IN THE SUPREME COURT OF MISSISSIPPI,
AT JACKSON

DAVID SCOGGINS,

Plaintiff/Appellant,

vs.

APPEAL NO. 2006-CA-02004

BAPTIST MEMORIAL HOSPITAL DESOTO,

Defendant/Appellee.

PLAINTIFF'S APPEAL AGAINST THE ORDER IN CIVIL NO. CV2006-0005CD DATED 10/26/2006 PASSED BY THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI, FOR THE SEVENTEENTH JUDICIAL DISTRICT AT HERNANDO, GRANTING SUMMARY JUDGMENT TO THE DEFENDANT, BAPTIST MEMORIAL HOSPITAL DESOTO

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

DAVID SCOGGINS,

Plaintiff/Appellant,

vs.

APPEAL NO. 2006-CA-02004

BAPTIST MEMORIAL HOSPITAL DESOTO,

Defendant/Appellee.

The undersigned attorney of record certifies that the following listed persons have an intrest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Plaintiff David Scoggins:
Plaintiff Attorney: John Michael Bailey:

Defendant Baptist Memorial Hospital DeSoto
Defendant Attorney: John H. Dunbar

John Michael Bailey (MBN [redacted])
Attorney of Record for Plaintiff
David Scoggins

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SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction in the Supreme Court of Mississippi is conferred by virtue of Miss. Code Ann § 9-3-9. This appeal is from an order granting Defendant's Motion for Summary Judgment passed by the Circuit Court of DeSoto County, Mississippi, for the Seventeenth Judicial District at Hernando and is taken pursuant to Miss. Code Ann § 11-51-3 and MS R RAP Rule 16 (a).

STATEMENT OF THE ISSUES

1. Whether the Learned Trial Judge erred in granting the Defendant's Motion for Summary Judgment in that there were questions of material fact presented ?

2. Whether the Learned Trial Judge erred in granting the Defendant's Motion for Summary Judgment in that the Plaintiff had alleged negligence in the maintenance of the electrical system of the hospital would clearly not arise out of the course of medical surgical or other professional services?

3. Whether the Learned Trial Judge erred in granting the Defendant's Motion for Summary Judgment in holding that a certificate of consultation and/or expert testimony was necessary?

4. Whether the Learned Trial Judge erred in granting the Defendant's Motion for Summary Judgment in holding that the Plaintiff had not carried his burden regarding the certificate of Res Ipsa Loquitur?

5. Whether the Learned Trial Judge erred in granting the Defendant's Motion for Summary Judgment when the Plaintiff had Motions pending but unheard regarding the matters ultimately ruled upon by the Learned Trial Judge?

6. Whether the Learned Trial Judge erred in granting the Defendant's Motion for Summary Judgment when the Plaintiff had pending Discovery, which was timely under the Agreed Scheduling Order entered in the cause?

7. Whether the Learned Trial Judge erred in granting the Defendant's Motion for Summary Judgment in holding that the Requests for Admissions were deemed admitted?

STATEMENT OF THE CASE

On October 26, 2006, the Learned Trial Judge of the Circuit Court, DeSoto County, Mississippi, heard the Defendant's Motion for Summary Judgment and held that Plaintiff/Appellant did not respond to the requests for admissions on time and did not ask for the admissions to be withdrawn, hence, matters were conclusively established and Motion, by law, was granted pursuant to MISS. CODE ANN 11-1-58(1)(b). By holding that the case of the Appellant was a medical malpractice claim, the court held that the Appellant failed to present expert testimony to rebut the Motion and the appellant had not set forth proof of the elements of res ipsa loquitur.

STATEMENT OF CAUSE OF ACTION

The cause of action arose in tort as a result of injuries the Plaintiff/Appellant sustained when as a patient undergoing a routine Colonoscopy at Baptist DeSoto, the cauterizing machine malfunctioned, tearing a hole in the colon and abdominal wall of the Appellant, known as an intestinal perforation, causing extremely grievous and permanent injury.

STATEMENTS OF THE FACTS

That on or about June 22, 2004, Appellant checked in to Baptist DeSoto, for a scheduled medical procedure known as a Colonoscopy, to have polyps removed from the surface of the colon. That Appellant was prepared for surgery, and in the course of this preparation, he was placed on surgical table and was rendered unconscious by general

anesthesia. During the procedure, the attending surgeon was using a cauterizing machine to "burn" polyps from the surface of the Appellant's colon. The attending surgeon, according to written medical narratives, asked the nurse to adjust this machine, at which time, the machine created a jolt of electricity, comparable to a lightning strike, into the colon of the Appellant. The electric shock burned a hole into Appellant's colon, causing him to suffer a respiratory arrest and failure, erratic heart rates and an extended stay under intensive care on a ventilator for breathing support, and a feeding tube inserted into his stomach. In addition, the Appellant was required, as part of efforts to save his life, to undergo an additional surgical procedure to repair the perforated colon, leaving the appellant with a scar from his chest to his waist. The Appellant has also been left with a cognitive deficit, including memory loss, from which he may never fully recover.

SUMMARY OF THE ARGUMENT

The Learned Trial Judge erred in holding that this matter was a medical malpractice case as opposed to a standard electrical negligence case. The Learned Trial Judge erred in granting the Motion for Summary Judgment when the Plaintiff had in fact raised issues of material fact. The Learned Trial Judge erred in ruling that the requests for admissions were irrevocably admitted. The Learned Trial Judge erred in granting the Motion for Summary Judgment when the period for discovery was open under the scheduling Order and the Plaintiff had several Motions pending.

ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THAT THERE WERE QUESTIONS OF MATERIAL FACT PRESENTED.

Standard of Review:

The appellate court conducts de novo review of Summary Judgments entered by lower courts to determine whether genuine issues of material fact exist. In doing so, the non-movant

is given the benefit of all reasonable inferences and interpretations, which the facts may support. See ***Dennis v. Searle***, 457 So.2d 941, 944 (Miss.1984). If the appellate court finds that issues of material fact exist, or if the undisputed facts can support more than one interpretation, the appellate court can reverse the order. See ***Clark v. St. Dominic-Jackson Memorial Hosp.***, 660 So.2d 970, (Miss.,1995.)

In conducting review of trial court's grant of a Motion for Summary Judgment, evidence must be viewed in the light most favorable to the non-moving party. Party moving for Summary Judgment carries the burden of demonstrating that no genuine issue of material fact exists. See ***Chisolm v. Mississippi Dept. of Transp***., 942 So.2d 136, (Miss., 2006.)

The Supreme Court in ***Hammond v. Grissom,*** 470 So.2d 1049 (Miss.,1985) held that the trial court is required to give Plaintiff the benefit of all reasonable favorable inferences that may be drawn from the pleadings, and the same view of the evidence must be taken by the appellate court when the granting of directed verdict has been assigned as error on appeal.

Summary Judgment Was Inappropriate:

The Appellant while undergoing colonoscopy to have polyps removed from the surface of the colon sustained intestinal perforation due to the malfunction of a cauterizing machine, which created a sudden jolt of electricity. The Appellee and its surgical nurses were under a duty to use reasonable care under the circumstances to discover any condition or defect in or with equipment used for patient care and treatment that may have posed a danger to patients, to use reasonable care to maintain their equipment and electrical system and to warn patients of any dangerous condition on the premises, or with their equipment of which they were aware, or in the exercise of reasonable care, should have known existed, and posed a risk of harm, to take every precaution to ensure that all equipment used on the patients was in safe working order and train their nurses and technical staff to use the equipment properly.

The Learned Trial Judge erred in granting the Motion for Summary Judgment since the cause of the Appellant involved questions of material facts. The Appellant opposed the Motion for Summary Judgment in the matter by raising substantive factual issues to be

decided by the jury. The Motion for Summary Judgment moved by the Appellee was in error in terms of fact as well as in the application of law. The complaint and discovery answers were very clear that this is a standard negligence case and not a medical malpractice claim. When there was dispute about the "fact" whether this is a standard negligence or medical malpractice case, the same should not have been decided summarily. The Learned Trial Judge erred in its reasoning to hold that this a medical malpractice case.

It is undisputed that (1) the Appellant had been to Appellee Hospital for routine colonoscopy. (2) The Appellant suffered intestinal perforation while undergoing treatment under general anesthesia. (3) The Appellant was completely under the control of Appellee and its staff, and (4) the Appellee failed to explain why the Appellant sustained this injury, which ordinarily would not occur while doing the procedure of colonoscopy.

The Learned Trial Judge not only erred in finding that there was no genuine issue of material fact, but also erroneously held that the Appellant has to explain how he sustained an injury while undergoing treatment. The law is quite clear that where the thing or matter in controversy is shown to be under the management of the Appellee, or its agents, and where an accident in the ordinary course of events does not happen when business is properly conducted, the accident itself, if it happens, raises a presumption of negligence in the absence of any explanation. See ***Sanders v. Smith***, 200 Miss. 551, 557, 27 So.2d 889, 891 (1946). The fault rests upon the Appellee, and it's machines and electrical system and supply, as the Appellant was under the exclusive control of the Baptist DeSoto, while sustaining the injury. See ***Trustmark Nat. Bank v. Jeff Anderson Regional Medical Center,*** 792 So.2d 267, (Miss.App.,2000.)

As well the issue of control of the machines and electrical system and supply is an issue of fact that should have been decided by the jury. See ***Winters v. Wright***, 869 So.2d 357, (Miss.,2003.) Whether the inferences that the hospital was negligent should be drawn from the patient's testimony should be accepted or whether evidence of hospital should be believed, are questions for jury. See ***General Benev. Ass'n v. Fowler,*** 210 Miss. 578, 50 So.2d 137, (Miss. 1951.) It is self evident that an injury of this nature does not occur but for someone's negligence.

A fact is "material," for Summary Judgment purposes, if it tends to resolve any of the issues, properly raised by the parties. See ***Moss v. Batesville Casket Co., Inc.***, 935 So.2d 393, (Miss., 2006.) All that is needed for a nonmoving party to survive a Motion for Summary Judgment is to demonstrate that a genuine issue of material fact exists. It need not prove all of the elements of its case. See ***Flores v. Elmer***, 938 So.2d 824, (Miss.,2006.) In the case before this Honorable Court, the Appellant did raise issues of material fact. The evidence must be viewed in the light most favorable to the party against whom the Motion has been made. Issues of fact sufficient to require denial of a Motion for Summary Judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. That is, the non-movant should be given the benefit of the doubt. See ***Partin v. North Mississippi Medical Center, Inc.***, 929 So.2d 924, (Miss.App.,2005); ***Austin v. Baptist Memorial Hospital-North Mississippi*** 768 So.2d 929 (Miss.App.,2000).

The existence of a genuine issue of material fact will preclude Summary Judgment. Where material facts are disputed, or where different interpretations or inferences may be drawn from undisputed material facts, Summary Judgment is inappropriate. See ***Rankin v. Clements Cadillac, Inc.***, 903 So.2d 749, (Miss.,2005). Summary Judgment is inappropriate where there are undisputed facts, which are susceptible to more than one interpretation. See ***Johnson v. City of Cleveland***, 2003 WL 21232064, (Miss.,2003).

Motions for Summary Judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the Motion. If there is doubt as to whether or not a fact issue exists, it should be resolved in favor of the non-moving party. See ***Wilkins v. Bloodsaw***, 850 So.2d 185, (Miss.App.,2003); ***Burton v. Choctaw County***, 730 So.2d 1, (Miss.,1997).

In considering Motion for Summary Judgment, lower court must take as true those allegations, which are well pleaded; considering these and any defenses which have been raised. See ***McFadden v. State***, 580 So.2d 1210, (Miss.,1991).

The facts of the following cases are similar to the case subjudice, wherein, the courts have held that genuine issue of material facts exist precluding the Motion for Summary Judgment. They are: (1) the question as to whether the patient suffered more physically and

incurred more expense from the failures of the nursing staff at a health center. See ***Richardson v. Methodist Hosp. of Hattiesburg, Inc.***, 807 So.2d 1244, (Miss.,2002); (2) whether the school receptionist suffered electric shock due to school public address (PA) system or frayed electrical cord on fan precluded Summary Judgment for companies that manufactured, maintained, and repaired the PA system. See ***Butler v. Upchurch Telecommunications & Alarms, Inc.***, 2006 WL 1320598, (Miss.App.,2006); (3) whether the medical center breached its duty to protect patient from exposure to diseases by negligently allowing or causing medically recognized instrument to come into physical contact with patient. See ***South Central Regional Medical Center v. Pickering,*** 749 So.2d 95, (Miss.,1999); (4) whether the alleged failure of hospital's nursing staff to monitor patient's blood sugar level, even though there was standing order authorizing nurses to do so without order from physician. See ***Erby v. North Mississippi Medical Center,*** 654 So.2d 495, (Miss.,1995) and (5) whether physician's negligence proximately caused patient to suffer greater and more expensive treatment for infection of surgical wound. See *Drummond v. Buckley*, 627 So.2d 264, Miss.,1993.

2. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE PLAINTIFF HAD ALLEGED NEGLIGENCE IN THE MAINTENANCE OF THE ELECTRICAL SYSTEM OF THE HOSPITAL WOULD CLEARLY NOT ARISE OUT OF THE COURSE OF MEDICAL SURGICAL OR OTHER PROFESSIONAL SERVICES.

3. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN HOLDING THAT A CERTIFICATE OF CONSULTATION AND/OR EXPERT TESTIMONY WAS NECESSARY.

The Learned Trial Judge erred in holding that this a medical malpractice claim, and that hence, the certificate of expert consultation was necessary as provided under Miss. Code Ann. § 11-1-58. The findings of the Court that the Appellant failed to produce expert testimony to rebut the Motion are entirely misplaced and inapplicable in the facts of this case.

The case of the Appellant is that he underwent a colonoscopy procedure at the Appellee hospital attended by two nurses and a surgeon. In the surgical process, a cautery

machine was used. The surgeon instructed the nurses to move the machine. At that point of time it discharged an extremely high voltage of electricity. The Appellant was attached and in contact with the machine for the surgical process. As a result of which the Appellant suffered severe injuries, while he was unconscious in the operation theater. The cause of it was either the malfunctioning of the cautery machine or other electrical defect along with the negligent handling of the machine by the nurses. The events at the time of the Appellant's operation are detailed in the medical narrative. The Appellee Hospital and its nurses who were trained to operate the machine are squarely liable for the severe injuries suffered by the appellant, as they had a duty to ensure the safety of each patient in the premises. It is held in ***Boyd v. Lynch***, 493 So.2d 1315, (Miss.,1986) that "Hospital may be liable for injuries patient sustains either as result of hospital's own negligence, or as result of negligence of its health care personnel."

The Appellant has not averred in his complaint that he suffered injuries due to a lack of medical skill of the surgeon. The medicinal or surgical procedure involved in the treatment of the Appellant is not in issue in this case. The Appellant has not challenged any medical process, procedure or knowledge of any physician or surgeon. In fact, the surgeon operating upon the Plaintiff is not a party to the complaint. According to Miss. Code Ann. § 11-1-58(1), the expert's certificate is required only when the case cannot be proved without expert testimony. If the negligence is in common man's understanding as matter of common sense and practical experience, the expert testimony is not necessary. See ***Walker v. Skiwski,*** 529 So.2d 184, (Miss.,1988); ***Erby v. North Mississippi Medical Center,*** 654 So.2d 495, (Miss.,1995). In medical malpractice cases, negligence may be established without expert testimony in case where negligence or want of skill is so obvious as to dispense with need for expert testimony. See ***Duling v. Bluefield Sanitarium, Inc.***, 149 W.Va. 567, 142 S.E.2d 754, (W.Va. 1965.)

The cause of action in this case arises on account of the negligence of the Appellee in not maintaining it's electrical system or supply and its nurses in using a faulty machine, or a machine which had been wrongly or negligently calibrated. The proximate cause of the injuries suffered is self-evident. When the internal organs of the Appellant were exposed to

severe and uncontrolled electric shock, it is obvious that injuries to the organs will be the result.

The expert witness is required to provide aid and opinion with regard to complex technical issues, which would assist the court and the jury to understand and decide the issues involved, as the complexity and technicality may not be comprehensible by the layman. Testimony by expert witnesses are described in the Mississippi Rules of Evidence, Rule 702 which states that,

> " If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

It is pertinent to mention that in this case, there is no issue involved which requires the expert opinion of a medical practitioner. In terms of the Mississippi Rules of Evidence, Rule 702 the expert witness qualify as an expert by knowledge, skill, experience, training, or education. By his/her knowledge, skill, experience, training, or education the expert should be able to throw light on the issue in dispute in the form of opinion or otherwise. It is incomprehensible and impractical to call for an expert opinion on the issue of the Appellant suffering 'high voltage electric shock' in his internal organs. It is self evident that any 'high voltage electric shock' more so, in the sensitive internal organs of a surgical patient, will result in injury and proper standard of care demands that patient does not suffer uncontrolled high voltage electric shock while undergoing surgery. The case of the Appellant does not involve any complex question of medical science or procedure, which warrants the opinion of any expert. This is a standard negligence case and it rests on a cause of action, which a layman can appreciate without any formal training in medical or other sciences.

It was decided by the Supreme Court in ***Hammond v. Grissom***, 470 So.2d 1049 (Miss.,1985) that, "matters which are within the common knowledge of laymen are exceptions to the rule that expert medical testimony is required in medical malpractice case." Also see ***Austin v. Baptist Memorial Hospital-North Mississippi,*** 768 So.2d 929 (Miss.App.,2000).

In this case there is no claim for negligent performance of complex or complicated

diagnostics or surgical procedures. It is a clear and unambiguous issue of a patient suffering electric shock in the operation theater due to malfunction of a machine or the electric equipment or electrical system or supply. So, this case issue is squarely on point with the matter of ***Hammond v. Grissom***, 470 So.2d 1049 (Miss.,1985). In the circumstances of that case the court held that,

> "Plaintiffs' testimony, although largely non expert, along with medical records, and other evidence, were sufficient to carry medical malpractice case to the jury on issues of whether Defendants became aware, or in the exercise of ordinary care should have become aware, of the fact that patient had serious head injury and whether Defendants administered no meaningful treatment".

It has been recently decided by the Court of Appeals of Mississippi in ***Smith v. Gilmore Memorial Hosp.*** 2006 WL 1390554 (Miss.App.,2006) that,

> "expert testimony is not required in a medical malpractice action where the facts surrounding the alleged negligence are easily comprehensible to a jury". In the case the Court held that, "eye surgery patient, a minor, was not required topresent expert testimony, in opposition to hospital's Motion for summary judgment, that hospital breached its duty of care in failing to inform patient's mother that physician made surgical incision on wrong eye, since jury's determination of whether hospital breached duty required no special knowledge, but was merely factual in nature."

The Appellant has satisfied the four requirements contemplated in the above case, which say that the Plaintiff must show: (1) that the hospital had a duty to act in accord with the standard of care in order to prevent injury; (2) the hospital's failure to meet this standard of care; (3) that the hospital's breach of duty caused the injury; and (4) that the plaintiff suffered actual harm from the hospital's negligent conduct.

In this case, it hardly requires any special knowledge to determine whether hospital breached its duty by putting the Appellant through severe electric shock during surgical process on account of faulty cautery machine or electric equipment malfunction.

There were substantive issues of material fact to be decided by the Circuit Court regarding the liability of the Appellee and other Defendants and the breach of the duty of care they owed to their patient (Appellant) for their gross negligence in using faulty machinery and/or electrical equipment or electrical system or supply, which caused serious injuries to

the Appellant. Even if it is assumed that this is a medical malpractice case, the Motion cannot be granted. The Mississippi Supreme Court has ruled that in a medical malpractice action a layman may give testimony regarding purely factually matters thus avoiding Summary Judgment. See ***Kelley v. Frederic***, 573 So.2d 1385, 1388 (Miss.1990). Hence, the Learned Trial Judge erred in granting the Motion in favor of the Appellees.

4. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN HOLDING THAT THE PLAINTIFF HAD NOT CARRIED HIS BURDEN REGARDING THE CERTIFICATE OF RES IPSA LOQUITUR.

The Appellant alleged a standard negligence case in his complaint. Later, the Appellant amended his complaint to add the manufacturer of cautery machine as an additional Defendant. Along with the amended complaint, the Appellant's counsel filed his certificate of res ipsa loquitur based on Dr. Remak's operative report which states that a power surge occurred through a malfunction of the cautery machine. Hence, Appellee either failed to:

(i) Properly train and inform its employees in the use of the machine;
(ii) Properly maintain the cautery machine in good working condition;
(iii) Properly maintain the power surges within the hospital; or
(iv) The cautery machine was defective and malfunctioned.

The principles of "res ipsa loquitur" squarely apply to the present case. The cause of action in the case arises on account of the negligence of the Appellee and its nurses in using a machine or power surges, which with due care and diligence they ought to have taken. It is self evident that any 'high voltage electric shock' more so, in the sensitive internal organs of a surgical patient, will result in injury and proper standard of care demands that patient does not suffer uncontrolled high voltage electric shock while undergoing surgery. The court in ***Norville v. Mississippi State Medical Ass'n,*** 364 So.2d 1084, (Miss.,1978)., explained about the use of electrically operated surgical instrument as follows:

"Electricity is a dangerous instrumentality with the ever-present capacity todo serious bodily harm unless restrained within proper limitations. It is essential that its use as applied to the human body should be under the direction of

authorized persons.... Such machines are capable of causing bodilyharm and can be dangerous if improperly used."

In this case the fact that the Appellant suffered high voltage electric shock at the time of being operated upon hardly requires any qualification from an expert. The event negligence speaks for itself. The court in ***Coleman v. Rice***, 706 So.2d 696 (Miss.,1997) held that, "object being left in patient during surgery presents suitable case for application of doctrine of res ipsa loquitur." The act of negligence on part of the Appellee and other Defendants is so egregious that it speaks for itself and the grave injurious nature of the negligence is evident to any person.

The principle of "res ipsa loquitur" was explained in ***Winters v. Wright***, 869 So.2d 357, Miss.,2003., as follows:

> "The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that 'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstances that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." (9 Wigmore, Evidence, 3d ed., § 2509, p. 382)

Doctrine of "res ipsa loquitur" is a rule of evidence that allows negligence to be inferred in certain fact situations. Res ipsa loquitur, raises an inference of negligence which must be rebutted, creating a genuine issue of fact. See ***Austin v. Baptist Memorial Hospital-North Mississippi,*** 768 So.2d 929, (Miss.App.,2000).

In the circumstances where the negligence is apparent the doctrine of res ipsa loquitur is applied as rule of evidence that allows negligence to be inferred in certain fact situations. Res ipsa loquitur requires a finding that (1) the instrumentality causing the injury was under the control and management of the defendant and (2) the occurrence resulting in the injury does not happen in the ordinary course of events, where due care has been exercised. (3) The plaintiff did not contribute his negligence. See ***Austin, Supra*** is undisputed fact that the

Appellee's nurses used the cautery machine for colonoscopy and it was under their control. Requirement of "exclusive control" of damaging instrumentality does not limit res ipsa loquitur to single defendant; doctrine may be applicable where authority is shared concerning instrumentality in question . See ***Coleman v. Rice,*** 706 So.2d 696, (Miss.,1997). It is also shown by the Appellant that due to negligent handling, the cautery machine malfunctioned and as result of sudden electrical jolt, the Appellant sustained injuries, otherwise, in ordinary course of events such injury would not have occurred. Further, the Appellant was completely under the control of the Appellee, as he was under general anesthesia. So, there cannot be any argument that the Appellant had also contributed negligence for his injuries. Thus Appellant has proved all the three elements as set out above. Hence, the findings of the Circuit Court that the Appellant had tacitly admitted the second element of res ipsa doctrine is not correct.

The findings of the Circuit Court that the Appellant did not assert that he is solely relying on res ipsa, but on the contrary, he lists alternative theories including product liability is contrary to law. The Mississippi Rules of Civil Procedure, Rule 8 (e) provides that a party to litigation may alternatively set forth two or more statement of claims, regardless of consistency.

5. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHEN THE PLAINTIFF HAD MOTIONS PENDING BUT UNHEARD REGARDING THE MATTERS ULTIMATELY RULED UPON BY THE LEARNED TRIAL JUDGE.

6. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHEN THE PLAINTIFF HAD PENDING DISCOVERY, WHICH WAS TIMELY UNDER THE AGREED SCHEDULING ORDER ENTERED IN THE CAUSE.

On January 11, 2006, the Appellant filed his complaint against the Appellee and others. On February 13, 2006, the Appellee propounded request for admission, request for production of documents and interrogatories to the Appellant. On June 26, 2006, the Appellee filed the Joint Motion for Summary Judgment. On July 13, 2006, the Appellant filed his

answers to the request for admissions, request for production of documents and interrogatories along with a Motion to allow late filing of discovery requests, explaining the reasons for delay in filing the same. On August 8, 2006, the appellee filed joint Motion to supplement the Motion for Summary Judgment to include notice of claim. On August 31, 2006, the Appellant filed his response to joint Motion for Summary Judgment. On September 11, 2006, the Appellee filed a rebuttal to the Appellant's response. On September 22, 2006, the Appellant filed an Amended Complaint adding the unknown manufacturer of the cautery machine as an additional Defendant. On September 25, 2006, the Appellant filed Attorney's Certificate of Res Ipsa Loquitur, Motion to enlarge the agreed scheduling order, Motion to inspect cautery machine and propounded request for admission, interrogatories and production of documents to the Appellee. On October 3, 2006, the Appellant filed his response to the rebuttal. On October 26, 2006, the Circuit Court granted Motion for Summary Judgment in favor of the Appellee.

The parties had filed agreed scheduling order agreeing to designate Appellant's expert on or before September 30, 2006, Appellee's expert on or before November 30, 2006, to compete all discovery on or before January 31, 2007 and to serve all Motions on or before February 28, 2007.

The Learned Trial Judge hastily granted the Motion in favor of Appellee. The Circuit Court prematurely ruled on Appellee's Motion before the Appellant could collect all the facts and before he could discover or analyze the importance and materiality of the information by his expert.

On July 13, 2006, the Appellant filed a Motion to allow his late filing of responses to the Appellee's request for admission, first set of interrogatories and request for production of documents. In the Motion, he has set forth the reasons, namely the terminal illnesses and subsequent deaths of both his father and his mother, which were beyond the control of his attorney to timely respond the discovery requests. There was no willfulness, bad faith or fault by the Appellant, but only inability to comply the discovery requests by the attorney for the Appellant. Looking at the gravity of the matters which confronted the attorney for the Appellant, the Circuit Court should have ruled upon this Motion before considering the Motion

for Summary Judgment. And while the attorney for the Appellant concedes that it was not a Motion to Withdraw Admissions Deemed Admitted, the intent and the result requested were the same, namely to strike the admitted responses and substitute them by the responses filed by the Appellant. Likewise, the Circuit Court also failed to consider the Motion filed by the Appellant to continue the hearing, which was filed on the ground that he could not record the deposition of his expert Dr.Geza Remak, as the said expert witness was out of the country for some time. The Learned Trial Judge should have continued the hearing for another date up to January 31, 2007, the date fixed under agreed scheduling order to complete the discovery. The premature ruling on the Motion for Summary Judgment amounts to a denial of the Appellant an opportunity to bring forth all the facts and thus denies to the Appellant the right to have all favorable inferences to be drawn in his favor.

Another ground urged in the Motion to continue hearing was that on September 22, 2006, the Appellant filed an amended complaint to implead the manufacturer of the cautery machine. Had the Learned Trial Judge waited for the responsive pleading of the manufacturer, additional issues of material fact would have come to light. Lastly the important reason for the continuation of hearing was the Appellant's Attorney's inability to attend to the Appellants case, as his parents were on their deathbeds and subsequently succumbed to their terminal illnesses.

On September 25, 2006, the Appellant also filed a Motion to inspect the cautery machine. This Motion was filed within the period prescribed in the agreed scheduling order. The failure of the Circuit Court to rule upon this Motion prevented the Appellant from bringing forth additional issues of material fact and denied all the Appellant all the favorable inferences to be drawn therefrom.

On September 25, 2006, the Appellant propounded request for admission, interrogatories and production of documents to the Appellee. The discovery request of the Appellant was also well within the time stipulated in the agreed scheduling order. The Learned Trial Judge violated MRCP Rule 56 (f) while hastily ruling on the Motion for Summary Judgment. Rule 56 (f) reads thus:

"Should it appear from the affidavits of a party opposing the Motion that the party

> cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Where the evidentiary matter in support of the Motion does not establish the absence of a genuine issue, Summary Judgment must be denied even if no opposing evidentiary matter is presented. And Summary Judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition. See *Advisory Committee Notes* (1963 Amendment).

In ***Wilner v. White***, 2006 WL 1350037, (Miss.,2006), the Supreme Court held that in considering a Motion for Summary Judgment, the court must examine all the evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, and affidavits." Also see ***McCullough v. Cook***, 679 So.2d 627, 630 (Miss.1996). But the Circuit court failed to grant reasonable time to the Appellant to put forth all these materials.

Pursuant to Rule 56(f), the court has the discretion to postpone consideration of a Motion for Summary Judgment and to order that discovery be completed. See ***Prescott v. Leaf River Forest Products, Inc.***, 740 So.2d 301, 307 (Miss.1999). The Appellant presented specific facts why he could not oppose the Motion and specifically demonstrated how postponement of a ruling on the Motion would enable him to rebut the movant's showing of the absence of a genuine issue of material fact." See ***Frye v. Southern Farm Bureau Cas. Ins. Co.***, 915 So.2d 486, (Miss.App.,2005). Despite showing specific reasons, the Circuit Court has failed to exercise its discretion in favor of the non-movant/ the Appellant.

Trial court prematurely ruled on Appellee's Motion for Summary Judgment when it ruled on Motion before pretrial discovery had been completed. Justice is served when a fair opportunity to oppose a Motion is provided, because consideration of a Motion for Summary Judgment requires a careful review by the trial court of all pertinent evidence in a light most favorable to the nonmovant. See ***Malone v. Aetna Cas. and Sur. Co.***, 583 So.2d 186, (Miss.,1991).

Rule 56(f), contemplates that completion of discovery in some instances is desirable

and necessary before court can determine that there are no genuine issues as to material facts. See ***Smith v. H.C. Bailey Companies***, 477 So.2d 224, (Miss.,1985).

It was inappropriate for the lower court to sustain Motion for Summary Judgment when the Appellant had discovery pending as well as Motions relating to discovery of facts. See ***Owen v. Pringle***, 621 So.2d 668, (Miss.,1993).

7. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN HOLDING THAT THE REQUESTS FOR ADMISSIONS WERE DEEMED ADMITTED.

The Circuit Court held that the request for admissions were deemed admitted for not filing the answers within 30 days and accordingly, it granted Motion for Summary Judgment. On February 13, 2006, the Appellee propounded the request for admission, request for production of documents and interrogatories. On July 13, 2006, the Appellant filed his answers to the request for admissions, request for production of documents and interrogatories along with a Motion to allow late filing of discovery requests. And while the attorney for the Appellant concedes that it was not a Motion to Withdraw Admissions Deemed Admitted, the intent and the result requested were the same, namely to strike the admitted responses and substitute them by the responses filed by the Appellant. In the Motion, the Appellant had set forth the reasons, which were beyond the control of his attorney to timely respond the discovery requests. Specifically, that the parents of the counsel for the Appellant were under constant treatment for cancer and he lost his father on March 1, 2006 and his mother on August 10, 2006. Because of the constant care that each individual parent required, counsel for the Appellant was personally at the hospital or the home of the parents caring for his parents on a daily basis and during this time many tasks, which would have been performed as a matter of course on a routine basis, could not be done. There was no willfulness, bad faith or fault by the Appellant, but only inability to comply the discovery requests by the attorney for the Appellant. But the Circuit Court without ruling upon the Motion to allow late filing of discovery requests, straight away proceeded to rule upon the Motion for

Summary Judgment. Any request for admissions to which a response, objection or Motion for time has not been filed before the thirty-first day should not be taken as irrevocably admitted. Necessary and practicable leniency should be given based upon the circumstances, which are beyond the control of the parties. When the Appellant had given proper explanation or excuse for not answering the request for admissions in time, the Circuit Court should not have taken that the request for admissions are deemed admitted. See ***Educational Placement Services v. Wilson,*** 487 So.2d 1316, (Miss.,1986).

In ***Earwood v. Reeves,*** 798 So.2d 508, (Miss.,2001)., the Court held that for compelling reasons, the courts are allowed to disregard M.R.C.P. 36 regarding the set time for responding to requests for admissions. It is further held that a trial court may hold that an untimely response does not constitute a deemed admission because the trial court has broad discretion in pretrial matters. Dismissal for the delay in filing discovery responses is abuse of discretion. See ***Vosbein v. Bellias***, 866 So.2d 489, 492 (Miss.Ct.App.2004).

While opining that the trial courts have broad discretion to hold that an untimely response does not constitute a deemed admission, the court held in ***Earwood v. Reeves***, 798 So.2d 508, Miss.,2001., as follows:

> "We are compelled to acknowledge the adage that rules are promulgated for a purpose, this being precisely an instance in which that principle applies. Mechanisms exist whereby a trial court may hold that an untimely response does not constitute a deemed admission because the trial court has broad discretion in pretrial matters."

Four factors guide appropriateness of a dismissal with prejudice for a discovery violation:

(1) Dismissal is authorized only when the failure to comply with the court's order results from willfulness or bad faith, and not from the inability to comply;

(2) Dismissal is proper only where the deterrent value cannot be substantially achieved by the use of less drastic sanctions;

(3) Whether the other party's preparation for trial was substantially prejudiced; and

(4) Dismissal may be inappropriate when neglect is plainly attributable to an attorney, rather than a blameless client, or when a party's simplenegligence is grounded in confusion or sincere misunderstanding of the court's orders. See ***Ngo v. Centennial Ins. Co.***, 893 So.2d 1076, (Miss.App.,2005); ***Smith v.***

Tougaloo College, 805 So.2d 633, (Miss.App.,2002).

In ***Langley ex rel. Langley v. Miles***, 2006 WL 2807164, (Miss.App.,2006), the court held;

> "Regarding requests for admissions, a certain amount of discretion is vested in the trial judge with respect to whether he or she will take matters as admitted."

In ***Read v. Southern Pine Elec. Power Ass'n***, 515 So.2d 916, (Miss.,1987)., the Supreme Court of Mississippi held as follows;

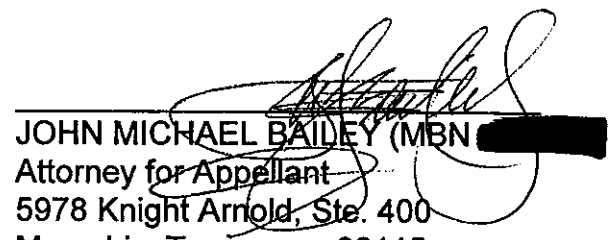
> "If the failure to comply is because of inability to comply, rather than because of willfulness, bad faith, or any fault of the party, the action may not be dismissed, nor a default judgment given, and less severe sanctions are the most that can be invoked."

The Circuit Court held that the Appellant did not file any Motion for withdrawal of the deemed admissions. Under Miss.R.Civ.P.36 (b), the Circuit Court had wide discretion to permit the Appellant to withdraw the deemed admissions. The Appellee did not show to the court that withdrawal would prejudice them in maintaining its action or defense on merits. Hence, there were no compelling reasons for the Circuit Court to fail to grant relief to the Appellant by treating the Motion for late filing of discoveries as Motion for withdrawal. While the Rule of Civil Procedure governing requests for admissions is to be applied as written, it is not intended to be applied in Draconian fashion, and thus if the Rule may sometimes seem harsh in its application, the harshness may be ameliorated by the trial court's power to grant amendments or withdrawals of admissions in proper circumstances. See ***DeBlanc v. Stancil***, 814 So.2d 796, Miss.,2002.

CONCLUSION

WHEREFORE, Appellant prays that the appeal may be allowed and the Appellee's Motion for Summary Judgment be overruled and dismissed.

Respectfully Submitted,
THE LAW OFFICE OF
JOHN MICHAEL BAILEY



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CERTIFICATE OF SERVICE

I, John Michael Bailey, Attorney for Appellant, certify that I have this day served a copy of the following by United States mail with postage prepaid on the following persons at these addresses:

John H. Dunbar
DUNBAR & ASSOCIATES, PLLC
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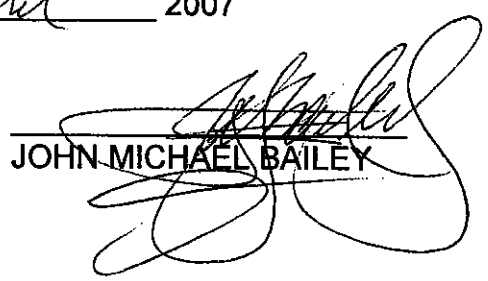
This the 10 day of April 2007



JOHN MICHAEL BAILEY