision Making*, 22 Current Directions in Psychol. Sci. 356, 358 (2013). Scholars have explained that when a patient experiences a poor outcome, "a hindsight observer" is predisposed to conclude that the negative outcome resulted from "incompetence, folly, or worse." Michael A. Haskel, *A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases*, 42 Tort & Ins. Prac. L.J. 895, 906 (2007). Thus hindsight bias can make it "difficult for finders of fact to evaluate [causation] fairly (e.g., without reference to whether the decision, in retrospect, turned out to be the right choice)." *Id.* at 905.

Further, without expert evidence, jurors are more likely to presume a physician's action or inaction caused a patient's alleged harms in order to provide compensation to a sympathetic plaintiff. *See* 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). Such liability turns the courts into mechanisms for transferring money to people with negative health outcomes irrespective of fault or the facts. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359 (2018). This is not the role of the courts.

Finally, when liability is not grounded in sound medical science, more than just false compensation is at stake. If liability is allowed in cases like the one at bar, patients may be subject to longer stays and more tests, which could have their own risks and costs, even when a patient's symptoms do not indicate the need for such measures or there are no actual benefits. *See* Emily R. Carrier et al., *High Physician Concern About Malpractice Risk Predicts More Aggressive Diagnostic Testing in Office-Based Practice*, 32 Health Aff. 1377, 1386 (2013). While it is difficult to estimate the total cost of such defensive medicine, evidence indicates that it adds billions of dollars to the nation's healthcare bill. *See* Office of the Assistant Secretary for Planning and Evaluation, U.S. Dep't of Health and Human Servs., Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care 11 (2003) (estimating the cost of defensive medicine at between $70 billion and $126 billion per year); Michelle M. Mello et al., *National Costs of the Medical Liability System*, 29 Health Aff. 1569, 1574 (2010) (estimating the cost of defensive medicine in 2008 at $45.6 billion).

For the benefit of Arizona patients, medical liability in the state must remain based on sound principles of law and science, not false assertions of common knowledge. Excusing the need for expert testimony on causation here, as in other cases, exposes health care providers to liability based on mere speculation, not medical science. The Court of Appeals ruling violates the rules set forth by this

Court and the State Legislature which require expert causation evidence.

CONCLUSION

For these reasons, the Court should grant the Petition and overturn the Court of Appeals ruling to allow the case to proceed without expert causation evidence.

Respectfully submitted,

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Dated: March 3, 2020