IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

DAVID SCOGGINS — APPELLANT

VS. — CASE NO. 2006-ca-02004

BAPTIST MEMORIAL HOSPITAL-DeSOTO
and RANDY KING — APPELLEES

BRIEF OF APPELLEES, BAPTIST MEMORIAL HOSPITAL-DESOTO, INC. AND RANDY KING

ORAL ARGUMENT NOT REQUESTED

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DAVID SCOGGINS **APPELLANT**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. Honorable Robert P. Chamberlin, Circuit Court Judge of DeSoto County;
2. Baptist Memorial Hospital-DeSoto, Inc., Appellee;
3. Honorable Walt A. Davis and Honorable John H. Dunbar, attorneys for Appellee;
4. Honorable John Michael Bailey, attorney for Appellant.

CERTIFIED, this the 10 th day of May 2007.

WALTER ALAN DAVIS, MSB [redacted]

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I. STATEMENT REGARDING ORAL ARGUMENT

This case involves questions of settled Mississippi law on the requirements of medical malpractice claims as well as the entry of summary judgment under Miss. R. Civ. P. 56. Oral argument is not warranted in this case.

II. STATEMENT OF ISSUES

ISSUES: **Whether the Trial Court properly granted summary judgment as to all claims asserted against Randy King as administrator of BMH-DeSoto, as he owes no independent, individual duty of care to Mr. Scoggins**

ISSUES: **Whether the trial Court properly granted summary judgment because Scoggins failed to properly submit an appropriate certificate in compliance with Miss. Code Ann. § 11-1-58(1)**

ISSUE: **Whether the trial Court properly granted summary judgment in light of the Plaintiff's failure to respond to relevant Requests for Admissions, which went to the heart of the Plaintiff's claims.**

ISSUE: **Whether the trial Court properly granted summary judgment because of Scoggins' failure to support any claim with appropriate expert testimony.**

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves allegations of medical negligence surrounding the use of a cautery machine during a surgical procedure at BMH-DeSoto in Southaven, Mississippi. On or about June 22, 2004, gastroenterologist Dr. Geza Remak[1] operated on Mr. Scoggins

[1]Mr. Scoggins did not name Dr. Remak as a Defendant in this case nor did he allege any wrongdoing on the doctor's part in his pleadings.

and utilized that cautery machine to remove colon polyps. During the course of surgery, Dr. Remak stopped the procedure after two separate "uncontrolled power bursts" occurred.

Consequently, Mr. Scoggins filed suit against BMH-DeSoto and its administrator, Randy King. According to Mr. Scoggins, he suffered serious injury as a result of these "uncontrolled power bursts." As detailed more fully below, Mr. Scoggins made allegations in this case that both BMH-DeSoto and Randy King[2] were negligent for at least three alternative reasons: 1) alleged failures to properly maintain and calibrate the cautery machine; 2) alleged failures to properly operate the cautery machine; and 3) alleged failures to properly maintain the hospital's overall electrical system.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

David Scoggins instituted this action with the filing of his Complaint with the DeSoto County Circuit Court on January 11, 2006. (R. 7). In that Complaint, Scoggins alleged that while "undergoing a routine colonoscopy at Baptist DeSoto, the cauterizing machine malfunctioned" and injured Mr. Scoggins. (R. 8). More particularly, the Complaint alleges that "the attending surgeon . . . asked the nurse to adjust this machine, at which time, the machine created a jolt of electricity" which injured Mr. Scoggins. (R. 9). The Complaint further goes on to make claims against BMH-DeSoto[3] for ostensibly failing to properly calibrate and

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[2]Other than the fact he happens to be the hospital administrator at BMH-DeSoto at the time, Mr. King has no factual involvement with this matter whatsoever.

[3]Allegations of negligence were also levied against Mr. Randy King, BMH-DeSoto's hospital administrator. Mr. King was alleged to have been negligent for failing to ensure that "each and every piece of medical or surgical equipment on the premises of Baptist DeSoto is in

maintain the machine as well as against for the supposed failure of nursing staff to properly operate the machine. (R. 10-11). However, Scoggins also made an alternative allegation that the "electric current" injuring Mr. Scoggins "was caused by the cautery machine ***or by an electrical malfunction in the outlet or electrical system of the hospital itself.***" (R. 11) (emphasis added). In light of this alternative allegation, the Complaint then makes a claim for not properly maintaining the hospital's overall electrical system. (R. 12).

The Complaint did not, however, include any certificate pursuant to Miss. Code Ann. § 11-1-58 that the case had been reviewed by a medical expert who had concluded there was a reasonable basis for the claims asserted in the Complaint. (R. 7-13).

BMH-DeSoto and Mr. King filed their answers to the Complaint and discovery ensued. (R. 14-27). On February 13, 2006, BMH-DeSoto and Mr. King propounded written discovery upon Mr. Scoggins, including an interrogatory requesting the identification of any expert witnesses as well as a number of Requests for Admission. (R. 40-43).

After having received no response to any of its discovery requests for over four months, BMH-DeSoto and Randy King moved for the entry of summary judgment based upon: 1) Scoggins' failure to submit a certificate of expert consultation pursuant to Miss. Code Ann. § 11-1-58; 2) Scoggins' failure to timely respond to the propounded

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safe working order." (R. 11).

Requests for Admission, thereby conclusively establishing those matters; and 3) Scoggins' inability to come forward with sufficient expert testimony to support his claims. (R. 28).

On July 13, 2006, more than six months after discovery was propounded, Scoggins responded to the outstanding discovery requests and also made other submissions to the Court, including a response to the pending motion for summary judgment. (R. 44-54; 88).

On October 3, 2006, DeSoto County Circuit Judge Robert Chamberlin conducted a hearing on the pending motion for summary judgment. After hearing arguments of counsel, Judge Chamberlin granted the motion for summary judgment by order and opinion signed on October 26, 2006 and entered by the Clerk on October 30, 2006. (R. 166-74). Scoggins then filed his "Notice of Appeal" with respect to that order on November 20, 2006 and this appeal followed. (R. 175).

C. Statement of Facts Relevant To the Issues Presented for Review

The record in this matter is devoid of any factual testimony or evidence in support of the Plaintiff's claims, as Scoggins failed to submit any factual proof in response to the dispositive motions filed below. However, as Scoggins failed to timely respond to BMH-DeSoto's Requests for Admission, the following facts and matters are conclusively established in this case:

- Scoggins had no proof to support the allegations of any negligence on the part of the nurses, servants, or employees of the defendant BMH-D at the time of the subject incident.

- Scoggins' attorneys obtained a copy of the medical records relevant to his allegations and reviewed them before filing this civil action.

- Scoggins' attorneys provided a copy of his medical records to a medical expert who reviewed them and consulted with his attorneys before they filed this civil action.

- No nurse, employee, or agent of BMH-D violated the applicable standard of care while providing care and treatment to plaintiff during his June 22, 2004 admission to BMH-D.

- No failure to meet the applicable standard of care on the part of any BMH-D nurse, employee, or agent proximately caused the injuries alleged by plaintiff in his complaint.

- Scoggins had no qualified expert witness who will testify at trial that any nurse, employee, or agent of BMH-D violated the applicable standard of care while providing care and treatment to Scoggins during his June 22, 2004 admission to BMH-D.

- Scoggins had no qualified expert witness who would testify at trial that a failure to meet the applicable standard of care on the part of any BMH-D nurse, employee, or agent proximately caused the injuries alleged by Scoggins in his complaint.

- Scoggins had no proof to offer of the alleged negligence of Randy King.

(R. 40-43).

IV. STANDARD OF REVIEW

This matter rests before this Court on appeal from the Trial Court's grant of a motion for judgment as a matter of law in favor of the Defendants. As such, this Court's review of this matter is *de novo*. See, e.g., Lawrence v. Lawrence, 2006 WL 2474029, *2

(Miss. App. 2006) ("This Court employs a *de novo* standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc..") McMillan v. Rodriguez, 823 So. 2d 1173, 1176-77(¶¶ 9) (Miss. 2002). This Court is fully familiar with the typical recitation of governing standards for summary judgment motions:

> Summary judgment may be appropriately entered by a trial court "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." All that is required of a nonmoving party to survive a motion for summary judgment is to establish a genuine issue of material fact by the means available under . . . Miss. R. Civ. P. 56(c).

Robinson v. Ratliff, 757 So. 2d 1098, ¶ 8 (Miss. Ct. App. 2000).

Stated another way, "***th[e] standard [for granting summary judgment] mirrors the standard for a directed verdict*** . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added); Celotex Corp. v. Catrett 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 - 2553 (1986). The relevant standards track the relative burdens of proof at trial:

> ***As to issues on which the nonmovant bears the burden of proof at trial, the movant needs only to demonstrate an absence of evidence in the record to support an essential element of the movant's claim.***

Pride Oil Co., Inc. v. Tommy Brooks Oil Co. 761 So. 2d 187, 191 (Miss. 2000) (Crain v. Cleveland Lodge 1532, Order of Moose, Inc., 641 So. 2d 1186, 1188 (Miss.1994)); see

also Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc., 519 So. 2d 413, 416 (Miss.1988); Galloway et al. v. The Travelers Insurance Co., et al., 515 So. 2d 678 (Miss.1987). Again, Mississippi's standards mirror those under the Federal Rules of Civil Procedure.

> we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). The Mississippi Supreme Court has discussed this fact in some detail:

> We have stated the party moving for summary judgment has the job of *persuading* the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, he is entitled to judgment as a matter of law. *Fruchter v. Lynch Oil Co.,* 522 So. 2d 195, 198 (Miss.1988) (emphasis added). ***The movant carries a burden of persuasion, not a burden of proof.*** *Id. "The movant has the burden of production only where at trial the movant would have the burden of proof." Id.* (emphasis added) Claude L. Stuart, III observes in his law journal article that if *Fruchter* is read literally, the moving party bears no burden of production on issues which the non-moving party will bear the burden of proof at trial. Claude L. Stuart, III, *Summary Judgment: A Trial Practitioner's Guide to Mississippi Rule of Civil Procedure 56,* 59 Miss. L.J. 284, 300 (1989). Stuart additionally points to this Court's decision in *Tucker v. Hinds County,* 558 So. 2d 869 (Miss.1990) where we said the moving party has the burden of "demonstrating" that no genuine issue of material fact exists. *Id.* at 872. Thus, the question becomes, what the movant must do to sufficiently "demonstrate" no

genuine fact issue exists when he does not bear the burden of proof at trial. According to Stuart:

> Under *Celotex* [*Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)], as adopted by the Mississippi Supreme Court in *Fruchter* and other cases, the movant has no duty to provide an evidentiary predicate to negate the existence of a material fact as to those issues on which he does not bear the burden of proof at trial. Rather, as to issues where the movant does not bear the burden of proof at trial, he must initially only make a sufficient "informing," "pointing out," or "showing" that there is an absence of evidence to support the non-movant's case.

59 Miss. L.J. at 303.

Even more recently, we stated that "once a party *files* a motion for summary judgment, the party opposing the motion ''may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'' *MST Inc. v. Mississippi Chem. Corp.,* 610 So. 2d 299, 304 (Miss.1992) (emphasis added).

> The Mississippi Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, and we have looked to the federal interpretations of our state counterparts as persuasive authority. *See Owens v. Thomae,* 759 So. 2d 1117,1121 n. 2 (Miss.1999); *Quinn v. Mississippi State Univ.,* 720 So. 2d 843, 846 (Miss.1998); *Brown v. Credit Ctr., Inc.,* 444 So. 2d 358, 364 n. 1 (Miss.1983). The few federal interpretations to pass on this question regarding Federal Rule 56 hold that a motion for summary judgment may be based on the pleadings alone. *See* 10A Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 2713 (3d ed.1998) ("a summary-judgment motion may be made on the basis of the pleadings alone"); *McWhirter Distrib. Co. v. Texaco Inc.,* 668 F.2d 511, 519 n. 11 (Temp. Emer. Ct. App.1981) ("Even though the typical role of summary judgment is to go beyond the pleadings to consider matters provided by affidavit, deposition, and other extra-pleading materials, summary judgment may be based solely on the pleadings"). *See also Chambers v. United States,* 357 F.2d 224 (8th Cir.1966); *Reynolds v. Needle,* 132 F.2d 161 (D.C. Cir.1942).

Hartford Cas. Ins. Co. v. Halliburton Co. 826 So. 2d 1206, 1215 (Miss. 2001).

Further, this Court should affirm the trial Court's decision on any appropriate ground ***regardless*** of whether those grounds were analyzed by the trial Court Judge or referenced in the trial Judge's decision.

> This Court will generally affirm, even if it finds that the lower court has employed erroneous legal reasoning, provided only that the correct result has been achieved below. . . . If this be so, ***the Court certainly must affirm where there is any ground disclosed by the record upon which the decision could have properly been reached, notwithstanding the lower court did not make explicit its grounds.***

DeFoe v. Great Southern Nat. Bank, N.A. 547 So. 2d 786, 788 -789 (Miss. 1989) (citations omitted; emphasis added).

V. SUMMARY OF THE ARGUMENT

Judge Chamberlin did not err in granting judgment as a matter of law in favor of BMH-DeSoto. As an initial matter, the mere fact that Randy King was hospital administrator at the time does not render him individually liable for any supposed shortcoming of equipment or facilities within the hospital itself. There were no allegations that Mr. King had any personal involvement with Mr. Scoggins' treatment or the regular care and maintenance of either the cautery machine or the building's electrical system. As such, Mr. King owed no individual legal duty to Mr. Scoggins and any claim against Mr. King is indistinct from his claims against the hospital itself. Further, all of Scoggins' claims were properly dismissed because he: 1) failed to timely file a certificate in compliance with Miss. Code Ann. § 11-1-58; 2) failed to respond to

timely respond to Requests for Admission and were therefore bound by those matters which were deemed admitted; and 3) failed to come forward with any admissible expert testimony in support of his claims.

Scoggins did not submit, along with the filing of his Complaint, the certificate required by Miss. Code Ann. § 11-1-58(1). As this case involves claims against a health care provider for alleged injuries occurring during the course of surgical treatment, a certificate was required. Moreover, even if Scoggins could properly proceed on a *res ispa* theory without the use of expert medical testimony, he failed to file - with the complaint - a certificate to that effect in compliance with Miss. Code Ann. § 11-1-58(3). In any event, Scoggins failed to comply with statutory requirements and summary judgment was proper for this reason.

Moreover, Scoggins failed to timely respond to multiple Requests for Admission which went to the heart of his claims. The essence of Scoggins' explanation for failing to respond is that "when discovery arrived at the office, it was simply placed in the physical file and was not noted in the electronic calendar system, and was therefore not diaried to make sure that discovery was timely filed." At best, this constitutes "simple inadvertence or mistake of counsel" and is insufficient to justify the failure to respond. Nothing in the record in this matter justifies a finding that Judge Chamberlin abused his discretion in this matter and he properly bound Scoggins to the matters which were "deemed admitted" by his failure to respond.

Finally, Scoggins failed to support any of his claims with expert testimony. As this is a case of medical malpractice, it was essential for him to support each element of his claim with expert medical testimony. Additionally, to the extent that he alleged failure to properly maintain electrical systems, those claims would have required expert testimony from an electrical engineer or other professional. This is not a case where res ipsa could properly be applied as Scoggins could not establish that the cautery machine was under the "exclusive control" of BMH-DeSoto, particularly since the incident in question occurred while gastroenterologist surgeon Dr. Remak (who is not an employee of BMH-DeSoto) was performing a procedure on Scoggins with this very machine at the time. Even if otherwise properly used, application of the *res ipsa* doctrine does not excuse Scoggins from the obligation to put forth available proof in support of his claims. This he failed to do.

For these reasons, Judge Chamberlin properly granted summary judgment on all of the claims asserted against BMH-DeSoto and Randy King. This Court should affirm that decision.

VI. ARGUMENT

1. SUMMARY JUDGMENT WAS APPROPRIATE AS TO ALL CLAIMS AGAINST RANDY KING AS HE OWED NO INDEPENDENT DUTY OF CARE TO MR. SCOGGINS

At the time of the events which form the basis of the Complaint in this matter,

Randy King served as the administrator of BMH-DeSoto. The Complaint does not make any particular factual allegations against Mr. King other than the generalized allegation that he "as Administrator and Chief Executive Officer of Baptist Memorial Hospital DeSoto, undertook the ultimate responsibility for the safety of all patients and visitors . . ." and that he *individually* had a duty to "ensure that each and every piece of surgical equipment on the premises of Baptist DeSoto is in safe working order." (R. 11).

Beyond the absurdity of attempting to require the chief administrator of a hospital to have the daily job duties of a medical equipment technician and electrician, Scoggins seeks to impose a level of legal responsibility upon Mr. King that is equal to that which Scoggins also claims is imposed upon the hospital itself. This Court has already addressed a very similar topic when it determined that nursing home administrators and licensees do not hold specific duties to individual nursing home residents:

> The Plaintiffs seek to expand the current common law duty that a nursing home or its proprietor or owner can be held liable under general principles of tort law for negligent acts or omissions regarding the care of its residents. Based on the absence of statutory law from the Legislature and the absence of case law calling for the expansion of this duty, ***as well as the fact that such expansion would be duplicative of the duty already owed by the nursing home business owner or proprietor***, we decline to impose the same common law duty upon a nursing home licensee or administrator.

Howard v. Estate of Harper ex rel. Harper, 947 So. 2d 854, 858 (Miss. 2006) (emphasis added).

Mr. King cannot be personally liable as he owed no individual duty to Mr.

Scoggins. For this reason, summary judgment was properly granted with respect to all claims asserted against Mr. King. In any event, as explained *infra*, the claims asserted against Mr. King also fail for the same reasons the claims against BMH-DeSoto fail.

2. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE SCOGGINS FAILED TO ATTACH A CERTIFICATE OF EXPERT CONSULTATION PURSUANT TO MISS. CODE ANN. § 11-1-58(1)

A. CERTIFICATES OF EXPERT CONSULTATION

Miss. Code Ann. § 11-1-58 provides in relevant part:

> (1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:
>
> > (a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or
> >
> > (b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph (b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or

> (c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.
>
> . . .
>
> (3) A certificate under subsection (1) of this section is not required where the attorney intends to rely solely on either the doctrine of "res ipsa loquitur" or "informed consent." In such cases, the complaint shall be accompanied by a certificate executed by the attorney declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate under subsection (1) of this section.

Miss. Code Ann. § 11-1-58 (emphasis added). This Court has already noted that compliance with § 11-1-58's provisions is required and has affirmed a dismissal of claims for non-compliance. Walker v. Whitfield Nursing Center, Inc. 931 So. 2d 583, 589 (Miss. 2006) ("[T]his Court has clearly indicated that when reviewing statutory requirements, this Court will examine the record to determine compliance or non-compliance.").

B. A CERTIFICATE WAS REQUIRED IN THIS CASE

It is undisputed that Mr. Scoggins' claimed injuries occurred during the course of a surgical procedure and that BMH-DeSoto is a "health care provider" within the meaning of the statute. Regardless of how one looks at Scoggins' claims in this case, it is clear that expert testimony is required - the mechanics, operation and maintenance of a surgical cautery machine is not within the common knowledge of laymen, nor is the maintenance of an building's electrical system. See, e.g., Arguello v. Gutzman, 838 S.W.2d 583, 588

(Tex. App.-San Antonio 1992) (proper use of medical device not matter plainly within common knowledge of laymen).

C. SCOGGINS FAILED TO COMPLY WITH STATUTORY REQUIREMENTS

Here, Scoggins wholly failed to submit any certificate of expert consultation with the filing of his Complaint or any certificate whatsoever. (R. 7-13). Scoggins did, however, submit a "Certificate of Res Ipsa Loquitor" on September 26, 2006 - more than seven months after the filing of the Complaint and ***after*** BMH-DeSoto had filed its Motion for Summary Judgment and pointed out Scoggins' deficiency under Miss. Code Ann. § 11-1-58 . (R. 128). In any event, as noted by Judge Chamberlin, this certificate is also insufficient to meet the requirements of statute. First and foremost, § 11-1-58(3) requires such a "res ipsa" certificate to be filed ***with the Complaint*** and such a tardy filing by Scoggins in this case does not meet that statutory requirement. Walker v. Whitfield Nursing Center, Inc. 931 So. 2d 583, 589 (Miss. 2006) ("Clearly, Walker did not comply with the mandatory prerequisites of Miss. Code Ann. §§ 11-1-58(1)(a) when she filed her suit."). Moreover, the Certificate itself does not state that Scoggins is solely relying upon the doctrine of *res ipsa*, but instead offered several theories in the alternative. According to the certificate itself, Scoggins' theories of recovery were that BMH-DeSoto was negligent in failing to:

a. Properly train and inform it's employees in the use of the cautery machine;

b. Properly maintain the cautery machine in good working condition;

c. Properly maintain the power surges in the hospital; or

d. The cautery machine was defective and malfunctioned.

(R. 128-129).

Because Scoggins failed to comply with the provisions of Miss. Code Ann. § 11-1-58, summary judgment was properly granted by Judge Chamberlin. This is so regardless of whether Scoggins' claims are properly pursued under a theory of *res ipsa loquitor* or otherwise.

2. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE SCOGGINS FAILED TO TIMELY RESPOND TO REQUESTS FOR ADMISSION AND THOSE MATTERS WERE CONCLUSIVELY ESTABLISHED

On February 13, 2006, as part of its initial written discovery, BMH-DeSoto and Randy King propounded Requests for Admission upon Mr. Scoggins pursuant to Miss. R. Civ. P. 36. (R. 40-42). Included were requests for admission that went to the heart of this case. (R. 41-42). Having received no response to any of their discovery requests - including the requests for admission - BMH-DeSoto filed their Motion for Summary Judgment on June 23, 2006 and argued as one of the grounds for relief the matters which had been "deemed admitted" by virtue of Scoggin's failure to respond.

A. REQUESTS FOR ADMISSION, GENERALLY

Rule 36(a) of the Mississippi Rules of Civil Procedure provides that where a party

> does not respond to requests for admission within thirty days, the requests are deemed admitted. The admission conclusively establishes the matter for the pending litigation unless the trial judge allows withdrawal or amendment. M.R.C.P. 36. . . . . pursuant to Rule 36(a), these requests were deemed admitted unless the chancellor permitted amendment or withdrawal. *Id.* The rule is enforced according to its terms. *Martin v. Simmons,* 571 So. 2d 254, 256 (Miss.1990).

Williams v. Estate of Williams ex rel. Fairley 2006 WL 2530398, *3 (Miss. App. 2006)

> In the above cited cases, no justifiable excuse was given for the defaulting party's failing to respond within the time allowed by Rule 36(a). In the instant case, Langley's failure to comply within the time allowed was explained to the trial court's satisfaction by counsel's illness. However, the trial court was within its discretion in also considering counsel's neglect of the situation after his illness had resolved and he had returned to work. When a party is in default under Rule 36(a), the trial court and the requesting party should not have to wait indefinitely for the defaulter to serve the responses, to file a motion for an extension of time pursuant to Rule 6(b)(2), to file a Rule 36(b) motion to withdraw, or to take other action to attempt to rectify the default. Rather, it is within the court's broad discretion concerning discovery matters to consider a party's failure, after the illness or other justifiable impediment to responding has ended, to make a reasonably timely effort to correct the default.

Langley ex rel. Langley v. Miles, 2006 WL 2807164, *4 (Miss. App. 2006)

B. ADMISSIONS IN THIS CASE

Scoggins did not respond to the Requests for Admission propounded upon him within thirty (30) days and therefore all of those matters were "deemed admitted." Miss. R. Civ. P. 36. In fact, Scoggins did not file any response to the requests for admissions until after the undersigned counsel filed a Motion for Summary Judgment and included

the admissions as a basis for relief. (R. 28-31). Even so, the responses came four (4) months late.

While the Appellee understands the statements of opposing counsel regarding family illness and the passing of close family members during the year previous to the service of the Requests for Admission, the essential reason offered by Scoggins' counsel for the failure to respond was that "when discovery arrived at the office, it was simply placed in the physical file and was not noted in the electronic calendar system, and was therefore not diaried to make sure that discovery was timely filed." (R. 56). As such, Judge Chamberlin did not abuse his discretion in binding Scoggins to the matters which had been "deemed admitted." See, e.g., Sanders v. Robertson, 2007 WL 1121466, *3 (Miss. App. 2007) ("simple inadvertence or mistake of counsel" does not constitute excusable neglect.); Bacou-Dalloz Safety, Inc. v. Hall 938 So. 2d 820, 823 (Miss. 2006) (same).

3. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE SCOGGINS FAILED TO COME FORWARD WITH EXPERT TESTIMONY IN SUPPORT OF HIS CLAIMS

A. NEED FOR EXPERT MEDICAL TESTIMONY IN MEDICAL MALPRACTICE CASES

In a claim for medical or surgical negligence, the traditional four elements of duty, breach, causation, and damages apply. Phillips v. Hull, 516 So. 2d 488, 491 (Miss. 1987). In order to prevail, a plaintiff was required to establish (1) the standard of care applicable

to the BMH-D nurses; (2) the specific manner in which the BMH-D nurses deviated from the standard of care; (3) that the deviation from the standard of care caused plaintiffs' injuries; and (4) damages. Brown v. Baptist Memorial Hospital-DeSoto, Inc., 806 So. 2d 1131 (Miss. 2002); Powell v. Methodist Health Care-Jackson Hosp., 856 So. 2d 353 (Miss. App. 2003). A medical malpractice Plaintiff is required to come forward with sufficient expert medical testimony:

> From the very moment the suit was filed it was known that an expert witness would be needed to survive summary judgment, for ***it is our general rule that in a medical malpractice action negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care***.

Brooks v. Roberts, 882 So. 2d 229, 232 (Miss. 2004) (emphasis added) (citing Sheffield v. Goodwin, 740 So. 2d 854, 858 (Miss. 1999)).

> [A]ssuming we are in an area not within the common knowledge of laymen, absent expert medical testimony which (a) articulates the duty of care a physician owes to a *particular* patient under the circumstances and (b) identifies *the particular(s)* wherein the physician breached that duty ***and caused injury*** to the plaintiff patient, a plaintiff's claim for negligence . . . must fail.

Phillips, 516 So. 2d at 491; see also Potter v. Hopper, 2005 Miss. App. LEXIS 32, *7 (Miss. App. January 11, 2005) (emphasis added). Moreso than any of Scoggins' failures in this case, he failed to come forward with any proof of expert testimony to support his claims. For this reason, his claims were fatally flawed and were properly dismissed by Judge Chamberlin.

Scoggins argues to this Court that expert testimony is not required to prevail on his claims and further argues that he is entitled to utlize the doctrine of *res ipsa loquitor* to establish his claims. Yet, this matter does not "speak for itself." If it did, then Mr. Scoggins would have had no need for multiple, alternative theories for his case, including a claim that the cautery machine neither designed nor manufactured by the Appellees was defective. (R. 129).

> [T[he doctrine of res ipsa loquitur should be cautiously applied. *Powell v. Methodist Health Care-Jackson Hosps.*, 876 So. 2d 347, 349 (¶¶ 7) (Miss.2004) (citing *Winters v. Wright,* 869 So. 2d 357, 363 (Miss.2003)). "A jury may not presume negligence because of the untoward results of surgery." *Latham v. Hayes,* 495 So. 2d 453, 459 (Miss.1986) (citing *Ross v. Hodges,* 234 So. 2d 905, 909 (Miss.1970)). The elements of res ipsa loquitur require that:
>
> 1) the instrumentality causing the damage must be under the exclusive control of the defendant,
> 2) the occurrence must be such as in the ordinary course of things would not happen if those in control of the instrumentality used proper care, and
> 3) the occurrence must not be due to any voluntary act on the part of the plaintiff.
>
> Coleman v. Rice, 706 So. 2d 696, 698 (¶¶ 10) (Miss.1997) (citing *Read v. Southern Pine Electric Power Ass'n,* 515 So. 2d 916, 920 (Miss.1987)). The Mississippi Supreme Court has outlined the proper role of res ipsa loquitur in the context of medical negligence:
>
> > The real question, generally, is whether or not in the process of the operation any *extraordinary incident or unusual event,* outside of the routine of the action of its performance, occurred, and beyond the regular scope of its customary professional activity in such operations, which, if unexplained, would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequence.

Powell, 876 So. 2d at 349 (¶¶ 7) (emphasis added) (citing *Winters v. Wright,* 869 So. 2d 357, 363 (¶¶ 12) (Miss.2003)).

Holt v. Summers, 942 So. 2d 284, 289 (Miss. App. 2006).

> **The caution the court is to exercise in applying the doctrine, however, demands that something more than mere assertion be present before finding *res ipsa loquitur.***

Sports Page Inc. v. Punzo, 900 So. 2d 1193, 1202 (Miss. App. 2004) (emphasis added).

It is important to note that the *res ipsa* doctrine does not excuse the Plaintiff from his obligation to come forward with proof in support of his claims.

> **[*Res ipsa loquitur*] (1) has no operation to excuse or dispense with definite proof, by the plaintiff, of material facts which are tangible and are capable of direct and specific evidence, as much within the power of plaintiff to produce as of the defendant;** and (2) it is available to establish negligence on the part of the defendant only when the accident is such that, according to ordinary human experience, it could not have happened without such negligence; from which it follows that the doctrine does not apply when, upon the whole case, there has been specific proof which discloses some reasonable explanation for the happening other than the negligence charged against the defendant.

Sports Page Inc. v. Punzo 900 So. 2d 1193, 1202 (Miss. App. 2004) (emphasis added); Winters v. Wright, 869 So. 2d 357, 364 (¶¶ 15) (Miss.2003). Because of this, expert testimony can be necessary even to establish the elements of res ipsa. See, e.g., Butler v. Upchurch Telecommunications & Alarms, Inc. 946 So. 2d 387, 390 (Miss. App. 2006) (use of electrical engineering expert regarding claim of shock from PA system).

2. Evidence In This Case

As noted, *res ipsa loquitur* can apply only when the instrument of the event is in the sole control of the defendant. Dillon v. Greenbriar Digging Service, Ltd. 919 So. 2d 172, 178 (Miss. App. 2005); Phillips v. Illinois Cent. R.R. Co., 797 So. 2d 231, 236(¶¶ 9) (Miss. Ct. App.2000). According to the very allegations of the Complaint, however, this incident occurred while the cautery machine was being utilized by Dr. Remak - who is not an employee of BMH-DeSoto and was not named as a defendant in this case. (R. 9). Mr. Scoggins argues that this "control" element can be met when "authority is shared regarding the instrumentality in question." Coleman v. Rice, 706 So. 2d 696, 698 (Miss. 1997). Of course, Scoggins conveniently leaves out the portion of Coleman that limits this principle to shared control *among the defendants to the action*:

> Additionally, the requirement of "exclusive control" of the damaging instrumentality does not limit res ipsa loquitur ***to a single defendant***; the doctrine may be applicable where authority is shared concerning the instrumentality in question.

Coleman v. Rice, 706 So. 2d 696, 698 (Miss. 1997) (emphasis added). Coleman made this holding when discussing "shared control" between two physicians who jointly performed surgery upon the plaintiff and ***who were both defendants to the action***. Id.

This aspect of Coleman is consistent with a wealth of authority from around the country. See, e.g., Balfour v. Kimberly Home Health Care, Inc. 830 N.E.2d 145, 149 (Ind. App. 2005) ("Exclusive control may be shared control ***if multiple defendants each***

have a nondelegable duty to use due care.") (emphasis added); DiPilato v. H. Park Cent. Hotel, L.L.C. 17 A.D.3d 191, 193, 795 N.Y.S.2d 518, 520 (N.Y.A.D. 1 Dept. 2005) ("[T]he doctrine of res ipsa loquitur can be applied even when ***more than one defendant*** is in a position to exercise exclusive control.") (emphasis added); Qualls v. U.S. Elevator Corp. 863 P.2d 457, 463 (Ok. 1993) ("Other jurisdictions have held res ipsa loquitur invocable ***against two or more defendants exercising joint or successive control*** of the instrumentality causing the injury.") (emphasis added) (citing cases).

Here, Dr. Remak is not a defendant and Scoggins himself states in his brief to this Court that he "has not challenged any medical process, procedure or knowledge of any physician or surgeon." Appellant's Brief, p. 14. Because Dr. Remak was operating the machine at the time as the surgeon, BMH-DeSoto cannot be said to have had "exclusive" control of the cautery machine during Scoggins' polyp removal procedure.

Moreover, Scoggins did not demonstrate to Judge Chamberlin the second element of ***res ipsa***, specifically that "the occurrence must be such as in the ordinary course of things would not happen if those in control of the instrumentality used proper care." Scoggins' only argument in this regard is that this element is "self evident." Yet, Scoggins did not present any evidence regarding the machine itself to the Court. Whether electrical surges during the use of devices such as this one can happen in the absence of negligence by the hospital or nurses - as opposed to the surgeon performing the procedure - is itself a matter of expert testimony and beyond the purview of a layman. Here, such

testimony would have to come from an electrical engineer or perhaps some person skilled in the operation and maintenance of such a machine. Scoggins presented no such proof and did not carry his burden to establish this element of *res ipsa*.

This case simply does not present an appropriate fact situation for the application of the doctrine. Because the use of a surgical machine has so many potential causes of failure, manufacturing defect or misuse, the doctrine is simply unworkable

> A *res ipsa loquitur* analysis is ill-suited to this and most product cases involving the use of medical devices.

Enlow v. St. Jude Medical, Inc. 327 F. Supp.2d 738, 743 (W.D. Ky. 2003). Indeed, at least one other Court has addressed similar situations involving burns from cautery devices and specifically found the res ipsa doctrine inapplicable. Tramontin v. Glass, 668 So. 2d 1252 (La. Ct. App. 1996) ("*res ipsa loquitur* was not a doctrine applicable here.")

VII. CONCLUSION

Randy King, as hospital administrator, owed no individual duty of care to Mr. Scoggins as a patient of BMH-DeSoto. Further, Mr. Scoggins failed to comply with statute requirements for a medical malpractice action, failed to timely respond to requests for admissions which go to the heart of this case and failed to support his claims with expert testimony. As such, Judge Chamberlin properly granted summary judgment in this case and his decision should be affirmed by this Court.