

**IN THE SUPREME COURT
STATE OF ARIZONA**

MICHELLE SAMPSON, on behalf of
herself and other statutory beneficiaries
of AMARÉ 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

**SUPPLEMENTAL *AMICI CURIAE* BRIEF OF THE
AMERICAN MEDICAL ASSOCIATION AND
ARIZONA MEDICAL ASSOCIATION
(FILED WITH WRITTEN CONSENT)**

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STATEMENT OF INTEREST OF AMICI CURIAE

As explained in *amici*'s initial brief in this case, 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). *Amici*, therefore, value the Court's decision to hear this case.

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 in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in AMA's policy-making process. The AMA, founded in 1847, promotes the art and science of medicine and betterment of public health, which remain its core purposes. AMA members practice in every state, including Arizona, and every medical specialty.

ArMA is a voluntary membership organization for all Arizona physicians. It represents the interests of nearly 4,000 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.

STATEMENT OF THE FACTS AND CASE

Amici rely on the full statement of facts and case submitted in its initial brief. In short, Ms. Sampson brought a wrongful death suit for her deceased son, Amaré who underwent a procedure for obstructive sleep apnea. At 10:30 a.m., a nurse discharged Amaré to Ms. Sampson's care after recording an eight-of-eight score on the post-anesthesia discharge test. About two hours later, Ms. Sampson tragically discovered Amaré stopped breathing while sleeping at home. The trial court granted Defendants' Motion for Summary Judgment because Ms. Sampson's experts failed to make the required causal connection between any failure to keep Amaré at the center for more time and his death. The Court of Appeals reversed, stating the jury could *infer* such causation without any expert testimony.

ARGUMENT

Arizona has long required plaintiffs in medical negligence cases to provide expert testimony to satisfy each element of its cause of action, including causation,

to ensure the medical and scientific veracity of the lawsuit. This Court has been exceedingly clear that “a plaintiff cannot satisfy the burden of production absent an expert physician witness; failure to produce such a witness results in judgment for the defendant.” *Seisinger v. Siebel*, 220 Ariz. 85, 94, ¶ 35 (2009). Here, the trial court correctly applied this law and dismissed the case because, despite its request, Plaintiff provided no expert evidence to demonstrate that a failure to adhere to a medical standard of care, even if existed, *caused* Amaré’s death.

The Plaintiff’s Supplemental Brief actually underscores the reasons expert testimony is required in medical negligence cases like this one. First, because Plaintiff did not provide any expert medical causation theory, she asserts the medical treatment decisions at issue are somehow akin to removing “a healthy right lung instead of a left lung diseased with cancer.” *See* Pl. Supp. Br. at 18. This case, though, is not among the narrow set of claims where causation is readily apparent or speaks for itself. It presents a traditional diagnosis and treatment scenario requiring assessments of medical science on the standard of care and causation.

Second, Plaintiff seeks to supplant actual medical evidence with mere rhetoric. She presents an overly simplistic notion of causality: had a nurse been watching Amaré’, the nurse would have stopped him from choking. *See* Pl. Br. at 16-17. Merely making this assertion does not allow the jury to determine whether Amaré’s death was a tragic adverse event or caused by true medical negligence.

Finally, Plaintiff obfuscates the issues, citing to experts from the record to create the appearance of a factual dispute and relegating the legal issue in this appeal to the middle of its brief. To be clear, neither the trial court nor Court of Appeals found any expert testimony on causation. The issue here remains legal and simple: whether causation can be *inferred* in this medical negligence case.

For these reasons, as explained further below, causation here—as in all cases involving medical decision-making—requires expert testimony. *Amici* respectfully urge the Court to overturn the ruling below and ensure that medical negligence claims in Arizona remain based in medical science.

I. EXPERT CAUSATION EVIDENCE MUST REMAIN A FOUNDATIONAL REQUIREMENT FOR PROVING MEDICAL NEGLIGENCE

This Court has been exceedingly clear that, in medical negligence actions, each element “normally must be established by expert medical testimony.” *Siebel*, 220 Ariz. at 94, ¶ 33. The Court has carved out a narrow exception: only where the applicable physician standard of care is “a matter of common knowledge . . . that the injury would not ordinarily have occurred if due care had been exercised.” *Id.* (quoting *Falcher v. Saint Luke’s Hosp. Med. Ctr.*, 19 Ariz. App. 247, 250 (1973)). With respect to the need for expert causation evidence, the only exception is when causation is “readily apparent.” *Rasor v. Northwest Hosp., LLC*, 243 Ariz. 160, 166,

¶ 32 (2017) (referencing standard).¹ Neither exception applies in this case.

Examples of these situations, as Plaintiff acknowledges in the Supplemental Brief, are limited to operating on the wrong body part or performing the wrong operation on a patient. *See* Br. at 18. Other examples include leaving a foreign object in a patient's body. *See, e.g., Revels v. Pohle*, 101 Ariz. 208 (1966); *Tiller v. Von Pohle*, 72 Ariz. 11 (1951). These cases involve categorical errors and do not require applying medical standards of care or wrongful causation.² *Cf.* Robin J. Fisk, *What Are Never Events, And Why Do They Matter?*, 21 No. 1 Health Law. 34 (2008) (discussing adverse medical events considered largely or entirely preventable). Consequently, jurors do not require the assistance of expert testimony regarding medical diagnosis or treatment decisions. By contrast, when a jury must assess a medical determination, including, as here, when to release someone after anesthesiology and what consequences can result therefrom, expert testimony is needed to determine whether actual medical negligence occurred.

Plaintiff's attempt to downplay the narrow scope of this exception relies on

¹ *See also Barrett v. Harris*, 207 Ariz. 374, 378, ¶ 12 (App. 2004) ("Ordinarily, a plaintiff in a medical malpractice lawsuit must prove the causal connection between an act or omission and the ultimate injury through expert medical testimony, unless the connection is readily apparent to the trier of fact.").

² These examples of medical negligence may also implicate Arizona's *res ipsa loquitur* doctrine, which permits a jury to be instructed that it may infer negligence for obvious injuries. Arizona courts, however, have narrowly construed this doctrine. *See, e.g., Falcher*, 19 Ariz. App. at 251 ("We cannot hold, as a matter of law, that in the common experience of laymen, patients do not ordinarily fall from hospital beds or carts absent a failure to exercise due care.").

court rulings that, upon review, do not support this asserted conclusion. Plaintiff cites to several cases that involve causation *generally*, not medical negligence cases. *See* Pl. Supp. Br., at 13-15 (citing *Gipson v. Kasey*, 214 Ariz. 141 (2007) (negligence against co-worker); *State v. LeBlanc*, 186 Ariz. 437 (1996) (criminal action involving intoxicated driver); *Ontiveros v. Borak*, 136 Ariz. 500 (1983) (negligence action against tavern owner)). Indeed, the only apparent medical negligence case this Court decided that Plaintiff cites, *Morrison v. Acton*, 68 Ariz. 27, 33 (1948), involved a claim that a doctor left “two foreign metallic substances” in a patient during a surgical procedure. *Morrison* does not inform the case at bar.

Similarly, many of the lower court decisions Plaintiff relies upon actually *support* the need for expert causation testimony in medical cases such as the one at bar. *See Benkendorf v. Advanced Cardiac Specialists*, 228 Ariz. 528, 530-531, ¶ 8 (App. 2012) (“To establish the requisite causal connection, the plaintiff’s expert is generally required to testify. . . .”); *Ryan v. San Francisco Peaks Trucking Co.*, 228 Ariz. 42, 49, ¶ 25 (App. 2011) (recognizing the party “was required to present expert medical testimony on both the standard of care and causation”); *Ritchie v. Krasner*, 221 Ariz. 288, 289, ¶ 28 (App. 2009) (stating the “jury heard testimony from expert witnesses and reviewed volumes of evidence”).

Plaintiff cites to *Salica v. Tucson Heart Hosp.*, 224 Ariz. 414 (App. 2010) for the core assertion that a jury may *infer* causation. *See* Pl. Supp. Br. at 13, 15. In

Salica, though, the court clearly relied on “the testimony of qualified expert witnesses . . . to establish both a breach of the standard of care and causation.” 224 Ariz. at 420, ¶ 20. Further, the court found the case, which involved issues related multiple potential causes, was similar to *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 9 P.3d 314 (2000), where “expert testimony [also] ‘provided evidence of a breach of the standard of care . . . and a causal relationship to [Plaintiff’s] injuries.’” *Id.* at 419, ¶ 19. Thus, *Salica* actually reaffirmed the fact that a “party cannot leave causation to the jury’s speculation.” *Id.* ¶ 16.

In the case at bar, Plaintiff’s allegations of medical negligence are not “readily apparent,” but require expert testimony, *inter alia*, on the impact of anesthesia on a child, how long a child should be kept for observation, what tests the child should have to pass before being released into the care of his mother, what instructions were given to the mother, what other causes could have led to death, and whether the decisions made proximately caused Amaré’s death. These allegations reflect an “ordinary” medical negligence case where the care provided, procedures followed, timing of events, and potential other causes inform the causation analysis, and for which only expert evidence can properly assist a jury. The inability of Plaintiff to present such evidence does not mean it is appropriate to depart from Arizona’s law requiring expert causation evidence in this case.

II. REQUIRING EXPERT CAUSATION EVIDENCE PROTECTS THE INTEGRITY OF MEDICAL NEGLIGENCE LITIGATION

In lieu of presenting expert causation evidence, Plaintiff offers a rhetorical approach to causation. Plaintiff merely asserts that if the nurse was watching Amaré, the nurse would have saved him while he was choking. The ability of lawyers, as here, to oversimplify complex issues of medicine and science, is the very reason that jurors need experts to help them correctly “differentiate between adverse events and medical errors.” David Sohn, *Negligence, Genuine Error, and Litigation*, 6 Int’l J. Gen. Med. 49, 50 (2013). Here, other potential causes may have existed. *See* Pet. at 4 (stating one such alternative cause is Ms. Sampson giving cough medicine with codeine to Amaré upon returning home).

As *amici* explained more fully in its initial brief, without reliable expert testimony, juries may improperly fill this factual void with emotion, sympathy, hindsight bias and other speculative assessments of liability. *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). Indeed, these normal human factors can make it “difficult for finders of fact to evaluate [causation] fairly.” 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, 905 (2007). Here, by encouraging the jury to *infer* causation, Plaintiff is asking the jury to find, based on factors having nothing to do

with medical science, that this outcome resulted from medical negligence.

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. 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. There is no denying the tragedy that has befallen Ms. Sampson. But, if Ms. Sampson's 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.

CONCLUSION

For these reasons, the Court should reverse the Court of Appeals ruling.

Respectfully submitted,

s/ Peter R. Montecuolo

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Dated: December 9, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 of the Arizona Rules of Civil Appellate Procedure, I certify that the Supplemental *Amici Curiae* Brief of the American Medical Association and Arizona Medical Association uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 2037 words, exclusive of captions and tables.

s/ Peter R. Montecuolo

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Dated: December 9, 2020

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Counsel of record for *Amici Curiae*, Peter R. Montecuolo, certifies that on December 9, 2020, he caused the original of the Supplemental *Amici Curiae* Brief of the American Medical Association and Arizona Medical Association (“Supplemental *Amici Curiae* Brief”) to be electronically filed with the Clerk of Court, and that he caused the Supplemental *Amici Curiae* Brief to be emailed on this date, with copies also deposited in the United States Mail, postage prepaid to:

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