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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement as though fully set out herein.

STATEMENT OF FACTS

In accordance with Missouri Rule of Civil Procedure 84.04 (f), Respondent hereby provides additional facts to correct errors and omissions contained in Appellant's Statement of Facts.[1] Appellant was not diagnosed with Hepatitis C until Dr. Bruce Bacon made such diagnosis in March of 1998 (L.F. 10, 87-88 and 156). One of Appellant's experts, Dr. Charles P. Pattison, testified that Appellant began to have symptoms of *acute hepatitis* (not Hepatitis C) in September of 1997, and then gave an opinion after the fact that Appellant may have developed full blown *hepatitis* as of October 7, 1997 (L.F. 146 [deposition, p. 40, ln. 9-24]).

Dr. Pattison also testified to the following:

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[1] Respondent asserted below, and maintains during this appeal, that Appellant has attempted to "boot strap" additional and unnecessary facts by virtue of Plaintiff's Response to Defendant's Motion for Summary Judgment filed with the trial court. In essence, Appellant has attempted to expand the facts on appeal by including additional self-serving factual testimony that was not responsive to Capital Region's Motion for Summary Judgment. (See Defendant Capital Region Medical Center's Motion to Strike Certain Improper Portions of Plaintiff's Response to Defendant's Motion for Summary Judgment, L.F. 220-223.) Furthermore, Rule 84.04 (c) requires that the Statement of Facts in an Appellant's brief "be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Failure to conform the Statement of Facts to the requirements of Rule 84.04 (c) constitutes grounds for dismissal. McKee v. Wilmarth, 771 S.W.2d 955, 956 (Mo. App. W.D. 1989).

1. A patient does not have to be exposed to Hepatitis C by access to a blood supply in order to become infected (L.F. 12, 142 [deposition, p. 22, ln. 2-7]);

2. A person can acquire Hepatitis C through minute breaks in the mucus membranes in the mouth or eyes (L.F. 12, 142 [deposition, p. 22, ln. 8-14]);

3. Dr. Pattison was not able to give an opinion on what procedure at Capital Region allegedly gave Plaintiff Hepatitis C (L.F. 12, 142 [deposition, p. 23, ln. 7-16]);

4. Dr. Pattison could not rule out another invasive procedure outside the time Plaintiff was hospitalized at Capital Region as being the potential cause of Plaintiff's Hepatitis C infection (L.F. 12, 145 [deposition, p. 33, ln. 16-25]);

5. Based on the incubation period of Hepatitis C, there was a window of time of anywhere from 2 to 20 weeks when Plaintiff could have been infected by exposure to Hepatitis C, and the window could be as large as from June 1, 1997 to the first of September, 1997 (L.F. 12, 146 [deposition, p. 36, ln. 10-25; p. 37, ln. 1-11]);

6. It is possible for a patient to become infected with Hepatitis C by blood transfusion, drug abuse, accidental inoculation, sexual exposure, or exposure to the blood, saliva or bodily fluids of another, such as by fluid entering into a cut or mucus membrane (L.F. 12, 150 [deposition, p. 56, ln. 3-14]);

7. It is even possible that a person may be exposed and infected with Hepatitis C from being sneezed on (L.F. 12, 150 [deposition, p. 56, ln. 15-25]).

With regard to whether a hospital patient might acquire Hepatitis C through an "accidental inoculation" from a non-health care provider, Dr. Pattison's opinion was actually that although very

unlikely, it is *possible* (L.F. 151 [deposition, p. 58, ln. 19-24]). Nowhere did Dr. Pattison state that the means of determining the source of Hepatitis C are within the control of the hospital and its laboratory (L.F. 151-152). Rather, Dr. Pattison gave the opinion that by the very fact Appellant acquired Hepatitis C there must have been a breach in the standard of care by Capital Region (L.F. 152 [deposition, p. 63, ln. 14-25; p. 64, ln. 1]). He could not point to any specific event while Appellant was a patient at Capital Region which would support a conclusion that there was a breach in the standard of care, other than the fact that Appellant eventually developed Hepatitis C (L.F. 152 [deposition, p. 63, ln. 4-21]).

Appellant identified four (4) retained experts, Dr. Mitchell L. Shiffman, Dr. John B. Gross, Dr. Charles P. McGinty, and Dr. Charles P. Pattison, and one non-retained expert, Dr. Bruce Bacon, as individuals that may testify on his behalf at trial (L.F. 11, 64, 91, 101 and 103). Appellant admits that one or more experts were necessary to attempt to prove his allegations that he was infected with Hepatitis C while a patient at Capital Region (L.F. 11, 66 and 156).

Appellant's expert, Dr. Bruce Bacon, testified that somewhere less than 5% of Hepatitis C patients are unable to identify the cause of their Hepatitis C infection (L.F. 11, 121 [deposition, p. 11, ln. 16-25]). Dr. Bacon stated that there are multiple ways a person might become infected with Hepatitis C, including contaminated blood, needle sharing and intra-nasal cocaine use (L.F. 11, 121 [deposition, p. 11, ln. 22-25; p. 12, ln. 1-22]). Dr. Bacon could not express an opinion about how Plaintiff may have allegedly been infected with the Hepatitis C virus while at Capital Region (L.F. 11, 124 [deposition, p. 27, ln. 4-8]).

Appellant's expert, Dr. Mitchell L. Shiffman, also testified that as many as 10-15% of his patients cannot identify the source of their Hepatitis C infections (L.F. 13, 80 [deposition, p. 29, ln. 19-24]). Further, Appellant's attorney stated in open court that he would not be using expert testimony to prove that Capital Region (or any of the Defendants) violated the standard of care in this case (App. A-23, A-24).

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FOR RESPONDENT ON ITS MOTION FOR SUMMARY JUDGMENT, BECAUSE RESPONDENT DEMONSTRATED THAT THERE EXISTED NO GENUINE DISPUTE OF MATERIAL FACT AND THAT IT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW, IN THAT THE TRIAL COURT CORRECTLY FOLLOWED MISSOURI LAW AS STATED BY THIS COURT, WHICH DOES NOT PERMIT THE APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR IN MEDICAL MALPRACTICE CASES REQUIRING EXPERT TESTIMONY; AND FURTHER, APPELLANT FAILED TO ESTABLISH SUFFICIENT EVIDENCE OF THE ELEMENTS NECESSARY TO SUPPORT A RES IPSA LOQUITUR SUBMISSION.

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

Deveney v. Smith, 812 S.W.2d 810 (Mo. App. W.D. 1991)

Graham v. Thompson, 854 S.W.2d 797 (Mo. App. W.D. 1993)

Savina v. Sterling Drug, Inc., 795 P.2d 915 (Kan. 1990)

RESPONDENT'S ARGUMENT

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FOR RESPONDENT ON ITS MOTION FOR SUMMARY JUDGMENT, BECAUSE RESPONDENT DEMONSTRATED THAT THERE EXISTED NO GENUINE DISPUTE OF MATERIAL FACT AND THAT IT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW, IN THAT THE TRIAL COURT CORRECTLY FOLLOWED MISSOURI LAW AS STATED BY THIS COURT, WHICH DOES NOT PERMIT THE APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR IN MEDICAL MALPRACTICE CASES REQUIRING EXPERT TESTIMONY; AND FURTHER, APPELLANT FAILED TO ESTABLISH SUFFICIENT EVIDENCE OF THE ELEMENTS NECESSARY TO SUPPORT A RES IPSA LOQUITUR SUBMISSION.

A. The Trial Court Properly Followed the Law as Stated by the Missouri Supreme Court, Holding That the Doctrine of Res Ipsa Loquitur Is Only Applicable in Medical Malpractice Cases Where the Medical Provider May Be Found to Have Failed to Exercise the Requisite Degree of Care in the Absence of Expert Medical Testimony Tending to So Prove.

Appellant correctly states the elements necessary for a plaintiff to invoke the doctrine of res ipsa loquitur:

1. The occurrence resulting in injury does not ordinarily happen in the absence of negligence;

2. The instrumentalities that caused the injury are under the care and management of the defendant; and

3. The defendant possesses either superior knowledge of or means of obtaining information about the cause of the occurrence. Bass v. Nooney Company, 646 S.W.2d 765, 768 (Mo. banc 1983); Graham v. Thompson, 854 S.W.2d 797, 799 (Mo. App. W.D. 1993).

In actuality, res ipsa loquitur is a rule of evidence whereby a submissible issue of negligence can be presented to the jury through circumstantial evidence. Hasemeier v. Smith, 361 S.W.2d 697, 700 (Mo. banc 1962). Res ipsa loquitur, however, is generally not applicable in medical malpractice cases. Hasemeier, 361 S.W.2d at 700; Graham, 854 S.W.2d at 799.

In fact, the doctrine of res ipsa loquitur in a medical malpractice case ***requires that laypersons know, based upon their common knowledge or experience, that the cause of plaintiff's injury does not ordinarily exist absent the medical provider's negligence.*** Hasemeier, 361 S.W.2d at 700; see also, Zumwalt v. Koreckij, 24 S.W.3d 166, 169 (Mo. App. E.D. 2000) (emphasis added). Stated another way, the doctrine of res ipsa loquitur is only applicable in a medical malpractice case where the medical provider may be found to have failed to exercise the requisite degree of care in the absence of expert medical testimony tending to so prove. Hasemeier, 361 S.W.2d at 700; Deveney v. Smith, 812 S.W.2d 810, 815 (Mo. App. W.D. 1991).

This is drastically different from a direct medical malpractice claim not relying on res ipsa loquitur. The elements of a medical malpractice claim are:

1) proof that the defendant's act or omission failed to meet the requisite standard of care;

2) proof that the act or omission was performed negligently; and

3) proof of a causal connection between the act or omission and the injury sustained by the plaintiff. Super v. White, 18 S.W.3d 511, 516 (Mo. App. W.D. 2000).

The basic philosophy in malpractice cases is that a health care provider is negligent by reason of the fact that the provider failed to adhere to a standard of reasonable medical care and that consequently the service rendered was substandard and negligent. Aiken v. Clary, 396 S.W.2d 668, 673 (Mo. 1965); Foster v. Barnes-Jewish Hospital, 44 S.W.3d 432, 435 (Mo. App. E.D. 2001).

This Court has made it clear that in a res ipsa loquitur case, laypersons must be able to determine, based solely on their common knowledge and experience and without expert testimony, that a given result would not have occurred but for the medical provider's negligence. Hasemeier, 361 S.W.2d at 700. Furthermore, no inference of negligence arises, and res ipsa loquitur is not applicable, from the mere fact that an unfavorable result ensues from treatment or surgery even though the unfavorable result may be a rare one in the particular case. Id. See also, Hart v. Steele, 416 S.W.2d 927, 931 (Mo. 1967) (where this Court reiterated the rule that merely having a bad result does not allow a medical malpractice case).

Appellant has attempted to use res ipsa loquitur to infer negligence on the part of Capital Region based on the mere fact that Appellant was diagnosed with Hepatitis C more than six months after being discharged from Capital Region (L.F. 10, 87-88, 155-156). Appellant has also retained *numerous experts* to testify regarding the timing of the incubation period for Hepatitis C and the fact that the timing is such that Appellant could have contracted Hepatitis C while a patient at Capital Region (L.F. 11, 64, 91, 101, 193; 75, 166; 12, 141, 144, 158-159). More importantly, Appellant attempts to rely

on his experts to state that Appellant would not have acquired Hepatitis C in a hospital setting without there being a breach in the standard of care by the hospital (Appellant's Substitute Brief, p. 20).

Appellant attempts to use experts to render opinions regarding a breach in the standard of care even though Appellant's attorney stated in open court that Appellant would not be using expert testimony to prove that the Defendants violated the standard of care in this case:

> Now, I understand it's one of the elements of res ipsa that it be an accident. That does not request [sic] expert testimony to prove, and we're not going to use expert testimony other than to prove that he contracted the disease during the period of time he was in Capital Region. I'm confident that any juror would understand that anything that comes in contact with your body fluids, whether it be an injection, your blood going through a bypass machine, the hands of the surgeons or someone else on the surgical team, that it should be free of germs and viruses, including hepatitis C. Obviously, it was not in this case.
>
> ***So we're not going to use expert testimony to prove that they violated the standard of care. Our expert testimony is only going to be to prove that it was during that period of time that he contracted hepatitis C.***
>
> As far as naming with specificity the persons at Capital Region who are responsible for this, or the instrumentality, that's going to have to wait for further discovery (App., A-23; p. 8, ln. 23-25; A-24; p. 9, ln. 1-15)(emphasis added).

The statements of Appellant's counsel constitute judicial admissions. State v. Vandiver, 592 S.W.2d 304, 306 (Mo. App. E.D. 1979); Illinois Glass Company v. Ingram, 215 Mo. App. 12, 264

S.W.42, 46 (Mo. App. 1924). Appellant should be precluded from using experts to prove the essential elements of a res ipsa case, including that the occurrence in question does not ordinarily occur in the absence of negligence. Appellant instead wants to ignore the above admission and have his experts testify not only to "common knowledge" facts of the medical community, but also on the standard of care as well.

The very fact that Appellant requires the testimony of experts to attempt to prove his case demonstrates the ultimate reality: Appellant's case does not fit the mold for a res ipsa loquitur submission under Missouri law. The average jury of laypersons could not determine from their common knowledge and experience that a patient diagnosed with Hepatitis C more than six months after receiving life-saving care from a hospital for a heart attack must necessarily have contracted the Hepatitis C while a patient at that hospital. Appellant's argument that he should be allowed to use expert testimony to prove a breach in the standard of care by Capital Region demonstrates that Appellant cannot make a submissible case under the doctrine of res ipsa loquitur.

A review of the cases where the doctrine of res ipsa loquitur has been applied in medical malpractice scenarios demonstrates that there are simply no cases applying the doctrine under facts similar to the present case.[2] Generally, cases in Missouri which have allowed submission under res ipsa

[2] Appellant fails to cite even a single case in the entire nation allowing the application of the doctrine of res ipsa loquitur in a medical malpractice case involving the alleged infection of the plaintiff with Hepatitis C, HIV, or some other blood borne disease. Furthermore, Capital Region's research has failed to disclose such a case.

loquitur involve "unusual injuries" which consist of injuries to an area of the body unconnected with the surgery or treatment, and generally where the patient was unconscious. See Zumwalt, 24 S.W.3d at 166 (upon waking from surgery for a right knee replacement, plaintiff experienced pain in her right shoulder, arm and hand); Graham, 854 S.W.2d at 798 (plaintiff allegedly suffered severe burns to her calf while undergoing surgery to the top of her right foot); Swan v. Tigett, 669 S.W.2d 590 (Mo. App. E.D. 1984) (plaintiff complained of an injury to her chest after undergoing vaginal surgery); Calvin v. Jewish Hospital of St. Louis, 746 S.W.2d 602 (Mo. App. E.D. 1988) (plaintiff allegedly suffered an injury to her arm during back surgery).

Appellant's experts have admitted that there are numerous ways in which a person can acquire the Hepatitis C virus (L.F. 11, 12, 121, 142, 150). These same experts have admitted that they cannot identify the specific cause by which plaintiff was infected in the present case (L.F. 11, 12, 13, 76, 77, 124, 142). Appellant was under general anesthesia for only a brief part of his week long stay at Capital Region (L.F. 9, 30). In addition, the surgery team were all tested for Hepatitis C and were found to be completely clear of the virus (L.F. 161, 176). Appellant is therefore claiming that he was infected with Hepatitis C sometime during his week long stay, but not necessarily during the surgery, and neither he nor his experts can say when he was infected, the manner in which he was infected, or precisely who infected him. This is in direct contrast to the typical res ipsa case, where a patient is unconscious during a procedure and awakens to discover an injury to an area of his body not directly involved in the procedure. It is just as probable that Appellant was infected while conscious at Capital Region through no negligence of Capital Region's employees, or even that Appellant was infected before or after his seven day hospitalization (recall that Appellants experts stated the incubation period for Hepatitis C is 2

to 20 weeks). These facts do not fall into the exceptional case in Missouri where res ipsa loquitur is applied in a malpractice setting.

This Court has clearly stated the law on this issue, and both the trial court and the Western District Court of Appeals followed that law. Where expert medical testimony is required, the doctrine of res ipsa loquitur is not applicable. Hasemeier, 361 S.W.2d at 700. This Court should stand by its precedent and affirm the trial court's grant of summary judgment in favor of Capital Region.

B. Regardless of What "Rule" Applies, Appellant Cannot Present Sufficient Evidence to Support the Elements of a Res Ipsa Loquitur Claim.

Appellant's argument to this Court puts the proverbial cart before the horse: Appellant argues that he has presented sufficient evidence to support each element of a res ipsa loquitur claim ***if Missouri adopts the "majority rule" allowing for expert testimony in a medical malpractice case utilizing the doctrine of res ipsa loquitur***. In reality, regardless of whether Appellant's claim is examined under the so-called "majority rule" providing for expert testimony, or under the current law of this state, Appellant fails to meet his burden of presenting sufficient evidence on the elements of a res ipsa loquitur claim.

Capital Region established that Appellant has not produced and would not be able to produce sufficient evidence to allow the jury to find the existence of the elements of a res ipsa loquitur claim, thereby entitling Capital Region to summary judgment at the trial level. See ITT Commercial Finance Corporation v. Mid-America Marine Supply Corporation, 854 S.W.2d 371, 381 (Mo. banc 1993).

I. Absence of Negligence.

Appellant cannot demonstrate that a person does not ordinarily acquire Hepatitis C in the absence of negligence. Appellant's experts testified that anywhere from 5 to 15% of patients are unable to identify the cause of their Hepatitis C (L.F. 11, 13, 80, 121). In addition, Appellant's experts admit that there are multiple ways to become infected with the Hepatitis C virus, including receipt of contaminated blood, needle sharing, and intra nasal cocaine use (L. F. 11, 121). Persons can acquire Hepatitis C through minute breaks in the mucus membranes of the mouth, thereby acquiring Hepatitis C through using the toothbrush of another (L.F. 12, 150). One of Appellant's experts even testified that it is possible, however unlikely, that a person might acquire Hepatitis C from being sneezed upon (L.F. 12, 150). Appellant attempts to meet his burden of establishing the first element of a res ipsa loquitur submission through the use of expert testimony in direct violation of the law as stated by this Court. In addition, Appellant's use of experts to provide testimony on a breach of the standard of care is in direct contradiction of the statements of Appellant's counsel to the trial court (App., A-23, A-24).

The statements of Appellant's experts are nothing more than blanket conclusions without any evidentiary support or foundation. Furthermore, Appellant claims that one of his treating physicians, Dr. Bacon, stated in his opinion that Appellant was infected with the Hepatitis C virus as a result of Capital Region's breach in the standard of care (Appellant's Substitute Brief, p. 20). This statement by Appellant is simply not true. In actuality, Dr. Bacon conceded that a patient could contract Hepatitis C in a hospital setting without there being a deviation from the standard of care, and refused to give an opinion that Capital Region or its employees deviated from the standard of care in this case. (L.F. 126-127; deposition, p. 30-33.) Thus, only Appellant's ***hired*** experts gave the opinion that Appellant must have acquired Hepatitis C at Capital Region as a result of a breach in the standard of care.

The blanket statements of Appellant's hired experts are not sufficient evidence that a patient does not ordinarily contract the Hepatitis C virus when due care is exercised. This is supported by one of the cases cited by Appellant (Appellant's Substitute Brief, p. 43). That case is Buckelew v. Grossbard, decided in the Supreme Court of New Jersey in 1981. Note that New Jersey is one of the states that allows expert testimony in a medical malpractice claim founded upon res ipsa loquitur. The Court in the Buckelew case stated:

> . . . it will not be sufficient for plaintiff's expert simply to follow slavishly a "common-knowledge-within-the-medical-community" formula. There must be some support offered for the expert's conclusion that the medical community recognizes that the mishap in question would not have occurred but for the physician's negligence [sic] support in the form, for instance, of textual references or experience or the like. If the plaintiff's expert's direct and cross-examination provide no basis for the witness's 'common knowledge' testimony other than the expert's intuitive feeling in other words, no more than a flat-out statement designed to satisfy the 'common knowledge' test, then the court should not apply the res ipsa doctrine to the proceedings. Buckelew v. Grossbard, 435 A.2d 1150, 1159 (N.J. 1981).

The "slavishly" asserted opinions of Appellant's experts, Dr. Pattison and Dr. Shiffman, do not contain any support from textual references or direct experience demonstrating the likelihood of a patient contracting Hepatitis C in a hospital setting. In fact, Dr. Wendell Clarkston, the expert endorsed by Capital Region, directly disagrees with the opinions they asserted (App., deposition of Dr.

Clarkston, A-11).[3] Dr. Clarkston stated that there are other potential means of infection of a patient with the Hepatitis C virus which would not be a breach of the standard of care. These include possible transmission through dialysis and means of transmission for which there is yet no explanation (App., A-11). In addition, there are only two known cases of patients contracting Hepatitis C in a hospital setting, one involving a heart surgeon in Spain that transmitted the virus during heart surgery and the other involving a colonoscopy (App., A-18). The fact that the experts disagree on whether or not a

[3] While it is not necessary for purposes of determining the issues raised in this appeal, Dr. Clarkston's deposition testimony is necessary to refute some of the arguments raised by Appellant in his brief that Missouri should change its existing law and adopt the "majority rule." Therefore, while Respondent recognizes that it did not use Dr. Clarkston's deposition in support of its summary judgment, the deposition is relevant and material to the additional factual statements improperly raised by Appellant in response to the Motion for Summary Judgment at the trial level, and then boot strapped into Appellant's arguments in this appeal.

patient can acquire Hepatitis C in the hospital without a breach in the standard of care demonstrates that Appellant's claim does not fall within the "common knowledge within the medical community" formula adopted by the court in Buckelew. Therefore, even if Missouri did follow the majority rule, which it should not, Appellant has not presented sufficient evidence to support the first element of a res ipsa loquitur submission.

Appellant also attempts to rely on the Hale case for support that he can satisfy the first prong of a res ipsa loquitur claim (Appellant's Substitute Brief, p. 20-21). The Hale case, however, is distinguishable on its facts. In that case the court identified the unknown motorist's vehicle as the instrumentality that set in motion the series of events that created the accident causing a rock to break through Mr. Hale's windshield, striking him in the head. Hale v. American Family Mutual Insurance Company, 927 S.W.2d 522, 527 (Mo. App. W.D. 1996). The court reasoned that the driver of the unknown vehicle had ***exclusive control*** over the vehicle, which was the instrumentality that created the incident. Id. (emphasis added).

In the present case, there is simply no evidence regarding the ***means, method or instrumentality*** by which Appellant contracted Hepatitis C. Justice Hannah writing for the dissent in the Hale case makes a particularly good point. There was no direct evidence that the rock which injured Mr. Hale came from another vehicle. He further noted that there was no evidence as to how the rock may have become wedged between the duals of a tractor trailer (the theory espoused by the plaintiff), and to suggest that it got there through the tractor trailer driver's negligence was sheer speculation. Hale, 927 S.W.2d at 21-22.

Likewise, in the present case there is no evidence that the Hepatitis C contracted by Appellant resulted from Appellant's hospitalization at Capital Region. There is likewise no evidence as to how the Hepatitis C was allegedly transmitted to Appellant, and to suggest that it got there through Capital Region's negligence is sheer speculation, just as it was in the Hale case.

The present case is unlike any other res ipsa case involving medical care found in the case law, nation wide. Appellant does not know and cannot state when the injury occurred (when he was infected with the Hepatitis C virus). In a res ipsa case against a medical provider, there is usually no doubt of when the injury occurred. It involves a period of unconsciousness where the patient is under the defendant's complete control, and allows laypersons to conclude there is no other reasonable explanation for the injury besides the negligence of the health care provider. The example of a surgeon leaving a sponge inside a patient during surgery is often cited.

None of Appellant's experts can state ***how or when*** Appellant contracted Hepatitis C while a patient at Capital Region. Appellant may have acquired Hepatitis C through no fault of Respondent, as demonstrated by the fact that a good percentage of patients are not able to identify the cause of their Hepatitis C. As a result, Appellant cannot demonstrate that his acquiring Hepatitis C is something that does not happen in the absence of negligence.

ii. Exclusive Control.

Appellant also cannot demonstrate that whatever "caused" him to acquire Hepatitis C was under the care and management of Respondent. This fact is demonstrated by the admission of Appellant's own expert, Dr. Pattison. Dr. Pattison testified that there was a "window" when Appellant could have been infected by exposure to the Hepatitis C virus, dating from the first of June, 1997, to the

first of September, 1997 (L.F. 12, 146). During this period of more than three months, Appellant was a patient at Capital Region for only one week (L.F. 10, 155). That leaves a large window of time when Appellant was not a patient under Capital Region's care and management. Although Appellant denies any events, conduct or activities that may have caused a transmission of Hepatitis C during the window of opportunity (L.F. 160, 170), this does not excuse Appellant's compliance with the second element of a res ipsa submission. There is absolutely no way Capital Region was responsible for the care and management of everything Appellant came into contact with outside the time he was hospitalized. And it is undisputed that Appellant could have acquired the virus during that time. Appellant would have this Court excuse the requirement of exclusive control and instead place its imprimatur on a theory of strict liability.

Furthermore, Appellant cannot identify the specific instrumentality that allegedly caused Appellant's injury, which is also decisive on Appellant's inability to submit a res ipsa loquitur claim. Appellant cites the case of Savina v. Sterling Drug, Inc., 795 P.2d 915 (Kan. 1990). The court in Savina states the following with regard to the instrumentality causing the injury or damage being within the exclusive control of the defendant:

> To meet the first condition, plaintiff must be able to show two things: (1) the specific thing or instrumentality which actually caused his injury or damage, and (2) that the thing or instrumentality which caused his injury or damage was within the exclusive control of the defendant. The doctrine does not apply where the thing or instrumentality which caused the injury or damage is unknown or cannot be shown. Savina v. Sterling Drug, 795 P.2d 915, 933 (Kan. 1990).

Appellant admits that he cannot state who, when or the manner in which he was infected with the Hepatitis C virus (L.F. 10, 156). Appellant's failure to demonstrate what instrumentality caused his injury is fatal to his claim. See also Palmer v. Krueger, 897 F.2d 1529, 1536 (10th Cir. 1990) (Stating that res ipsa loquitur cannot be invoked until, as a preliminary proposition, a plaintiff establishes what caused the accident. Plaintiff tried to submit on a res ipsa loquitur theory on a case involving a plane crash, and although several theories were advanced as to causation, what actually caused, or who was responsible for the plane crash was a mystery. The court held that plaintiff failed to show it was more likely than not the defendant's negligence caused the accident).

It is also important that the surgical staff which performed Appellant's bypass surgery were all tested for Hepatitis C and were found to be negative (L.F. 161, 175-176). In addition, Appellant did not receive a blood transfusion while at Capital Region. (L.F. 76-77). Both of these factors further decrease the likelihood that Appellant contracted Hepatitis C during his hospitalization, and increase the likelihood that the Hepatitis C was transmitted during the time Plaintiff was not hospitalized at Capital Region.

Appellant claims he is excused from identifying the specific instrumentality that caused his Hepatitis C because Missouri does not require the defendant to be in control of the instrumentality at all, but that instead the plaintiff can submit a case "by showing the defendant had the right or power to control the instrumentality and the opportunity to exercise it." (Appellant's Substitute Brief, p. 22-23, citing Weaks v. Rupp, 966 S.W.2d 387, 394 (Mo. App. W.D. 1998). Appellant fails to acknowledge, however, that he also cannot demonstrate that Capital Region had the right or power to control the instrumentality, when he cannot even say what the instrumentality was which caused his Hepatitis C.

The Weaks case upon which Appellant relies is completely distinguishable from the present case. The court in Weaks reasoned that it was not necessary to show actual physical control of the instrumentality that caused the injury because the landlord had the sole right and responsibility for repair and maintenance of the heating system which malfunctioned and caused carbon monoxide poisoning to the plaintiffs. Weaks, 966 S.W.2d at 395-396. There was no doubt in Weaks, however, that the instrumentality which caused the injury was the malfunctioning heating system, which was under the exclusive control (or right of control) of the landlord. Id. The uncontradicted evidence showed that the furnace within the Weaks' apartment emitted carbon monoxide fumes. The landlord was found to have superior knowledge as to the cause of the emission of the carbon monoxide fumes. Id. In the present case, however, there is a complete lack of evidence to demonstrate that the Hepatitis C virus was transmitted as a result of some instrumentality within the hospital's control. The Weaks case and the present case are at opposite ends of the spectrum.

iii. Superior Knowledge.

Appellant cannot demonstrate that Capital Region possessed superior knowledge regarding the cause of Appellant's Hepatitis C. Simply because Appellant was hospitalized for seven days and then six months later was diagnosed with Hepatitis C does not demonstrate that Capital Region possesses superior knowledge regarding the cause of Appellant's Hepatitis C.

Appellant's experts testified that there are multiple causes for Hepatitis C, and it is certainly possible, if not probable, that Appellant acquired Hepatitis C outside the time he was hospitalized at Capital Region. Appellant tries to state that because Respondent "conducted an investigation" in an attempt to determine how Appellant acquired Hepatitis C, this somehow supports Appellant's burden of demonstrating superior knowledge on the part of Respondent (Appellant's Substitute Brief, p. 24). Appellant, however, has presented absolutely no evidence that Capital Region's investigation disclosed any information whatsoever regarding the cause of Appellant's Hepatitis C. Further, the Appellant, who has had every opportunity to conduct full discovery on the issue but has purposefully not done so, wants Capital Region to prove how he did not become infected during his one week hospitalization.

Appellant argues that "the nature of Hepatitis C is such that Capital Region has superior means of obtaining information about the cause of Mr. Spears' infection." (Appellant's Substitute Brief, p. 24). Appellant however, again fails to recognize that he was under the care and management of Capital Region for only one week during the potential 20 weeks when he might have been infected by the virus. Essentially, Appellant wants this Court to *assume* that Capital Region has superior means of obtaining the information, without actually proving this essential element of a res ipsa loquitur case. While Missouri courts will sometimes infer superior knowledge in a res ipsa loquitur case, such an inference is

only raised when the plaintiff can demonstrate a defendant's exclusive control over the instrumentality at issue. Weaks, 966 S.W.2d at 395. As already pointed out, this is something that Appellant cannot do.

Appellant further argues that Capital Region could have tested and still can test its employees to determine whether they are carriers of the Hepatitis C virus (Appellant's Substitute Brief, p. 24). The fact is that the surgical team which performed Mr. Spears' bypass surgery ***was*** tested for the Hepatitis C virus and was found to be negative. Any argument by Appellant that Capital Region should test all of its employees for blood borne diseases is untenable. Appellant has cited no federal or state law or any guidelines of the Joint Commission on the Accreditation of Hospitals requiring such a thing, nor does he explain how such testing could be rationalized with the rights of employees. If Appellant believes that a lack of testing is indicative of a breach in the standard of care, then Appellant could proceed with his case on a specific negligence theory.

C. Public Policy Does Not Support Adopting the "Majority Rule" Endorsed by Appellant.

I. The Origin of the Doctrine Supports Missouri's Current View.

Appellant concedes that the law as stated by the Missouri Supreme Court is that laymen must be able to find based on their common knowledge or experience ***without the aid of expert testimony*** that a given result would not have occurred but for the physician's negligence. Deveney, 812 S.W.2d at 815; Hasemeier, 361 S.W.2d at 700. Appellant then contends that Missouri represents the minority view and argues in favor of the adoption of the view held by the "majority states."

Appellant's brief makes it sound like states are rapidly abandoning the rule that medical experts should not be allowed to testify in a res ipsa case. This is simply not true. In Seavers v. Methodist Medical Center of Oakridge, cited by Appellant, the Tennessee court, acknowledged that several states still follow the more restrictive view prohibiting expert testimony in res ipsa cases. Seavers v. Methodist Medical Center of Oakridge, 9 S.W.3d 86, 93 (Tenn. 1999). States holding to the "minority view" include Florida, Idaho, Iowa, Maryland, Minnesota, North Dakota, Georgia and Florida. See Anderson v. Gordon, 334 S.2d 107, 109 (Fla. Dist. Ct. App. 1976); Kolln v. St. Luke's Regional Medical Center, 940 P.2d 1142 (Idaho 1997) (holding that res ipsa loquitur has absolutely no application in medical malpractice cases due to the adoption of I.C. Section 6-1012 by the legislature); Forsmark v. State, 349 N.W.2d 763 (Iowa 1984); Orkin v. Holy Cross Hospital of Silver Spring, Inc., 569 A.2d 207 (Md. 1990); Todd v. Eitel Hospital, 237 N.W.2d 357 (Minn. 1975); Larsen v. Zarrett, 498 N.W.2d 191 (N.D. 1993); Hattick v. Arnspiger, 793 S.W.2d 948 (Tex. 1990); Kapsch v. Stowers, 434 S.E.2d 539 (Ga. 1993).

While the efforts of the courts in some states have been inclined to expand the application of the doctrine of res ipsa loquitur, the legislatures of several states have seen fit to limit or otherwise eliminate its application to medical malpractice cases. Such statutes include I.C. Section 6-1012 (Idaho), N.D.C.C. Section 28-01-46 (North Dakota), and N.R.S. 41A.100 (Nevada) (stating the specific instances where a res ipsa claim is allowed). Idaho and Georgia actually have a stricter viewpoint than does Missouri, since they completely prohibit the application of res ipsa in medical malpractice cases.

Despite a number of states that allow expert testimony in res ipsa cases involving medical malpractice, Missouri's current rule makes the most sense, and is the most logical and equitable under the circumstances. There are several factors which support this position.

First, the very origin of the doctrine itself supports Capital Region's position that it should have limited application in medical malpractice cases. The doctrine originated in the case of Byrne v. Boadle, 159 Eng. Rep. 299 (Ex. 1863), a case involving a plaintiff that was struck and injured by a barrel of flour that fell out of the defendant's shop window. Because the court concluded that a barrel of flour could not roll out of a warehouse without some negligence, it held that the occurrence of the accident, without more, constituted enough evidence for the plaintiff to avoid a non-suit. Thus, the term "res ipsa loquitur" found its way into the law, which roughly translated means "the thing speaks for itself."

Where an expert is required to testify on complicated issues, the thing does not "speak for itself." Use of expert testimony in complicated medical malpractice actions is counter-intuitive. If the fact of the accident "speaks for itself" then why is it necessary to present expert testimony to prove negligence and causation? This is probably why res ipsa loquitur was not initially applicable to medical malpractice cases, which is still the rule in Idaho and Georgia. In medical cases, injuries may result from

a variety of other potential causes, such as disease, pre-existing medical condition, or a known risk associated with certain types of surgery or treatment.

Missouri, like several other states, allows for the application of res ipsa loquitur in medical malpractice cases where laypersons can determine, based solely on their common knowledge and experience and without expert testimony, that a given result would not have occurred but for the medical provider's negligence. Hasemeier, 361 S.W.2d at 700; Deveney v. Smith, 812 S.W.2d at 815. The case where a sponge is left in a patient's abdomen during a surgery and not discovered until afterward is the classic example. Other examples include "unusual injuries" consisting of injuries to an area of the body unconnected with surgery or treatment, and generally where the patient was unconscious. Missouri's rule provides a consistent compromise whereby the original intent of res ipsa loquitur is enforced by allowing classic "the thing speaks for itself" cases to proceed to a jury while prohibiting technical cases which may involve a variety of probable causes from proceeding to the jury.

ii. Burden Shifting and the Proliferation of Experts.

In her Virginia Law Review Note Karyn Ablin discussed some reasons why expert testimony should not be allowed in res ipsa cases involving medical malpractice. She related the extent to which courts have extended the doctrine beyond its original function in Byrne v. Boadle, allowing it to, at least partially, shift the basis of responsibility in medical malpractice cases making a physician accountable not only for his own negligence, but for a patient's physical condition. Ablin, Karyn, *Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows,* 82 Va. L. Rev. 325, 334 (1996).

That is exactly what the Appellant is attempting to do in this case. Appellant can demonstrate absolutely no causal connection between any conduct on the part of Capital Region and Appellant's exposure to Hepatitis C. Instead, Appellant offers experts to opine that a patient does not ordinarily contract Hepatitis C unless there has been a breach in the standard of care. If this Court were to adopt Appellant's position, all any plaintiff would have to do in a res ipsa medical malpractice case is hire experts to state ***conclusions*** that the result in question does not ordinarily occur in the absence of negligence, without stating any facts to support such conclusions. This "burden shifting" scenario is well beyond the original intent of the doctrine as first described in Byrne v. Boadle, and provides additional reason to affirm the trial court.

The increased use and proliferation of expert testimony in modern court is yet another reason for limiting the application of experts in res ipsa cases involving medical malpractice. Karyn Ablin's note discusses the modern reality of expert testimony in just this situation:

> First, a more liberal implication of res ipsa loquitur is less desirable today than previously because of the increased willingness of experts to testify for plaintiffs. This is due in part to the relaxation of the locality rule, which required medical experts to be practicing in the same locality as the defendant. This relaxation has increased the number of potential medical experts available to the plaintiff by providing a larger geographic area from which the plaintiff may select them. It has also increased the ratio of medical experts who are willing to testify, because physicians are much less concerned with testifying against unknown defendant-physicians in distant parts of the

country, where there will be fewer professional and social repercussions from doing so. 82 Va. L. Rev. at 351-352.

The potential for abuse of the doctrine of res ipsa loquitur in medical malpractice cases is more present today than ever. Experts are widely available, even in the medical context, to testify regarding a variety of subjects and offer their "expert opinions" on any number of things, including that an event does not ordinarily occur in the absence of negligence. Glen Bradford notes in a recent journal article that a physician holding the M.D. degree is permitted to testify to anything, so long as he is "willing to mumble some magic words about 'reasonable medical certainty.'" Bradford, Dissecting Missouri's Requirement of "Reasonable Medical Certainty," Journal of the Missouri Bar (May-June 2001) (citing Peter W. Huber, Galileo's Revenge, Junk Science in the Courtroom). Missouri courts have also commented on the use of experts:

> The complexities of contemporary litigation have caused a significant increase in the use of and the need for expert testimony. Indeed, most legal periodicals today contain pages of classified advertisements by professional expert witnesses offering to testify upon a myriad of subjects. Ellis v. Union Electric Company, 729 S.W.2d 71, 75 (Mo. App. E.D. 1987).

To allow a plaintiff in a medical malpractice claim to make a submissible case of negligence using res ipsa loquitur based solely on this type of hired expert testimony further defeats the foundation and origins of the doctrine.

iii. RSMo. Section 538.225 Prohibits the Use of Res Ipsa Loquitur in Medical Malpractice Cases.

Appellant also contends that RSMo. Section 538.225 demonstrates the inconsistency in Missouri law by requiring expert testimony in order to "open the courthouse doors, and then to use that same expert testimony to slam them closed." (Appellant's Substitute Brief, p. 36). The statute does require a plaintiff to file an affidavit with the court stating he has found a medical expert willing who has given a written opinion that the defendant breached the standard of care and thereby caused or directly contributed to cause the damages claimed by the plaintiff. The statute, however, is silent on whether or not res ipsa loquitur should continue to be used in medical malpractice cases.

No Missouri court has ever interpreted the statutory language of RSMo. Section 538.225, to determine whether the legislature specifically intended to prohibit res ipsa loquitur cases. Such an argument can be made. In examining a statute, a court's role is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. Budding v. SSM Healthcare System, 19 S.W.3d 678-680 (Mo. banc 2000). In construing a statute to determine legislative intent, a court must presume the legislature acted with full awareness and complete knowledge of the state of the law at the time the statute was enacted. Suffian v. Usher, 19 S.W.3d 130, 133 (Mo. banc 2000). See also State v. Rumble, 680 S.W.2d 939, 942 (Mo. banc 1984).

The statute in this case clearly says "***in any action*** against a health care provider for damages for personal injury . . ." RSMo. Section 538.225 (2000). In interpreting this statute, the legislature is charged with knowledge that experts are not allowed in res ipsa loquitur cases involving medical providers. The plain language of the statute would indicate that an expert is required in any action against a health care provider, however, and therefore could be interpreted to exclude the use of res

ipsa loquitur against health care providers. The Hasemeier case was decided in 1962, and was well established at the time that RSMo. Section 538.225 became law in 1986. Therefore, contrary to Appellant's argument, it is reasonable to conclude that the legislature actually intended to prevent the use of res ipsa loquitur in medical malpractice cases.

The rationale of this Court in the case of Budding v. SSM Healthcare System supports the conclusion that the legislature intended to eliminate res ipsa loquitur in medical malpractice cases. In that case, plaintiff sued a hospital on a theory of strict liability alleging the hospital used defectively designed implants. The implants had been surgically placed in plaintiff's jaw as a teenager. Budding v. SSM Healthcare System, 19 S.W.3d 678, 679 (Mo. 2000). When the plaintiff decided to schedule surgery to remove the implants in 1993, serious complications arose during the surgery when the doctor tried to remove one of the implants and part of the plaintiff's skull broke off leaving a hole in the floor of plaintiff's temporomandibular joint. Id. As a result of the complications, a second surgery became necessary, and between surgeries, plaintiff experienced severe pain, facial nerve weakness and other problems. Id.

A verdict was returned in favor of the hospital at the trial level. Budding 195 S.W.3d at 680. On appeal, plaintiff claimed the trial court erred in requiring the use of the word "sale" instead of "transfer" in the verdict directing instruction relating to strict products liability. This Court, however, did not reach the question presented because it concluded that Chapter 538 foreclosed any such claim. Id.

In reaching its decision, this Court noted that any action against a health care provider for damages for personal injury or death requires the filing of an affidavit from a legally qualified health care

provider stating there has been a breach in the standard of care, pursuant to RSMo. Section 538.225. In further analyzing the case, the Court stated:

> It is true that nothing in the statute specifically requires the plaintiff to prove negligence or other level of culpability in order to recover. However, in construing the statute, the Court is not to assume the legislature intended an absurd result. Akers v. Warson Garden Apartments, 951 S.W.2d 50 (Mo. banc 1998). It would be an obvious absurdity to require an affidavit of negligence as a condition of proceeding with the cause of action even though negligence need not be proved in order to submit the case to a jury or to obtain a judgment. On that basis alone, it is reasonable to conclude that the legislature intended to eliminate liability of health care providers for strict liability. Budding, 19 S.W.3d at 681.

Following the same reasoning, it would be an obvious absurdity to require an affidavit of negligence as a condition of proceeding with a cause of action based on res ipsa loquitur, given the current law in the State of Missouri under Hasemeier prohibiting use of experts in res ipsa medical malpractice cases. On that basis alone, it is likewise reasonable to conclude that the legislature intended to eliminate the liability of health care providers under the doctrine of res ipsa loquitur.

Even if such were not the intent, it is not inconsistent to require expert testimony in medical malpractice cases involving specific negligence, if one considers the traditional foundations of the res ipsa loquitur doctrine. The purpose of the statute is to eliminate at early stages of litigation, medical malpractice actions against health care providers which lack color of merit and to protect the public against the costs of ungrounded medical malpractice claims. Morrison v. St. Luke's Health

Corporation, 929 S.W.2d 898 (Mo. App. E.D. 1996). Given that purpose, no inconsistency is created if res ipsa loquitur is only used in those cases where the negligence of a party is so obvious that "the thing speaks for itself." Requiring expert testimony in such "obvious" res ipsa cases would be more inconsistent.

iv. The "Seavers" Case.

One of the cases primarily relied upon by Appellant is the Seavers case decided by the Supreme Court of Tennessee. Although that court decided to change its law to allow expert testimony in medical malpractice res ipsa cases, two of the five judges dissented. Judges Holder and Drowota demonstrated the inherent inconsistency of allowing expert testimony in a res ipsa loquitur case involving medical malpractice. In a concise but well written dissent, Justice Holder wrote that the nature of the injuries should be "so simple and clear as not to require a layman to speculate or analyze how the injury might have occurred." Seavers, 9 S.W.3d at 97. Justice Holder further noted:

> A plaintiff now need only procure an expert willing to opine that the injury should not have occurred. Such testimony may permit a case to go to the jury even though the expert is unable to testify to a specific standard of care or the manner in which the injury occurred. Thus, the jury is free to speculate as to how the injury may have occurred. A broad invocation of the hybrid res ipsa/expert testimony strategy could potentially make professionals insurers of 'good results.' Seavers, 9 S.W.3d at 97-98.

The facts of the present case describe the exact situation that Justice Holder was addressing. Were this case submitted to a jury as plead, the jury would have to speculate as to exactly when and

how Appellant contracted Hepatitis C in the first place. Although Appellant's paid experts stand ready, willing and able to offer an opinion that this type of thing does not ordinarily occur in the absence of negligence, none of these same experts can testify to a specific standard of care or the manner in which the injury occurred. In essence, Appellant wants this Court to impose a rule whose effect would be more akin to strict liability than to negligence.

Appellant relies primarily on Seavers for his argument that Missouri should change its law to adopt the "majority view." The present case, however, is distinguishable on its facts. Appellant claims that "like Mr. Seavers, he contracted a subtle injury (the Hepatitis C virus) while under the exclusive care of the hospital, and likely while sedated." (Appellant's Substitute Brief, p. 31). There are a number of reasons why this statement is not accurate. First, Capital Region has already demonstrated that Appellant was not under the exclusive control of the hospital. For the three month window when Appellant could have contracted Hepatitis C, Appellant was a patient at Capital Region for only one week. Thus, no exclusive control.

Second, Appellant claims he contracted Hepatitis C "likely while sedated." What Appellant fails to acknowledge is that the surgical team which performed Appellant's bypass surgery were all tested and found to be negative for the Hepatitis C virus (L.F. 161, 176). In addition, Appellant was under general anesthesia for only a brief time during the week long stay at Capital Region (L.F. 9, 30). This is nothing like the case in Seavers, where the patient was symptom free upon admission to the hospital and ***while still in the hospital*** developed weakness and numbness in her right hand, ultimately determined to be from damage to her right ulnar nerve. In Seavers, the manifestation of the

injury all occurred during the period when Seavers was a patient at and within the exclusive control of the hospital.

In addition, the court in Seavers notes that the patient was heavily sedated and unable to talk during most of her stay. Seavers, 9 S.W.3d at 88. Appellant's statement that his experts testified to a reasonable degree of medical certainty that the injury occurred while Appellant was under the exclusive control of the hospital is not supported by the record on appeal. Rather, Appellant's experts have simply made a blanket assertion that Appellant must have contracted Hepatitis C at Capital Region (L.F. 75, 141, 144, 158-159, 166). Stated another way, in Seavers there was no potential intervening cause or preceding cause, but in the present case, Appellant may have contracted Hepatitis C either prior to his admission to Capital Region or even after discharge.

v. Other Public Policy Issues.

Appellant claims that public policy is served by adopting the majority rule. There are a number of policy justifications, however, for refusing to allow expert testimony in res ipsa cases involving medical malpractice. 82 Va. L. Rev. at 353-354. Several policy justifications arise from an analysis of the effects of the liberal use of res ipsa in such cases. The liberal rule may stem more from a desire to find deep pockets rather than from a logical standpoint. Jurors may feel that a wealthy physician should compensate an injured patient, regardless of whether the physician was negligent, because a physician is better able to pay for the damages than the patient. 82 Va. L. Rev. at 353.

A liberal rule also creates perverse incentives for physicians. 82 Va. L. Rev. at 353. It can cause malpractice insurance rates to increase because of an increased risk of physician liability. These rates might be passed on to patients, resulting in an increase in the cost of health care and health

insurance rates. 82 Va. L. Rev. at 353. Furthermore, allowing expert testimony may create a disincentive for physicians to try risky but potentially lifesaving procedures on their patients, for fear of a future malpractice suit if something goes awry. 82 Va. L. Rev. at 353.

Appellant also accurately points out another public policy argument in favor of affirming the trial court. Allowing an expert to testify in support of a res ipsa loquitur theory of medical malpractice will "open the flood gates" for litigation by effectively making a hospital strictly liable for any virus or disease contracted by a patient while hospitalized. Appellant, however, reasons that the flood gates will not be opened due to the "nature of the transmission of the Hepatitis C virus." According to Appellant, transfer of Hepatitis C, which can only occur through blood to blood or tissue to tissue contact (a point disputed by Appellant's expert, Dr. Pattison, L.F. 12, 150), may only result from a deviation in the standard of care (a point which is also disputed by Appellant's expert, Dr. Bacon, L.F. 126-127). Appellant's argument is therefore not supported by the record and fails to address why any individual who contracts a blood borne disease after seeing a health care provider will not be able to assert a claim.

Appellant also correctly notes Respondent's argument that allowing expert testimony shifts the burden of proof to the defendant, requiring defendant to prove non-negligence. This cannot be more clear than in the present case, where there is a clear window of time when Appellant was outside of Respondent's exclusive control. Appellant was a patient at Capital Region for only one week, yet there is a three month window when Appellant might have contracted Hepatitis C (L.F. 12, 146). Appellant attempts to overcome this dilemma by filing an affidavit asserting that he had not engaged in sexual relations, used illegal drugs, or inserted any foreign object into his body. This self-serving, conclusory

affidavit does nothing more than attempt to shift the burden of proof to Respondent to present evidence that Appellant is somehow distorting the truth or otherwise mistaken. In essence, Appellant would have Respondent prove that Appellant did not contract Hepatitis C while a patient at its hospital, and further, prove that Appellant contracted Hepatitis C either before or after he left the hospital, *when he was completely outside of the hospital's care and management*. This is not an appropriate use of res ipsa loquitur. The Appellant is challenged to refer this Court to case with analogous facts on the issue of "exclusive control."

Appellant also claims that Capital Region is the only party in a position to have identified the cause of Mr. Spears' Hepatitis C by testing its employees for the virus (Appellant's Brief, p. 30). Appellant claims Respondent attempts to use a "lack of testing" and lack of knowledge by all parties as to the specific source of Mr. Spears' Hepatitis C as a shield to recovery (Appellant's Substitute Brief, p. 32). As already pointed out, Respondent's surgical team was tested and found to be negative for Hepatitis C (L.F. 161, 176). In addition, Respondent is not in a position to identify the cause of Appellant's Hepatitis C, as that cause is just as likely to be found outside the time Appellant was a patient at Capital Region. Furthermore, when talking about a disease, is it not also possible that Appellant contracted the Hepatitis C from a visitor, or someone other than hospital personnel while a patient at Capital Region? Appellant's own experts admit that it is possible for the disease to be transmitted in such an obscure manner as being sneezed upon (L.F. 12, 150). Appellant's argument is that this Court should close its eyes and pretend that Appellant has presented sufficient evidence to prove a breach of duty and causation on the part of Respondent, without any evidence as to the instrumentality which caused his injury, the manner of transmission of the Hepatitis C, or the exact timing

under which the alleged transfer occurred. This attempt to submit a case with no proof of a breach in the standard of care is what flies in the face of fundamental fairness, and demands that Missouri keep its current rule in place.[4]

Appellant's case simply does not fit the parameters of a res ipsa loquitur submission. Appellant urges this Court to adopt a new legal standard, but acknowledges that failing such a change, summary judgment was proper. Even if this Court were to change the law, Respondent has demonstrated that Appellant will not be able to present sufficient evidence to support the necessary elements of a res ipsa loquitur submission. Respondent properly obtained summary judgment by demonstrating that Appellant could not produce sufficient evidence to allow the trier of fact to find the existence of the elements necessary to make a res ipsa loquitur submission. ITT Commercial Finance, 854 S.W.2d at 381. This is true with or without the use of expert testimony. This case is simply not the proper case upon which to argue a change in Missouri's law on the use of experts in medical malpractice cases involving res ipsa loquitur.

[4] The fact that Appellant conducted little discovery regarding Respondent's infection control policies and procedures further supports this argument. Appellant wants to avoid the entire issue of whether a breach in the standard of care occurred by utilizing expert testimony under res ipsa loquitur.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the ruling of the trial court granting summary on behalf of Capital Region.

Respectfully submitted,

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CERTIFICATE OF SERVICE

COMES NOW Respondent, Capital Region Medical Center, by and through its undersigned attorneys, and hereby certifies that one true copy of RESPONDENT'S SUBSTITUTE BRIEF and one copy of the disk required by Rule 84.06(g) were served on John D. Beger, 103 West 10th Street, P.O. Box 805, Rolla, Missouri 65401-0805, Attorney for Appellant, by mailing same to his office address listed above, via first-class U.S. Mail, postage prepaid, on the 8th day of July, 2002.

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CERTIFICATION OF COMPLIANCE WITH RULE NO. 84.06

The undersigned, Attorney for Respondent, hereby certifies that the SUBSTITUTE BRIEF OF RESPONDENT complies with the limitations contained in Rule No. 84.06(b). There are 927 lines of monospaced type in the Brief, as counted by the word processing program used, WordPerfect 10. A floppy disk containing Respondent's Substitute Brief has been filed with the Court, and in accordance with Rule 84.06(g) the undersigned further certifies that said disk has been scanned for viruses and that it is virus free.

_____

Jason L. Call