

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC84401**

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**GLEN SPEARS,**

**Appellant,**

**v.**

**CAPITAL REGION MEDICAL CENTER,**

**Respondent.**

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

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**APPELLANT'S SUBSTITUTE REPLY BRIEF**

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## **ARGUMENT IN REPLY**

### **A. Preliminary Matters raised by Capitol Region**

As an initial matter, Capital Region notes that at a motion hearing Mr. Spears' attorney predicted he would be relying on expert witness testimony at trial to a limited extent, and not to prove that Capital Region violated the applicable standard of care. (Resp. Brief, p.14-15). Capital Region attempts to characterize Mr. Spears' attorney's opinion about his trial strategy as a judicial admission. That characterization is inaccurate. A judicial admission occurs when a party concedes that a certain factual matter is true, thus dispensing with the need for the other party to produce evidence on the matter. See Chilton v. Gorden, 952 S.W.2d 773, 777 (Mo. App. 1997). Predictions regarding trial strategy, as made by Mr. Spears' counsel, are not assertions of fact (as would relieve Capital Region of the need to produce evidence on the issue). This issue is a red herring.

Capital Region also contends that Mr. Spears somehow improperly interjected "additional and unnecessary facts" into this case in his response to Capital Region's motion for summary judgment. (Resp. Sub. Brief, p. 6, n.1) Suffice it to say that Rule 74.04(c)(2) itself, pertaining to responses to summary judgment motions, commands that "[t]he response . . . shall set out each additional material fact that remains in dispute."

### **B. Capitol Region's Arguments on the Elements of Res Ipsa Loquitur**

Turning to the merits, Capital Region's argument is two-pronged, and can be summarized thus: 1) Missouri should not follow the majority of states by

allowing plaintiffs to rely on expert opinion when submitting a medical malpractice claim under a res ipsa loquitur theory; and 2) even if Missouri were to follow the majority rule, Mr. Spears is unable to present sufficient evidence on the elements of res ipsa loquitur to survive summary judgment. The majority of Capital Region's arguments were anticipated and fully addressed in Mr. Spears' previously filed Substitute Brief, so this Brief will merely provide a summary of those particular arguments.

**1. A res ipsa loquitur claim is based on circumstantial evidence of probability, not speculation about possibilities.**

The first element of a res ipsa loquitur claim requires a plaintiff to show that the occurrence resulting in injury does not ordinarily happen in the absence of negligence. See Graham v. Thompson, 854 S.W.2d 797, 799 (Mo. App. 1993). On this point, Capital Region repeatedly argues that because there are many "possible" ways a person "might" become infected with Hepatitis C, it somehow follows that Mr. Spears cannot prove he became infected as a result of Capital Region's negligence. That argument is founded on a misunderstanding of the nature of a res ipsa loquitur case.

In a res ipsa case, like any negligence case, the plaintiff is not required to disprove any and every theory of possible causation the defendant might surmise, but instead need only show that it is probable that the defendant's negligence caused the injury. See, e.g., Weeks v. Rupp, 966 S.W.2d 387, 394 (Mo. App. 1998); Hale v. American Family Mut. Ins. Co., 927 S.W.2d 522, 525 (Mo. App.

1996); Shannon v. Welch, 858 S.W.2d 748, 751 (Mo. App. 1993).

In that connection, as more fully discussed in Mr. Spears' opening brief, Mr. Spears is able to provide substantial evidence demonstrating that Capital Region's negligence probably caused his Hepatitis C. For example, 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 too 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. 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).

The "occurrence" resulting in Mr. Spears' injury, as revealed by the circumstantial evidence in this case, is one of the several invasive procedures Mr. Spears underwent while hospitalized. (L.F. 76-77, 83, 167). Manifestly, a heart operation and corresponding hospital stay do not ordinarily result in infection with a serious blood-borne disease in the absence of negligence, and Mr. Spears has presented sufficient evidence of negligence to survive summary judgment.<sup>1</sup>

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<sup>1</sup> Capital Region's attempt to impugn Mr. Spears' evidence because it derives from the testimony of "hired" experts does nothing but demonstrate an irrelevant and anachronistic distaste for expert evidence.

**2. Inability to identify the specific injury-causing instrumentality does not impede a res ipsa loquitur case.**

The second element of a res ipsa loquitur case is that the instrumentalities involved are under the management and control of the defendant. Graham, 854 S.W.2d at 799. “The requirement that the instrumentality be under the management and control of the defendant does not mean, nor is not limited to, actual physical control, but refers rather to the right of control at the time the negligence was committed.” Weeks v. Rupp, 966 S.W.2d 387, 394 (Mo. App. 1998) (citation omitted). Also, it is helpful to keep in mind that “[r]es ipsa loquitur is incompatible with proof of specific negligence.” Id.; see also Racer v. Utterman, 629 S.W.2d 387, 397 (Mo. App. 1981) (plaintiff identified the specific instrument and conduct that caused her injury, so could not rely on res ipsa loquitur).

Mr. Spears’ experts all opined that Mr. Spears contracted the Hepatitis C virus 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’ 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).

Also, 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).

The upshot is that, although Mr. Spears cannot identify the specific injury-causing instrumentality, he has presented substantial evidence showing that any such instrumentality was provided by and in the control of Capital Region. Moreover, in the context of *res ipsa loquitur* medical malpractice cases it is common for plaintiffs to be unable to identify the specific injury-causing instrumentality for the simple reason that they were unconscious when they were injured. See Zumwalt v. Koreckij, 24 S.W.3d 166, 167 (Mo. App. 2000) (plaintiff under general anesthesia at time of injury); Calvin v. Jewish Hosp. of St. Louis, 746 S.W.2d 602, 606 (Mo. App. 1988) (same).

### **3. Superior Knowledge Element.**

The third element of a *res ipsa* case is that the defendant has either superior knowledge or means of obtaining information about the cause of the occurrence. In essence, this element turns on determining “. . . who had the ability to present facts detailing the cause of the incident . . .” Hale, 927 S.W.2d at 527, the plaintiff or the defendant.



Like under the first element, Capital Region argues that because Mr. Spears “might” have acquired Hepatitis C sometime other than during his stay at Capital Region, he therefore cannot show that Capital Region had control over every instrument that “might” have caused his injury. As explained above, that argument is based on a misunderstanding of negligence law, but even worse it is irrelevant to the dispositive inquiry of determining who is in the best position to provide the facts, Mr. Spears or Capital Region.

In sum, because Mr. Spears was under general anesthesia during the by-pass procedure (L.F. 9, 15, 155), and because even when conscious he would not have been able to identify the source of his infection (as the virus cannot be detected by human senses), and because the means of determining the source of Hepatitis C are within the control of Capital Region (L.F. 151-52, 166), Mr. Spears has presented sufficient evidence on the third element to avoid summary judgment.

### **C. Public Policy Arguments**

Like with Capital Region’s arguments about the legal elements of Mr. Spear’s *res ipsa loquitur* claim, its arguments about public policy considerations were for the most part anticipated and more fully addressed in Mr. Spears’ opening brief.

To the extent that Capital Region and amici curiae attempt to characterize Mr. Spears’ case as a “bad result” case, they are indulging in mischaracterization. To be sure, a bad “result” arising from a given medical procedure does not, by

itself, permit an inference of negligence. See Seippel-Cress v. Lackamp, 23 S.W.3d 660, 667 (Mo. App. 2000). But Mr. Spears' hepatitis C is obviously not the "result" of his heart by-pass operation and corresponding hospital stay at all. In fact, Mr. Spears' injury is more accurately analogized to the classical *res ipsa* case where a foreign substance remains in the plaintiff's body after surgery. Except -- far worse than those classical cases -- the foreign substance left in Mr. Spears' body cannot be easily removed, like a sponge, and it can cause liver failure. This is not a "bad result" case. It is a "foreign substance" or "unusual injury" case.

Another more subtle mischaracterization advanced by the opposing briefs attempts to portray the effect of the majority rule (permitting expert testimony in *res ipsa loquitur* cases) as tantamount to requiring abandonment of the "common knowledge" component. As noted in Mr. Spears' opening brief (App.s Sub. Brief, p. 38), that characterization misses the mark.

Again, the "thing" that speaks for itself is the circumstantial evidence of the character and circumstances surrounding the plaintiff's injury. See D.S. Sifers Corp. v. Hallak, 46 S.W.3d 11, 19 (Mo. App. 2001). Once that circumstantial evidence is before the jury then the "common knowledge" assessment comes into play. The jury considers the evidence (adduced from experts or otherwise), and then in light of its "common knowledge" it decides whether the circumstantial evidence "speaks" of negligence. Put simply, after being educated about the particulars of Hepatitis C, the ordinary Missourian will be able to conclude, as a

matter of common sense, that a heart operation and one-week hospitalization should not cause a patient to acquire such a serious blood-borne disease, unless somebody “probably” made a mistake. That is what this case is all about.

More to the point, what the doctrine of *res ipsa loquitur* is all about is probability. See Strick v. Stutsman, 633 S.W.2d 148, 153 (Mo. App. 1982); Neis v. Nat’l Super Markets, Inc., 631 S.W.2d 690, 691 (Mo. App. 1982). The relevant inquiry is whether, after balancing all of the facts and circumstances, as established by all of the evidence, is it within the ambit of “common knowledge” that this accident was probably the result of the defendant’s negligence? If yes, the case is submissible. But if the facts and circumstances suggest that a party other than the defendant has an equal probability of fault, then the case should not be submitted under *res ipsa loquitur*. See Neis, 631 S.W.2d at 691.

The upshot is that because the “common knowledge” component of a *res ipsa* case is relevant only to the later-in-time probability determination, not to the predicate marshalling of all the facts and circumstances, adoption of the majority rule would not require abandonment of the “common knowledge” component in the least. Rather, the jurors’ “common knowledge” (pertaining to the probability that Capital Region was negligent) will be enlarged -- not negated -- by the testimony of Mr. Spears’ experts regarding the facts and circumstances of his case.

Another public policy argument offered by the opposing briefs claims that if this Court adopts the majority rule the public will suffer economically because the cost of health-care will go up as health-care providers are exposed to increased

liability (that the increased liability is for meritorious claims is not disputed; that the cost of Mr. Spears' injury may also be spread to the public is not addressed).

This too-simplistic economic argument overlooks the fact that, even assuming there is a burden on its pocketbook, the public will nonetheless benefit greatly from a rule encouraging providers to take precautions to ensure that members of the public are not infected with serious disease, like that endured by Mr. Spears. Moreover, the majority rule, again assuming it indeed increases costs, puts the cost of taking precautions where it belongs: On Capitol Region, the party in the best and only realistic position to take precautions. In sum, increased liability will lead to safer health-care facilities.

#### **D. 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 Glen Spears has presented a submissible case of *res ipsa loquitur*, and 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 COMPLIANCE WITH RULE 84.06**

The undersigned certifies that this Appellant's Substitute Brief complies with the limitations contained in Rule 84.06(b), contains 2485 words, as counted by the word-processing program used, Microsoft Word 2000, and that the floppy disk filed together with this Appellant's Substitute Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of Appellant's Substitute Brief and one copy of the disk required under Rule 84.06(g) have been mailed this 16th day of July, 2002, 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.

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John D. Beger