

**IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

WD No. 59842

GLEN SPEARS,

Appellant,

v.

CAPITAL REGION MEDICAL CENTER,

Respondent,

**Appeal from the Circuit Court of Callaway County, Missouri
The Honorable Gene Hamilton, Judge**

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the entry of a Judgment in a medical malpractice case by the Circuit Court of Callaway County, Missouri. The issues presented in this appeal do not fall within the exclusive jurisdiction of the Supreme Court of Missouri, and thus this appeal is within the general appellate jurisdiction of the Missouri Court of Appeals. Article V, section 3, Missouri Constitution (1945). Jurisdiction is also proper in the Western District of the Missouri Court of Appeals. Section 477.070, RSMo. 1994.

STATEMENT OF FACTS

On August 11, 1997, appellant Glen Spears was admitted to respondent Capital Region Medical Center, Inc. (“Capital Region”) for treatment of symptoms consistent with cardiac distress (L.F. 9, 155, 170). Mr. Spears was hospitalized at Capital Region from August 11, 1997, to August 18, 1997 (L.F. 10, 155, 160). On August 14, 1997, Dr. Jackie Curtis performed cardiac by-pass surgery upon Mr. Spears at Capital Region (L.F. 9, 155, 161, 173-74). The surgery was performed under general anesthesia (L.F. 9, 15, 155). During his hospitalization at Capital Region, Mr. Spears underwent numerous invasive procedures, ranging from injections to the by-pass surgery (L.F. 161, 170, 174).¹

In early October, 1997, doctors diagnosed Mr. Spears with an acute phase of the Hepatitis C virus (L.F. 10, 146, 155, 164-65). The Hepatitis C virus is a blood-born pathogen, predominately transmitted by blood products or intra-venous needle, and rarely transmitted by sexual contact (L.F. 121). Approximately 75 to 85 percent of people infected with the Hepatitis C virus develop “chronic hepatitis C,” which can cause chronic liver disease (L.F. 122). Generally the first objective indication of the presence of the Hepatitis C virus is elevated liver enzymes (L.F. 123). The doctor then performs an HCV antibody test to determine if the patient has the Hepatitis C virus, and test results showing the patient is “antibody positive” confirms the Hepatitis C virus. (L.F. 123).

¹ An “invasive procedure” is generally any procedure that disrupts the skin (L.F. 78, 141-42, 167).

Invasive procedures include major procedures, such as the cardiac by-pass surgery, to small procedures such as penetrating the skin with a needle or any other object (L.F. 78, 141-42, 164).

There is typically a delay between the exposure to the Hepatitis C virus and the development of its symptoms of two to 20 weeks (L.F. 77, 167). Further, on average, there is a two-month period between becoming infected and becoming antibody positive. (L.F. 124). The process of the human body becoming antibody positive after becoming infected with the Hepatitis C virus is called “seroconversion” (L.F. 124). However, it is possible that a person could have normal liver enzymes 20 weeks after becoming infected with the Hepatitis C virus, but that would be unusual (L.F. 165).

Prior to his admission to Capital Region Mr. Spears had normal liver enzyme levels (L.F. 165). Mr. Spears also had normal liver enzyme levels two weeks following his admission to Capital Region (L.F. 164). In early September, 1997, Mr. Spears began to have symptoms of acute Hepatitis C (fatigue and pyrites) and had a mild elevation of his liver enzyme levels (L.F. 77, 167). Mr. Spears’ liver enzyme levels continued to rise in September, 1997 (L.F. 77-78, 165). Mr. Spears’ liver enzyme levels were significantly elevated on October 7, 1997 (L.F. 165). He had a more full-blown case of Hepatitis C as of October 7, 1997 (L.F. 165).

Mr. Spears subsequently filed suit against Capital Region, alleging that he contracted the Hepatitis C virus while hospitalized and under the control of Capital Region (L.F. 15, 16). Mr. Spears’ Second Amended Petition alleged two counts, Count I for “res ipsa loquitur” and Count II for medical negligence (L.F. 10, 15, 156). The trial court dismissed Count II (medical negligence), leaving only a claim under Count I for res ipsa loquitur (L.F. 10, 156). Capital Region then filed a Motion for Summary Judgment as to Count I on the grounds that Mr. Spears could not prove that he was infected with the Hepatitis C virus while a patient at Capital Region without the testimony of expert witnesses, and that Missouri Courts prohibit expert testimony in support of a res ipsa loquitur case (L.F. 9, 11).

Mr. Spears' response to Capital Region's Motion for Summary Judgment included the deposition testimony of two retained expert witnesses, Dr. Mitchell L. Shiffman and Dr. Charles P. Pattison. Dr. Shiffman concluded that Mr. Spears did not have Hepatitis C before he was admitted to Capital Region on August 11, 1997 (L.F. 76, 166). Dr. Shiffman testified that, in his opinion, Mr. Spears "almost certainly" developed acute Hepatitis C during his hospitalization at Capital Region (L.F. 75, 166). Dr. Shiffman explained that the blood tests performed when Mr. Spears entered the hospital showed normal liver enzymes (L.F. 76, 166). Further, Dr. Shiffman explained, at the time of the diagnosis of his acute Hepatitis C, Mr. Spears tested negative for the Hepatitis C virus; this seroconversion process confirms to Dr. Shiffman that Mr. Spears did not have Hepatitis C before his hospitalization at Capital Region (L.F. 76, 166).

Dr. Shiffman cannot state exactly how Mr. Spears contracted Hepatitis C while a patient at Capital Region (L.F. 13, 159). Dr. Shiffman explained:

I don't know how he got Hepatitis C. I can't pinpoint you a specific time, but it's pretty clear that everybody agrees that he went into the hospitalization without Hepatitis C and he came out of it with. So sometime during that hospitalization he got it. I don't know how he got it.

.....

I mean, he went into the hospital without it. He comes out of the hospital with it.

Somewhere during that hospitalization, he got exposed to Hepatitis C virus.

(L.F. 83). Dr. Shiffman is not aware of any situation in his own practice or in the medical literature where a patient has been infected with Hepatitis C from a health care worker in a non-surgical setting (L.F. 13, 160). In Dr. Shiffman's opinion, one of the several invasive procedures Mr. Spears

underwent at Capital Region was the source of the infection, and Mr. Spears contracted the disease through some infected instrument or medical personnel (L.F. 76-77, 167).

Dr. Shiffman stated his opinion that it would be a violation of the appropriate standard of care within the hospital setting for a healthcare provider to permit foreign bodily fluid or tissue to come in contact with the bodily fluid or tissue of a patient (L.F. 84, 168). Likewise, it would be below the appropriate standard of care for a healthcare provider to permit a non-sterile instrument to be inserted or break the skin of a patient (L.F. 84, 168). In Dr. Shiffman's opinion, Mr. Spears became infected with Hepatitis C as a result of his hospitalization at Capital Region through Capital Region's breach of the applicable standard of care (L.F. 85, 168).

Mr. Spears' response to Capital Region's motion for summary judgment also referenced the testimony of a second retained expert witness, Dr. Pattison (L.F. 164-66). Dr. Pattison testified, to a reasonable degree of medical certainty, that it was his opinion that Mr. Spears acquired the Hepatitis C virus sometime during his hospitalization at Capital Region in August, 1997, due to an invasive procedure (L.F. 12, 141, 144, 158-59, 164). Dr. Pattison was not able to give an opinion about which invasive procedure at Capital Region gave Mr. Spears Hepatitis C, but explained that Mr. Spears underwent several major invasive procedures at Capital Region, including obtaining arterial blood gases, coronary artery by-pass grafting, central line placement, balloon placement and catheterization (L.F. 12, 144-145, 158). Dr. Pattison explained that it is very unlikely that plaintiff had Hepatitis C at the time of his hospitalization at Capital Region in August, 1997, because he had no clinical symptoms and his liver enzymes were normal during his hospitalization, he had a negative antibody test on October 7, 1997, and there was a two-month period between the hospitalization and the onset of symptoms (L.F. 149,

165).

In Dr. Pattison's opinion, Mr. Spears acquired Hepatitis C while hospitalized at Capital Region as a result of Capital Region's breach in the standard of care, as there was no other way infected material could have penetrated Mr. Spears' body so as to give him Hepatitis C without a breach of some kind (L.F. 150-52, 165). Dr. Pattison stated that it would not be possible for Mr. Spears to have acquired Hepatitis C at Capital Region through an "accidental inoculation" from a non-health care provider (L.F. 12, 150, 151, 158, 165). Dr. Pattison further stated that the means of determining the source of Hepatitis C are within the control of the hospital and its laboratory (L.F. 151-52, 166).

Mr. Spears' response also referenced deposition testimony from a treating physician, Dr. Bruce Bacon (L.F. 157, 163-64). Dr. Bacon stated his opinion that it was more likely than not that Mr. Spears was infected with Hepatitis C at Capital Region, most likely during surgery (L.F. 125-26, 157). However, Dr. Bacon could not express an opinion about specifically how Mr. Spears may have been infected with the Hepatitis C virus while at Capital Region (L.F. 11, 125, 157). Regarding whether it would be possible for a patient to contract Hepatitis C while at a hospital without there being a breach in the standard of care by the hospital, Dr. Bacon testified as follows:

Q: Is it possible for a patient to contract Hepatitis C while an in-patient at a hospital without there being a deviation of the standard of care by the hospital or its employees?

A: I don't know the answer to that question. I would think not. I mean, if an appropriate – but you see, when you phrase a question is it possible, has it always been this way, has it never been this way, it makes it – so, is it possible? I suppose it might be possible. I think it would be pretty unlikely.

(L.F. 126, 157).

Mr. Spears also provided his own affidavit in response to Capital Region's motion for summary judgment. In his affidavit, Mr. Spears stated that before his admission to Capital Region on August 11, 1997, he had not engaged in sexual relations for several years (L.F. 160, 170). Mr. Spears' affidavit stated he had never used illegal drugs (L.F. 160, 170). Further, Mr. Spears' affidavit stated that while confined in the hospital he did not engage in sexual relations with any person, nor insert any foreign object into his body or through his skin, and everything he ingested was provided by and under the direction of personnel of Capital Region (L.F. 160, 170-71). Mr. Spears' affidavit also stated that after his release from Capital Region, but before the onset of symptoms of Hepatitis C, he was not subject to invasive procedures, did not perform any on himself, and did not engage in sexual relations nor use illegal drugs (L.F. 160, 171). Finally, Mr. Spears' affidavit stated that before his admission to Capital Region, he had never been diagnosed with, nor treated for, the Hepatitis C infection (L.F. 161, 171).

Additionally, Mr. Spears presented the deposition testimony of Dr. Jackie Curtis and the other members of his surgical team in his response to Capital Region's motion for summary judgment (L.F. 155). Dr. Curtis was the surgeon who performed the coronary by-pass surgery on Mr. Spears (L.F. 161, 173). Dr. Curtis described the by-pass surgery as an invasive procedure (L.F. 161, 174). Dr. Curtis testified that the surgical team included Irv Stickney and Terry Bahler (L.F. 161, 174). Dr. Curtis and his surgical team had been tested for the Hepatitis C virus prior to Mr. Spears' by-pass surgery (L.F. 161, 175). Dr. Curtis was not positive for the Hepatitis C virus either before or after the surgery upon Mr. Spears (L.F. 161, 176). Mr. Stickney and Mr. Bahler were tested and found to be

negative for Hepatitis C as well (L.F. 161, 176).

Dr. Curtis testified that while Mr. Spears was under Dr. Curtis' care at Capital Region in August 1997, everything that was injected, inserted or used to invade Mr. Spears' body was provided by Capital Region (L.F. 161, 180).

Mr. Stickney testified that he is a physician's assistant who routinely accompanied Dr. Curtis to Capital Region for surgery (L.F. 162, 184-85). Mr. Stickney further testified that when he accompanied Dr. Curtis to Capital Region for surgery he did not bring any instruments or devices from the University to Capital Region, and that everything used on Mr. Spears would have been provided by Capital Region (L.F. 162, 186-87). Mr. Stickney has never been diagnosed with nor treated for Hepatitis C (L.F. 162, 187).

Mr. Bahler testified that he is a certified clinical perfusionist who accompanies Dr. Curtis to perform surgery (L.F. 162, 193, 197-98). During surgeries with Dr. Curtis, Mr. Bahler operates the heart lung machine, which is maintained at Capital Region (L.F. 162, 197-98). Everything Mr. Bahler used during Mr. Spears' surgery was provided by Capital Region (L.F. 162, 200-02). Mr. Bahler has never been diagnosed with nor treated for the Hepatitis C virus (L.F. 162, 202-03).

Mr. Spears' response to the summary judgment motion also included the deposition testimony of Dr. Lorenzo McKnelly, the Chairman of the Infection Control Committee at Capital Region (L.F. 163, 200). Dr. McKnelly testified it was possible that Mr. Spears acquired Hepatitis C while a patient at Capital Region (L.F. 163, 208). Dr. McKnelly testified that Capital Region has no policy for testing patient care personnel for Hepatitis C or HIV (L.F. 163, 208-09). Dr. McKnelly has no knowledge that anything used to invade, inject or which was otherwise inserted into Mr. Spears while he was a

patient at Capital Region had come from somewhere other than Capital Region (L.F. 163, 209). Dr. McKnelly could express no opinion whether Mr. Spears acquired Hepatitis C at Capital Region, but at the time of the deposition Capital Region was investigating the cause of Mr. Spears' Hepatitis C. (L.F. 163, 208, 210).

The trial Court sustained Capital Region's motion for summary judgment (L.F. 6-7). Mr. Spears now appeals to this Court (L.F. 224).

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CAPITAL REGION MEDICAL CENTER (HEREINAFTER “CAPITAL REGION”) ON ITS MOTION FOR SUMMARY JUDGMENT, BECAUSE CAPITAL REGION FAILED TO DEMONSTRATE THAT THERE IS NO GENUINE DISPUTE OF MATERIAL FACT AND THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT APPELLANT GLEN SPEARS PRESENTED EVIDENCE SUPPORTING EACH ELEMENT OF A RES IPSA LOQUITUR CASE IF THIS COURT ADOPTS THE MAJORITY RULE ALLOWING MR. SPEARS TO PRESENT EXPERT TESTIMONY IN SUPPORT OF HIS RES IPSA LOQUITUR CASE; SPECIFICALLY, MR. SPEARS HAS PRESENTED EVIDENCE THAT HIS ACQUIRING HEPATITIS C ORDINARILY DOES NOT HAPPEN WHEN DUE CARE IS EXERCISED BY THE PARTY IN CONTROL, THAT THE INSTRUMENTALITIES INVOLVED ARE UNDER THE CARE AND MANAGEMENT OF CAPITAL REGION, AND THAT CAPITAL REGION POSSESSES EITHER SUPERIOR KNOWLEDGE OR MEANS OF OBTAINING INFORMATION ABOUT THE CAUSE OF THE OCCURRENCE.**

Seavers v. Methodist Medical Center, 9 S.W.3d 86 (Tenn. 1999)

Connors v. Univ. Assoc. in Obstetrics, 4 F.3d 123 (2d Cir. 1993)

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

Restatement (Second) of Torts, § 328D, comment d (1965)

**II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR
RESPONDENT CAPITAL REGION MEDICAL CENTER (HEREINAFTER
“CAPITAL REGION”) ON ITS MOTION FOR SUMMARY JUDGMENT,
BECAUSE CAPITAL REGION FAILED TO ESTABLISH A RIGHT TO
JUDGMENT AS A MATTER OF LAW IN THAT DISALLOWING A REMEDY
TO APPELLANT GLEN SPEARS VIOLATES THE “OPEN COURTS”
PROVISION OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 14.**

Article I, Section 14, Missouri Constitution

Lewis v. Snow Creek, Inc., 6 S.W.3d 388 (Mo. App. 1999)

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

Powell v. American Motors Corp., 834 S.W.2d 184 (Mo. banc 1992)

Adams v. Children’s Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992)

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CAPITAL REGION MEDICAL CENTER (HEREINAFTER “CAPITAL REGION”) ON ITS MOTION FOR SUMMARY JUDGMENT, BECAUSE CAPITAL REGION FAILED TO DEMONSTRATE THAT THERE IS NO GENUINE DISPUTE OF MATERIAL FACT AND THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT APPELLANT GLEN SPEARS PRESENTED EVIDENCE SUPPORTING EACH ELEMENT OF A RES IPSA LOQUITUR CASE IF THIS COURT ADOPTS THE MAJORITY RULE ALLOWING MR. SPEARS TO PRESENT EXPERT TESTIMONY IN SUPPORT OF HIS RES IPSA LOQUITUR CASE; SPECIFICALLY, MR. SPEARS HAS PRESENTED EVIDENCE THAT HIS ACQUIRING HEPATITIS C ORDINARILY DOES NOT HAPPEN WHEN DUE CARE IS EXERCISED BY THE PARTY IN CONTROL, THAT THE INSTRUMENTALITIES INVOLVED ARE UNDER THE CARE AND MANAGEMENT OF CAPITAL REGION, AND THAT CAPITAL REGION POSSESSES EITHER SUPERIOR KNOWLEDGE OR MEANS OF OBTAINING INFORMATION ABOUT THE CAUSE OF THE OCCURRENCE.

A. Standard of Review

An appellate court's standard of review of a summary judgment is essentially de novo. Lewis v. Snow Creek, Inc., 6 S.W.3d 388, 392 (Mo. App. 1999). The appellate court reviews the record in the light most favorable to the party against whom judgment was entered and grants the non-moving party the benefit of all reasonable inferences from the record. Id. To be entitled to summary judgment, a movant must demonstrate that there is no genuine dispute of material fact and that he or she is entitled to judgment as a matter of law. Id.; Rule 74.04(c)(3) (2001).

Here the movant is the defending party. A "defendant party" is entitled to summary judgment upon proof of either (1) facts that negate any one of the elements of the plaintiff's cause of action; (2) that the plaintiff, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 381 (Mo. banc 1993); Rule 74.04(c)(3) (emphasis added).

B. The Elements of Res Ipsa Loquitur

Capital Region's motion for summary judgment is directed to Count I, which alleges a res ipsa loquitur theory of medical negligence. The res ipsa loquitur doctrine is a rule of evidence that allows the plaintiff "to make a submissible issue of negligence by showing the fact of an occurrence, which because of its character and circumstances, permits a jury to draw a rebuttable inference of negligence based on the common knowledge or experience of laymen that the causes of the occurrence do not ordinarily

exist in the absence of negligence attributable to the one in control.” Graham v. Thompson, 854 S.W.2d 797, 799 (Mo. App. 1993). The elements of the res ipsa case are:

- 1) the occurrence resulting in injury ordinarily does not happen when due care is exercised by the party in control;
- 2) the instrumentalities involved are under the care and management of the defendant; and
- 3) the defendant possesses either superior knowledge or means of obtaining information about the cause of the occurrence.

Id.; M.A.I. 31.02(3) (2001). The doctrine thus relieves the plaintiff of proving specific negligence and creates a rebuttable inference of general negligence which gets the plaintiff to the jury. Graham, 854 S.W. 2d at 799.

C. Mr. Spears Presented Evidence Supporting Each Element of a Res Ipsa Loquitur Claim

Mr. Spears presented evidence to support each element of his res ipsa case:

a. The occurrence resulting in injury ordinarily does not happen when due care is exercised by the party in control

The first element of the res ipsa case is that the occurrence resulting in injury ordinarily does not happen when due care is exercised by the party in control. Graham, 854 S.W.2d at 799. Mr. Spears’ response to Capital Region’s motion presented the opinion of several experts on this element. Dr. Shiffman testified that Mr. Spears became infected with Hepatitis C as a result of his hospitalization at Capital Region through Capital Region’s breach in the applicable standard of care (L.F. 85, 168). Dr. Pattison testified that Mr. Spears acquired the Hepatitis C virus during his hospitalization at Capital

Region (L.F. 141, 164), and that this was a result of Capital Region's breach of the standard of care (L.F. 150-52, 165). Dr. Pattison explained that patients do not acquire the Hepatitis C virus in the hospital setting without a breach of the standard of care by the hospital (L.F. 150, 165). Dr. Pattison explained that there was no way infected material could have penetrated Mr. Spears' body and infected him without a breach in the standard of care (L.F. 150-52, 165). Dr. Bacon also stated his opinion that Mr. Spears was infected with the Hepatitis C virus as a result of Capital Region's breach in the standard of care (L.F. 125-26, 157). Thus, Mr. Spears presented evidence supporting the first element of a res ipsa case, and Capital Region did not negate this element with its facts.

b. The instrumentalities involved are under the care and management of the defendant

The second element of a res ipsa loquitur case is that the instrumentalities involved are under the care and management of the defendant. Graham, 854 S.W.2d at 799. Mr. Spears presented substantial evidence supporting this element. Mr. Spears' experts (Dr. Shiffman, Dr. Pattison and Dr. Bacon) all explained that although there is no way of determining exactly how Mr. Spears contracted the Hepatitis C virus, they believed he contracted it as a result of an invasive procedure while hospitalized at Capital Region (L.F. 75-77, 83, 141, 144-45, 158, 164, 166-67). Further, Mr. Spears presented evidence that the instrumentalities involved in these invasive procedures were under the exclusive care and management of Capital Region. Mr. Spears' affidavit stated that everything injected into his body while hospitalized was provided by and under the direction of Capital Region personnel, and he did not insert any foreign object into his body or through his skin while hospitalized at Capital Region (L.F. 160, 170-71). Further, Dr. Curtis (the surgeon who performed by-pass surgery on Mr.

Spears at Capital Region) and two members of Dr. Curtis' surgical team all testified that everything that was injected, inserted or used to invade Mr. Spears' body was provided by Capital Region (L.F. 161-62, 180, 186-87, 200-02). Dr. McKnelly, the Chairman of the Infection Control Committee, testified that he had no knowledge that anything used to invade, inject or that was otherwise inserted into Mr. Spears while he was a patient at Capital Region came from a source other than Capital Region (L.F. 163, 209).

c. The defendant possesses either superior knowledge or means of obtaining information about the cause of the occurrence

The third element of a res ipsa case is that the defendant possesses either superior knowledge or means of obtaining information about the cause of the occurrence. Again, Mr. Spears presented sufficient evidence to support this element. Dr. Pattison testified that the means of determining the source of Hepatitis C are within the control of Capital Region (L.F. 151-52, 166). Dr. McKnelly, the Chairman of the Infection Control Committee at Capital Region, testified that Capital Region was in the process of conducting an investigation to determine how Mr. Spears acquired Hepatitis C (L.F. 163, 208).

Moreover, common sense supports a finding for Mr. Spears on this element, as the nature of Hepatitis C is such that Capital Region has superior means of obtaining information about the cause of Mr. Spears' infection. It could have tested – and still can test – its employees. Mr. Spears, on the other hand, cannot provide such information. He was unconscious under general anesthesia during the by-pass procedure at Capital Region (L.F. 9, 15, 155). Even if he was conscious, he would not have been able to identify the source of his infection, as the virus cannot be detected by human senses.

**D. Public Policy Supports Adopting the “Majority Rule” Admitting
Expert Testimony in a Medical Malpractice Res Ipsa Loquitur Case**

Capital Region argued in its motion that the trial court could not consider the expert testimony supporting Mr. Spears’ res ipsa case because Missouri courts prohibit expert testimony in support of a res ipsa case (L.F. 9, 11). Mr. Spears concedes that he cannot establish specific negligence, as he cannot show precisely how he contracted Hepatitis C, and thus he must rely on the res ipsa loquitur theory to recover for his injuries. Further, as the above-referenced testimony demonstrates, Mr. Spears concedes that he cannot submit his case under the res ipsa theory without expert testimony.

Missouri courts have stated that in order for res ipsa loquitur to apply in a malpractice action, 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 v. Smith, 812 S.W.2d 810, 815 (Mo. App. 1991); Hasemeier v. Smith, 361 S.W.2d 697, 700 (Mo. banc 1962). In Deveney, the trial court stated:

The doctrine of res ipsa loquitur is only applicable in a malpractice case when a physician or surgeon 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 v. Smith, 361 S.W.2d 697, 700 (Mo. banc 1962). In other words, for res ipsa loquitur to apply in a malpractice action, 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.

Id. at 701.

Missouri represents the minority view. Seavers v. Methodist Medical Center, 9 S.W.3d 86, 93 (Tenn. 1999). The majority of states permit medical malpractice plaintiffs to use expert testimony to establish the elements of a res ipsa case. Id.; see attached Appendix for other cases following the majority rule; see also W. Page Keeton, et al., Prosser and Keeton on the Law of Torts §39, at 247 (5th ed. 1984) (stating that when the jury lacks common knowledge on the subject, expert testimony may provide a sufficient foundation for an inference of negligence).

The Restatement (Second) of Torts, § 328D (1965), supports the majority approach. Comment d provides:

In the usual case the basis of past experience from which this conclusion [that such events do not ordinarily occur unless someone has been negligent] may be drawn is common to the community, and is a matter of general knowledge, which the court recognizes on much the same basis as when it takes judicial notice of facts which everyone knows. It may, however, be supplied by the evidence of the parties; and expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference. Such testimony may be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion.

Restatement (Second) of Torts § 328D cmt. d (1965) (emphasis added).

Courts state various reasons for adopting the majority view. First, barring expert testimony in a res ipsa loquitur medical malpractice case is not responsive to the advancements in medical technology.

Seavers, 9 S.W.3d at 94; Connors v. Univ. Assoc. in Obstetrics, 4 F.3d 123, 128-29 (2d Cir. 1993) (“[I]n this era of constantly developing medical science, cases in which injuries bespeak negligence to the average person occur less and less and complex cases predominate”). Second, a rule barring expert testimony “erroneously overstates” the common knowledge requirement. Id.; Seavers, 9 S.W.3d at 94. As the federal court in Connors explained:

Experts within a field share a common knowledge about whether a certain type of injury could only occur through negligence, just as average citizens can share a common knowledge about whether barrels of flour normally roll out of warehouse windows. See Byrne v. Boadle, 2 H C 722, 159 Eng. Rep. 299 (1863). These experts can educate the jurors, essentially training them to be twelve new initiates into a different, higher level of common knowledge. The jurors can then determine for themselves whether the expert opinion is credible, after also considering the defendant’s experts’ opinions that res ipsa does not apply.

Connors, 4 F. 3d at 128-29. Third, prohibiting expert testimony forces a medical malpractice plaintiff into an “all or nothing” scenario whereby the plaintiff must choose between either relying on lay testimony and the res ipsa doctrine or proving negligence through expert testimony. Seavers, 9 S.W.3d at 95; Connors, 4 F.3d at 129. Finally, prohibiting expert testimony fails to account for cases where the patient was unconscious or heavily sedated at the time of the injury. Seavers, 9 S.W.3d at 95.

Many states originally prohibiting expert testimony in a res ipsa medical malpractice case have reevaluated that position. For example, in Seavers, 9 S.W.3d 86 (Tenn. 1999), the Tennessee Supreme Court overruled prior decisions and adopted the majority view. Ms. Berdella Seavers was admitted into Methodist Medical Center of Oak Ridge (“the Hospital”) after she was diagnosed with

bilateral viral pneumonia. Id. at 88. At the time of admission, she was able to use her right arm and hand normally and there were no signs of injury to her right ulnar nerve. Id. Her treatment for pneumonia involved a month-long stay at the Hospital, during which time she was heavily sedated and unable to care for herself in any way. Id. In addition, she was unable to talk during most of her stay due to her endotracheal tube positioned through her mouth and into her trachea. Id. The Hospital nursing staff monitored Ms. Seavers and were responsible for turning, positioning, and restraining her body in the hospital bed. Id. Additionally, both of Ms. Seavers' hands were placed in wrist restraints that were fastened to the bed rails to prevent her from pulling or removing the endotracheal tube and the IV. Id. at 89. Ms. Seavers stayed in the Hospital's ICU for a month. Id. When the endotracheal tube was removed and Ms. Seavers could talk, she complained that her right arm was numb. Id. An examination revealed that she had suffered severe damage to her right ulnar nerve. Id. Ms. Seavers filed suit against the Hospital, alleging that its nurses negligently restrained or positioned her arm while she was under their care, resulting in the damage to her right ulnar nerve. Id. Ms. Seavers' suit included a count for *res ipsa loquitur*. Id.

The Hospital filed a motion for summary judgment. Id. Ms. Seavers' response to the motion for summary judgment referenced depositions of a doctor and a nurse. Id. The doctor testified in deposition that Ms. Seavers' injury occurred as a result of prolonged pressure on the ulnar nerve. Id. Although the doctor could not offer conclusive proof of causation, he stated that the nerve injury could have occurred if a member of the nursing staff failed to pad Ms. Seavers' elbow or failed to prevent her arm from becoming pressed against a hard object such as a guardrail. Id. Both the doctor and the nurse stated that Ms. Seavers was under the exclusive control and care of the Hospital's nursing staff

when the nerve injury occurred and that the injury was the type which would not have occurred if the nursing staff had upheld the standard of care. Id. at 89-90.

The trial court held that because expert testimony was necessary to establish both applicable standard of care and whether negligence could be reasonably inferred from the circumstances surrounding Ms. Seavers' injury, the *res ipsa loquitur* theory was unavailable. Id. at 90. The trial court thus granted summary judgment. Id.

On appeal, the Tennessee Supreme Court acknowledged that Tennessee courts had previously held that *res ipsa loquitur* was unavailable in medical malpractice cases where expert testimony was needed to assist the trier of fact. Id. at 92-93. The Court noted that this approach was the minority view, and adopted the majority rule in Tennessee:

[W]e believe that the better rule is to allow expert testimony in medical malpractice cases, where otherwise admissible, to assist the parties both in establishing or rebutting the inference of negligence under a theory of *res ipsa loquitur*. While we agree that *res ipsa loquitur* is best suited for cases where the nature of the injury lies within the common knowledge of lay persons, we see no reason to continue to preclude the use of the *res ipsa* doctrine simply because a claimant's injury is more subtle or complex than the leaving of a sponge or a needle in the patient's body. As recognized by the Restatement and a majority of other jurisdictions, the likelihood of negligence necessary to support a charge under *res ipsa loquitur* may exist even when there is no fund of common knowledge concerning the nature and circumstances of an injury.

This is especially true in medical malpractice cases where, as here, a claimant suffers a subtle nerve injury while heavily sedated and under the exclusive care of a hospital nursing staff. Claimants often have no knowledge of what happened during the course of medical treatment, aside from the fact that an injury occurred during that time. In cases where the standard of care or the nature of the injury requires the exposition of expert testimony, such testimony may be as probative of the existence of negligence as the common knowledge of lay persons. The use of expert testimony in that regard serves to bridge the gap between the jury's common knowledge and the complex subject matter that is "common" only to experts in a designated field. With the assistance of expert testimony, jurors can be made to understand the higher level of common knowledge and, after assessing the credibility of both the plaintiff's and defendant's experts, can decide whether to infer negligence from the evidence.

Id. at 94-95 (citations omitted).

As in Seavers, the facts of this case support the adoption of the majority rule in Missouri, allowing expert testimony in *res ipsa loquitur* medical negligence cases. Like Ms. Seavers, Mr. Spears contracted a subtle injury (the Hepatitis C virus) while under the exclusive care of the hospital, and likely while sedated. Neither Ms. Seavers' experts nor Mr. Spears' experts were able to identify precisely how the injury occurred, but stated, to a reasonable degree of medical certainty, that the injury occurred while the patient was under the exclusive control of the hospital. Finally, Mr. Spears, like Ms. Seavers, has no knowledge of what happened during the course of his medical treatment, aside from the fact that an injury occurred during that time.

In fact, 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. However, when Mr. Spears was a patient at Capital Region it was not testing for Hepatitis C (L.F. 163, 208-09). Capital Region now attempts to use this 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. An analogous principle applies to automobile law in Missouri, that one having a duty to lookout may not escape liability by saying that he or she did not see what, if he or she had looked, he or she could have seen. McWilliams v. Wright, 460 S.W.2d 699 (Mo. 1970). This flies in the face of fundamental fairness, and underscores the need for adoption of the majority rule.

Adopting the majority approach allowing these experts to testify is entirely consistent with the purpose of the res ipsa doctrine. Missouri courts allow a party to use the res ipsa loquitur doctrine in a medical negligence case where “the patient is unconscious during the course of an operation, and receives an injury to an unaffected portion of the body, one unconnected with the area of operation.” Graham, 854 S.W.2d at 799. “The doctrine serves to aid the injured party who does not know and cannot plead the specific cause of the injury.” Id. Here, Mr. Spears was unconscious during his surgery, and further due to the fact that the Hepatitis C virus cannot be identified by the senses, neither Mr. Spears nor his experts are in a position to determine exactly how he contracted the Hepatitis C virus while at Capital Region.

Capital Region will argue that allowing experts to testify in support of a res ipsa loquitur theory of medical malpractice will “open the floodgates” for litigation by effectively making a hospital strictly liable for any virus or disease contracted by a patient while hospitalized. However, allowing expert testimony in support of a res ipsa case here will not “open the floodgates” due to the nature of the transmission of the Hepatitis C virus. The transfer of Hepatitis C requires blood-to-blood or tissue-to-

tissue contact, a clear deviation from the standard of care as opposed to airborne pathogens which, while they may proliferate in a hospital setting, are not transmitted exclusively through a deviation in the standard of care.

Capital Region will also argue that adopting the majority rule effectively shifts the burden of proof to the defendant, requiring the defendant to prove non-negligence. However, this argument misstates the law of *res ipsa loquitur* in Missouri. To establish a case of *res ipsa loquitur* in Missouri, the plaintiff must show three elements, including that the occurrence resulting in injury ordinarily does not happen when due care is exercised by the party in control. Graham, 854 S.W.2d at 799; M.A.I. 31.02(3) (2001). Placing upon the plaintiff the burden of proving a lack of due care by the defendant effectively protects hospital defendants.

The best argument for adopting the majority rule is that it is fair, and the rule prohibiting expert testimony is not. Prohibiting expert testimony reserves *res ipsa loquitur* only to the most obvious of medical malpractice cases (such as where a sponge is left in the body during surgery), effectively barring recovery to an entire class of persons injured during more complex medical procedures. Mr. Spears has presented evidence supporting each element of his *res ipsa loquitur* theory, and specifically has produced the testimony of three expert witnesses who have testified, to a reasonable degree of medical certainty, that Mr. Spears contracted the Hepatitis C virus while a patient at Capital Region as a result of Capital Region's breach of the standard of care. Fundamental fairness supports allowing the trier of fact to hear this testimony.

D. Conclusion

Capital Region, as the defendant party, is entitled to summary judgment if it can establish one of the following: (1) facts that negate any one of the elements of the plaintiff's cause of action; (2) that the plaintiff, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 381 (Mo. banc 1993); Rule 74.04(c)(3) (emphasis added). Here, as demonstrated by the foregoing, if this Court adopts the majority rule and permits the trial court to rely upon evidence from Mr. Spears' expert witnesses, then Mr. Spears has presented evidence supporting each element of his res ipsa loquitur claim. Thus, if this Court adopts the majority rule, Capital Region has not presented facts that negate any one element of Mr. Spears' res ipsa loquitur case. Further, if this Court adopts the majority rule, Mr. Spears has produced evidence sufficient to allow the trier of fact to find the existence of each of the elements of a res ipsa loquitur case.² Capital Region does not rely upon an affirmative defense in its motion for summary judgment. Thus, if this Court adopts the majority rule, then summary judgment is improper for Capital Region.

² Mr. Spears' expert testimony, at the very least, creates an issue of fact on each of the res ipsa loquitur elements, thereby defeating summary judgment. Lewis v. Snow Creek, Inc., 6 S.W.3d 388, 392 (Mo. App. 1999).

**II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR
RESPONDENT CAPITAL REGION MEDICAL CENTER (HEREINAFTER
“CAPITAL REGION”) ON ITS MOTION FOR SUMMARY JUDGMENT,
BECAUSE CAPITAL REGION FAILED TO ESTABLISH A RIGHT TO
JUDGMENT AS A MATTER OF LAW IN THAT DISALLOWING A REMEDY
TO MR. SPEARS VIOLATES THE “OPEN COURTS” PROVISION OF THE
MISSOURI CONSTITUTION, ARTICLE I, SECTION 14.**

A. Standard of Review

An appellate court’s standard of review of a summary judgment is essentially de novo. Lewis v. Snow Creek, Inc., 6 S.W.3d 388, 392 (Mo. App. 1999). The appellate court reviews the record in the light most favorable to the party against whom judgment was entered and grants the non-moving party the benefit of all reasonable inferences from the record. Id. To be entitled to summary judgment, a movant must demonstrate that there is no genuine dispute of material fact and that he or she is entitled to judgment as a matter of law. Id.; Rule 74.04(c)(3) (2001).

**B. The Trial Court’s Judgment Violates the “Open Courts” Provision of
the Missouri Constitution.**

The Missouri Constitution, Article I, Section 14, provides:

That the Courts of justice shall be open to every person, and certain remedy afforded to every injury to person, property or character, and justice shall be administered without sale, denial, or

delay.

Article I, Section 14 “prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury.” Kilmer v. Mun, 17 S.W.3d 545, 549 (Mo. banc 2000). The “right of access” means the right to pursue in the Courts the causes of action the substantive law recognizes. Id. The open courts provision does not require Missouri Courts to adopt substantive law requiring recovery or relief not presently provided for by existing substantive law. Powell v. American Motors Corp., 834 S.W.2d 184, 191 (Mo. banc 1992).

Missouri courts generally distinguish between statutes or rules that impose procedural bars to access, and statutes that change the common law by the elimination (or limitation of) a cause of action. Adams v. Children’s Mercy Hosp., 832 S.W.2d 898, 905 (Mo. banc 1992). The former are impermissible; the latter are a valid exercise of a legislative prerogative. Id.

Prohibiting expert testimony in a res ipsa loquitur case, and thereby effectively barring plaintiff’s ability to recover despite a medical defendant’s negligence, creates a procedural bar to access and thereby clearly violates Article I, Section 14 of the Missouri Constitution.

Disallowing expert testimony in a case such as this creates a “shell game” for defendants such as Capital Region. There is no way for Mr. Spears to submit a specific negligence claim against Capital Region, because there is no way for him to know specifically how he contracted the Hepatitis C virus. Because of the complex nature of Hepatitis C, including the manner in which it is contracted, its seroconversion process, and lack of common knowledge about it by jurors, Mr. Spears cannot recover under res ipsa loquitur without expert testimony. Article I, Section 14 is designed to prevent precisely

this type of shell game, creating open courts, and a remedy, for this injury.

CONCLUSION

For the foregoing reasons, Appellant Glen Spears respectfully requests that this Court reverse the trial court's Judgment and remand this cause with instructions that the trial court enter a new Judgment in accordance with this Court's opinion, finding that plaintiff Glen Spears has presented a submissible case of *res ipsa loquitur*, and further permitting Glen Spears to present expert testimony on the fact that he has the Hepatitis C virus, that he acquired the Hepatitis C virus at Capital Region Medical Center, that hospital patients ordinarily do not acquire the Hepatitis C virus when the hospital and its employees use due care while in control of the patient, that the instrumentalities involved were under the care and management of Capital Region, that Capital Region possesses either superior knowledge or the means of obtaining information about the cause of Mr. Spears' Hepatitis C, and that his acquiring the Hepatitis C virus at Capital Region Medical Center resulted from a deviation from the standard of care by Capital Region, and for such further relief as the Court deems just and proper in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Appellant's Brief have been mailed this _____ day of July, 2001, by prepaid United States Mail, to Edward C. Clausen, Carson & Coil, P.C., 515 East High Street, P.O. Box 28, Jefferson City, MO 65102, attorneys for respondent Capital Region Medical Center, Inc.

John D. Beger

APPENDIX

Bucklelew v. Grossbard, 435 A.2d 1150, 1157-58 (N.J. 1981)

Cangelosi v. Our Lady of Lake Reg'l Med. Ctr., 564 So. 2d 654, 664-65 (La. 1989)

Carter v. Johnson, 617 N.E.2d 260 (Ill. App. Ct. 1993)

Edwards v. Boland, 670 N.E.2d 404, 406-07 (Mass. App. Ct. 1996)

Fehrman v. Smiul, 121 N.W.2d 255, 268 (Wis. 1963);

Horner v. Northern Pac. Beneficial Ass'n Hosp., Inc., 382 P.2d 518, 524 (Wash. 1963)

Hoven v. Kelble, 256 N.W.2d 379, 383 (Wis. 1977)

Jones v. Harrisburg Polyclinic Hosp., 437 A.2d 1134, 1138 (Pa. 1981)

Jones v. Porretta, 405 N.W.2d 863, 873 (Mich. 1987)

Kambat v. St. Francis Hosp., 678 N.E.2d 456, 459-60 (N.Y. 1997)

Kerr v. Bock, 486 P.2d 684, 686 (Cal. 1971)

Mayor v. Dowsett, 400 P.2d 234, 243-44 (Or. banc 1965)

Medina v. Figuered, 647 P.2d 292, 294 (Haw. Ct. App. 1982)

Mireles v. Broderick, 872 P.2d 863, 866 (N.M. 1994)

Morgan v. Children's Hosp., 480 N.E.2d 464, 467 (Ohio 1985)

Pederson v. Dumouchel, 431 P.2d 973, 979 (Wash. 1967)

Perin v. Hayne, 210 N.W.2d 609, 614-15 (Iowa 1973)

Savina v. Sterling Drug, Inc., 795 P.2d 915, 935-36 (Kan. 1990)

Seneris v. Haas, 291 P.2d 915, 923 (Cal. banc 1955)

Van Zee v. Sioux Valley Hosp., 315 N.W.2d 489, 492 (S.D. 1982)

Walker v. Rumer, 381 N.E.2d 689, 691 (Ill. 1978)

Walls v. Hazelton State General Hospital, 629 A.2d 232 (Pa. Commw. Ct. 1993)

Wilkinson v. Vesey, 295 A.2d 676, 691 (R.I. 1972)

CERTIFICATION OF COMPLIANCE
WITH SPECIAL RULE NO. 1

I hereby certify on this _____th day of July, 2001, that the Brief of Appellant includes the information required by Rule 55.03 and complies with the limitations contained in special Rule No. 1(b).

There are 887 lines of monospaced type in the Brief. A floppy disc containing the Brief of Appellant has been filed with the Court. I further certify that this disk has been scanned for viruses and that it is virus free.

John D. Beger

