Trial Law TIPS

Roy D. Wasson's
TIP #50

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Pleading *Res Ipsa Loquitur* as a Separate Count

Introduction

Any time a trial lawyer has a case which might be appropriate for a *res ipsa loquitur* instruction, the question comes up whether to plead that as a separate count in the complaint. The defense will almost always move to dismiss such a count using the old cases which hold that *res ipsa loquitur* is an evidentiary doctrine, not a separate legal theory. Some defense attorneys are just trying to bill the file on a minor motion which will make no real difference to them in the outcome of the case. Others seem hell-bent on striking your *res ipsa* count, even if you will be entitled to an instruction on that theory at the end of trial.

I recommend that trial lawyers continue to plead *res ipsa* as a separate count for two reasons: First is because I have seen trial

judges become confused at the charge conference when the plaintiff asks for a *res ipsa* instruction and the defense pulls the cheap tactic of arguing "that plaintiff did not plead *res ipsa*, so no instruction should be given on that theory." While it is not legally necessary to plead it as a separate count, you take away an argument by pleading it that way. Second, when you plead a count for *res ipsa*, the defendant's adjuster will be asking defense counsel about that theory and you will be getting the point across from the start of the case that you can win at trial without direct evidence of negligence.

There is no Florida case which forbids pleading *res ipsa* as a separate count. Here is some ammunition to defeat a motion to dismiss such a count.

Distinguishing Defendant's Cases

Defense attorneys sometimes support motions to dismiss *res ipsa* counts with cases that do not disapprove of pleading such counts at all. Instead, some such cases reverse dismissals of complaints which had been based on the failure of plaintiffs to plead basic facts amounting to negligence or to plead that such evidence is not needed under *res ipsa*. One such case is *LaMack v. Fountainbleu Hotel Corp*., 186 So. 2d 31 (Fla. 3rd DCA 1966). Instead, the decision merely establishes that a complaint should not be dismissed for failure to allege the elements of *res ipsa loquitur*. But just because a plaintiff can get to the jury on *res ipsa* without having pled that theory does not equal the holding that pleading the theory is improper.

Another defense tactic is to move to dismiss based on case law which discusses in general terms the limited applicability of the *res ipsa* doctrine, but which do not involve the propriety of pleading such a count. One such case is *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339 (Fla. 1978), which does not involve any question of pleading, much less disapproves the practice of separating *res ipsa* into a separate count. Those cases which hold that given evidence is not enough to get to the jury under *res ipsa* do not support dismissal where you have pled the elements of a *res ipsa* case.

Cases Supporting Pleading *Res Ipsa* as Separate Count

The few reported cases which expressly involve the situation of a plaintiff pleading separate counts for negligence and *res ipsa* do not disapprove of that practice, and tacitly recognize the appropriateness of separating such claims into separate causes of action. Those cases include decisions in which the dismissal or summary judgment in favor of the defendant on one count is affirmed, but the trial court's ruling on the other count is reversed, signifying the propriety of pleading separate counts.

For example, in *Cheung v. Ryder Truck Rental, Inc.*, 595 So. 2d 82 (Fla. 5th DCA 1982). The plaintiff sued three defendants in a five-count complaint. Count one was against John Slein for negligently failing to maintain and inspect the rear wheel of the Toyota during transit. Count two was filed against the owner of the Toyota "James Slein for negligently for failing to maintain and inspect the wheel of the Toyota prior to permitting the towing of the vehicle." Count three was a claim against "Ryder for negligence in failing to properly warn of danger and properly instruct in the proper use of the towing apparatus." Count four was against "John and James Slein for unspecified negligence under the theory of *res ipsa loquitur*." Count five was a claim against three defendants "under the dangerous instrumentality doctrine."

Significantly, the Fifth District in the *Cheung* case affirmed the summary judgments entered for the defendants on all three of the active negligence counts, count one, count two, and count three. Although it affirmed the trial court as to count four (*res ipsa loquitur*) as it applied to one of the defendants, James Slein, the court held: "We reverse the summary judgment entered in favor of John, however, because we find that *res ipsa loquitur* is particularly applicable in wayward wheel cases." 595 So. 2d at 83. Thus, the court noted that there were different elements in the count for ordinary negligence than in the count for *res ipsa* and treated them as if they were properly pled separately.

The Supreme Court decided a case in which separate counts were set forth for negligence and *res ipsa loquitur*, without disapproving of the practice, in *Unicare Health Facilities v. Mort*, 553 So. 2d 159 (Fla. 1989). In that case, the Supreme Court noted:

> Following several motions to dismiss and strike, Hoak filed an amended complaint on February 5, 1987. ***Count one sought compensatory damages and costs based on the negligence theory of res ipsa loquitur***; count two sought compensatory damages, punitive damages and costs based upon alleged intentional, grossly negligent, or negligent, acts of the nursing home staff; and count three sought compensatory damages, punitive damages, costs, and attorney's fees, based upon Unicare's alleged violation of sections 400.022-.023 of the Florida Statutes (1983).

553 So. 2d at 160 (emphasis added). Although not involving the propriety of the pleading issue, the case tacitly condones the practice of separating *res ipsa* into a separate count.

Similarly, other appellate courts in Florida have dealt with cases in which *res ipsa* was pleaded as a separate count, without disapproving of the practice. *See, Farrington v. McConnell,* 183 So. 2d 585 (Fla. 2nd DCA 1966), in which the court held: " the complaint was founded on three counts. . . . The third count is based upon a theory of *res ipsa loquitur*." *Id.* at 586. *See also, e.g.*, *Donner v. Morse Auto Rentals, Inc.*, 147 So. 2d 577, 579 (Fla. 3rd DCA 1963), in which the court noted: "the second amended complaint consisted of seven alleged causes of action. . . .The seventh cause of action was based upon the doctrine of *res ipsa loquitur*."

There is additional authority recognizing the propriety of pleading *res ipsa* as a separate count. In 65A C.J.S., *Negligence* §187 [12] at 366 (1966), the authors write: "Separate counts, one alleging specific acts of negligence and the other relying on the res ipsa loquitur doctrine may be proper." *See also id.* § 220.23(noting ability of litigants to rely upon the *res ipsa* doctrine "as affected by pleadings").

Conclusion

It makes common sense to keep the counts for negligence and *res ipsa* separate, because they are based upon different evidence. The Florida Rules of Civil Procedure expressly permit pleading in the alternative. Therefore, a count for negligence which

pleads specific acts and a count for *res ipsa* can be raised in the alternative. There is nothing improper or misleading about the way such counts are pled in the typical complaint. Such motions to dismiss should be denied. But even if granted, the judge should not deny your right to an instruction on that doctrine at the end of the case.

Keep Tryin!

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