IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE # 2006-CA-01275

BARBARA DOTSON **PLAINTIFF/APPELLANT**

VS.

PAUL D. JACKSON, M.D. **DEFENDANT/APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY

BRIEF OF DEFENDANT/APPELLEE, PAUL D. JACKSON, M.D.

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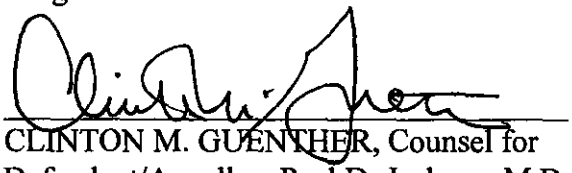
CERTIFICATE OF INTERESTED PERSONS

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

1. Barbara Dotson, Plaintiff/Appellant
2. Suzanne G. Keys, Counsel for Plaintiff/Appellant, Barbara Dotson
3. Isaac K. Byrd, Counsel for Plaintiff/Appellant, Barbara Dotson
4. Paul D. Jackson, M.D., Defendant/Appellee
5. Clinton M. Guenther, Counsel for Defendant/Appellee, Paul D. Jackson, M.D.
6. Tommie Williams, Counsel for Defendant/Appellee, Paul D. Jackson, M.D.
7. Honorable Richard A. Smith, Circuit Judge.



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Defendant/Appellee, Paul D. Jackson, M.D.

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References herein are made as follows:

- to the Record ("Clerk's Papers") as **"R ___"**;
- to Supplemental Record ("Supplemental Portion of Clerk's Papers) as **"SR____"**;
- to Appellant's Brief as **"App Br ____"**; and
- to Hearing Transcript as **"Tr _____"**.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the trial court erred in granting Defendant Jackson's Motion for Summary Judgment and Entering Final Judgment of Dismissal With Prejudice As To Defendant Jackson.

STATEMENT OF THE CASE

On August 8, 2000, Dr. Paul Jackson, an obstetrician/gynecologist, performed a pelvic EUA (evaluation under anesthesia), D & C (dilation and curretage), bilateral salpingo-oophorectomy (excision of both ovaries and fallopian tubes), and total abdominal hysterectomy (surgical removal of the uterus) on Plaintiff, Barbara Dotson, at The King's Daughters Hospital in Greenville, Mississippi. During the surgical procedure, a possible complication of a hysterectomy – a laceration of the bladder, known as a cystotomy – occurred. **(R 82, 85).** The cystotomy was repaired with the assistance of Dr. Robert Curry, a urologist. **(R 76-77).**

Ms. Dotson, who had a history of bladder or urinary leakage since at least October 9, 1998 **(R 78)**, had also suffered, for at least a year prior to her hysterectomy, from pelvic pain, uterine fibroids, and metromenorrhagia (uterine bleeding) which had not responded to conservative therapy, thus leading to her hysterectomy. **(R 63, 65, 66).**

Following the hysterectomy, Ms. Dotson complained of some bladder spasm, for which she continued to see Dr. Curry for several weeks. **(R 69-74)**. By her August 25, 2000 visit with Dr. Curry, she was passing urine well and was not leaking. She later saw another physician, Dr. Alberto Wee, a neurologist, in November, 2000 for a complaint of pain and numbness in her thighs, known as "meralgia paresthetica, which Dr. Wee related to "bilateral lateral femoral cutaneous neuropathy." **(R 60, 62-63)**. Neither Dr. Curry nor Dr. Wee diagnosed any of Ms. Dotson's complaints as being in a way a result of, related to, or caused by her August 8, 2000 surgery performed by Dr. Jackson.

On August 31, 2001 Plaintiff initiated her lawsuit against Dr. Jackson, alleging that Dr.

Jackson was negligent in performing the hysterectomy on August 8, 2000, which she alleged resulted in inability to control her bladder and her meralgia paresthetica. She also alleged lack of informed consent regarding her condition and the possible complication of a cystotomy. **(R 4)**. She amended her Complaint on September 27, 2001 to add as a defendant The King's Daughter's Hospital, alleging that Dr. Jackson was an employee, agent and/or servant of The King's Daughter's Hospital. **(R 21)**.

PROCEDURAL HISTORY

Plaintiff began this lawsuit with the filing of her Complaint against Dr. Jackson on August 31, 2001. **(R 4)**. Dr. Jackson responded to the Complaint, denying any negligence, on September 28, 2001 **(R 32)**, the day after Plaintiff filed an Amended Complaint joining Defendant The King's Daughters Hospital (on September 27, 2001). **(R 21)**. Dr. Jackson responded to the Amended Complaint on October 23, 2001, again denying any negligence. **(R 36)**.

On November 1, 2001, counsel for the parties entered into an Agreed Amended Scheduling Order, which provided that Plaintiff's expert witnesses would be designated no later than February 1, 2002, and Defendants' experts no later than March 15, 2002. **(R 42)**. On November 19, 2001, Plaintiff responded to discovery requests that Dr. Jackson had propounded to Plaintiff, including an interrogatory seeking the identity and other information regarding Plaintiff's expert witnesses pursuant to M.R.C.P. 26(b)(4)(A)(i). Plaintiff objected to the interrogatory but said that the response would be supplemented when her expert witnesses had been determined. **(R 43)**.

By September 4, 2002, Dr. Jackson's counsel had not received any designation of Plaintiff's expert witnesses nor any affidavit or other sworn testimony of an expert witness to support Plaintiff's allegations of negligence against Dr. Jackson. In light thereof, Dr. Jackson filed a motion for summary judgment based upon Plaintiff's failure to designate any expert witnesses, and upon Plaintiff's failure to provide any expert testimony to prove the requisite elements to establish a *prima facie* case of negligence against Dr. Jackson. **(R 160)**. The motion for summary judgment was noticed for hearing as soon as counsel could be heard. **(R 155)**. On October 2, 2002, Defendant King's Daughters Hospital filed its motion for summary judgment on similar grounds. **(R 189)**.

On October 23, 2002, Plaintiff responded to Dr. Jackson's motion for summary judgment,

attaching thereto a copy of Plaintiff's Designation of Experts. **(R 233)**. Although the designation bore the Circuit Clerk's "Filed" stamp of March 26, 2002, Dr. Jackson's counsel had never received nor seen that designation of Plaintiff's experts prior to receipt of Plaintiff's response to Dr. Jackson's motion for summary judgment. That designation identified and provided resumes of two expert witnesses, Dr. Norman Reiss and Dr. Richard Levin, but it contained no affidavits or other sworn testimony from either doctor. **(SR 6)**.

Shortly thereafter, in late 2002, counsel for Dr. Jackson in this case learned that through other/bankruptcy counsel, Dr. Jackson had filed for bankruptcy. Accordingly, a Suggestion of Bankruptcy was entered herein on January 17, 2003 by Dr. Jackson's counsel in this case, and by his bankruptcy counsel, invoking the automatic stay in bankruptcy. **(R 240, 244)**. On June 6, 2003, Plaintiff moved for partial relief from the automatic stay **(R 246)**, which was lifted in 2004.

On October 4, 2004, Plaintiff moved the trial judge, Circuit Judge Margaret Carey-McCray, to recuse herself, based upon the judge's recently having given notice to counsel that she had been a patient of Dr. Jackson's for over twenty years. **(SR 73)**. Following that motion for recusal, Defendants' counsel received no correspondence or contact from either the Court or Plaintiff's counsel regarding any action on Plaintiff's motion for recusal, despite numerous inquiries to Plaintiff's counsel about Plaintiff's intentions of going forward with the lawsuit, and regarding any ruling by the Court on the motion for recusal. **(SR 54-66)**.

Following the motion for recusal, Plaintiff took no action to seek any ruling on that motion. It was not until Dr. Jackson's counsel, after repeated inquiry, learned on April 7, 2006, that Judge Carey-McCray had entered an order granting Plaintiff's motion for recusal. **(SR 67, 75)**. However, a copy of that order had never been and was not provided to counsel for the parties until Dr.

Jackson's counsel contacted the court administrator, Angela Howard, about the status of Plaintiff's motion for recusal, and was faxed a copy of the order. (**SR 67**).

Dr. Jackson's counsel immediately alerted counsel for the other parties that he had learned of Judge Carey-McCray's recusal, and that he had also learned that Circuit Judge Richard A. Smith would be presiding over the case. Shortly thereafter, counsel for The King's Daughters Hospital contacted Dr. Jackson's counsel about the fact that Plaintiff's counsel had agreed to a June 5, 2006 hearing on the hospital's motion for summary judgment. (**SR 48**). Accordingly, both the hospital's and Dr. Jackson's motions for summary judgment were re-noticed before Judge Smith, to be heard on June 5, 2006 at 1:30 p.m. at the Sunflower County Courthouse in Indianola, Mississippi. The hospital's notice of hearing on its motion for summary judgment was served on April 11, 2006. (**R 260**). Dr. Jackson's notice of hearing on his motion for summary judgment was served on May 18, 2006. (**SR 76**).

On June 1, 2006, Plaintiff's counsel mailed counsel for Defendants a letter asking Defendants' counsel to agree to a several week continuance of the hearing on the motions for summary judgment, for no other reason but that Plaintiff's counsel was "...going to get Ms. Dotson in the office **within the next two weeks to discuss the case with her**." (**SR 68**). (**Emphasis** added).

Dr. Jackson's counsel, who was out of town from June 1 through June 4, 2006, did not receive that letter until June 5, 2006, the day of the hearing on the motions for summary judgment. Dr. Jackson's counsel immediately notified Plaintiff's counsel that he could not agree to a continuance of the hearing on Dr. Jackson's motion for summary judgment (**SR 69**), because (but meaning no disrespect) Ms. Dotson's counsel had already had more than ample time to "discuss the case with her."

Only an hour or so before the hearing on Defendants' motions for summary judgment, Plaintiff's counsel faxed Defendants' counsel a copy of Plaintiff's Response to the motions for summary judgment, which included not an expert's affidavit, but rather a copy of a letter from Dr. Norman Reiss, dated March 24, 2002, more than four years earlier. **(SR 4, 23)**. A copy of that letter had never before been provided to Defendants' counsel. The letter was not an affidavit, and it did not contain or constitute sworn testimony by Dr. Reiss establishing the requisite elements of a *prima facie* case of medical negligence against Dr. Jackson. Only a copy of an affidavit of attorney Suzanne Keys was attached, dated that same date, June 5, 2006. **(R 269; SR 21)**. Plaintiff's response also asked the Court to allow Plaintiff an additional ten days to get an affidavit from Dr. Reiss. **(SR 4)**.

At the hearing, Plaintiff's counsel announced they were confessing The King's Daughters Hospital's motion for summary judgment and dismissing Plaintiff's claim against the hospital. The Court then heard arguments of counsel for Dr. Jackson and for Plaintiff **(Tr 2-19)**, during which Plaintiff's counsel orally moved the Court for an additional ten days to serve an affidavit from Dr. Reiss. **(Tr 15, 17)**. The Court took the entire matter under advisement. **(Tr 19)**.

On June 14, 2006, nine days after the hearing on the motion for summary judgment, but before the Court had ruled on the motion, Plaintiff filed her "Motion to Reconsider Prior Ruling on Defendants' [*sic*] for Summary Judgment", which had attached thereto an affidavit of Dr. Norman Reiss. **(SR 30, 37)**. That motion to reconsider was filed before the Court had ruled on the motion for summary judgment. **(SR 30; R 275)**.

In his Response to Plaintiff's Motion to Reconsider, Dr. Jackson moved to strike the affidavit of Dr. Reiss as untimely, because it had not been provided to the Court or Dr. Jackson's counsel on

or before June 4, 2006, the day prior to the hearing on the motion for summary judgment, in accordance with M.R.C.P. 56(c). **(R 267, 271)**. That motion to strike also argued to the Court, what Dr. Jackson contended, were numerous inadequacies of Dr. Reiss' belated affidavit. Dr. Jackson argued that even if the affidavit had been timely, it nevertheless failed to establish the requisite elements for a *prima facie* case of negligence against Dr. Jackson. **(R 272)**.

On June 26, 2006, the Court entered its Order Granting Defendant Jackson's Motion for Summary Judgment and Entering Final Judgment of Dismissal With Prejudice As To Defendant Jackson **(R 275)**, from which order Plaintiff appealed on July 14, 2006.[1] **(R 262)**.

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[1] Plaintiff's Notice of Appeal, dated July 14, 2006, incorrectly refers to "**the Court's Order filed June 14, 2006, granting Motion for Summary Judgment...**" (**Emphasis** added). The Court's order, from which this appeal was taken, was filed on June 26, 2006, not June 14, 2006. Note also that **the Notice of Appeal reflects the Circuit Clerk's "Filed" stamp of June 17, 2006**, another incorrect date, again, since the Court's order was not entered until June 26, 2006, and since the Notice of Appeal was not mailed until July 14, 2006.

SUMMARY OF THE ARGUMENT

It was not until nine days after the hearing on Dr. Jackson's Motion for Summary Judgment, premised on Plaintiff's failure to provide expert testimony [establishing the requisite elements to maintain a *prima facie* case of negligence against Dr. Jackson] that Plaintiff produced any affidavit or sworn testimony of an expert witness. Even then, that affidavit of Dr. Norman Reiss, in addition to being untimely with regard to the hearing on the motion for summary judgment, was insufficient to establish the elements necessary for a *prima facie* case of medical negligence. Therefore, the affidavit was also inadequate to defeat Dr. Jackson's motion for summary judgment.

Dr. Jackson's motion for summary judgment had been properly noticed before the June 5, 2006 hearing. It was noticed for a date on which Plaintiff's counsel had agreed with counsel for Defendant The King's Daughters Hospital for hearing of the hospital's motion for summary judgment, which was also based upon the absence of expert testimony to prove negligence against Dr. Jackson and, vicariously, the hospital.

Neither before or at the hearing on the motion for summary judgment did Plaintiff provide any expert testimony, despite having had more than ample time, and numerous counsel, to do so. It was not until nine days after the hearing that Plaintiff produced the affidavit of Dr. Norman Reiss, which Dr. Jackson moved the Court to strike Dr. Reiss' affidavit as untimely. The Court did not grant the motion to strike, but a week after the affidavit was submitted, the Court entered an order granting Dr. Jackson's motion for summary judgment.

Dr. Reiss' affidavit was correctly found by the Court to be, if not untimely, then insufficient to meet Plaintiff's burden of establishing through expert testimony the requisite elements of a *prima facie* case of negligence against Dr. Jackson. Therefore, summary judgment was appropriate.

At the trial court level, Plaintiff never raised the argument of any "layman's" exception to the requirement of expert testimony to prove her case of medical negligence. As such, that argument or issue should not now be considered, having been raised for the first time on appeal. Nevertheless, the facts of this case do not lend themselves to a "layman's" exception to long-standing case precedent in the state of Mississippi, which requires expert testimony to prove the requisite elements to maintain a *prima facie* case of negligence against a physician.

The ruling of the trial court should be affirmed.

ARGUMENT

Plaintiff's Complaint alleges against Dr. Jackson medical negligence or "malpractice" which allegedly caused injury to Plaintiff. In order to maintain a *prima facie* case of medical negligence, a plaintiff must prove the existence of a duty by the defendant physician to conform to a specific standard of conduct or care; a failure to conform to that required standard of care; and an injury to plaintiff proximately caused or contributed to by the physician's breach of that duty. *Drummond v. Buckley*, 627 So.2d 264, 268 (Miss. 1993).

In order to prove those elements, a plaintiff must present expert testimony which identifies and articulates the details of the standard of care to which the physician is to be held. The expert must testify not only as to the manner in which the standard of care was not complied with, but that the failure to comply with the standard of care proximately caused or contributed to plaintiff's alleged injuries. *Barner v. Gorman*, 605 So.2d 805, 808-809 (Miss. 1992); "failed in some causally significant respect to conform to the required standard of care", *Boyd v. Lynch*, 493 So.2d 1315, 1318 (Miss. 1986). That is, an expert is needed to show specifically how a breach of the physician's duty proximately caused the plaintiff's injury. *Palmer v. Anderson Infirmary Benevolent Association*, 656 So.2d 790, 795 (Miss. 1995); *McCaffrey v. Puckett*, 784 So.2d 197, 206, ¶33 (Miss. 2001).

Expert testimony in such a case is required, because the issues of the standard of care to which a physician is held, and issues involving medical care are simply not generally within the common knowledge of laymen; nor are they matters of common sense or practical experience. *Erby v. North Mississippi Medical Center, Inc.*, 654 So.2d 495, 500 (Miss. 1995)

Only in certain instances can a layman "observe and understand the negligence [of a

physician] as a matter of common sense and practical experience." *Palmer v. Anderson Infirmary*, (above), 656 So.2d at 795. "Lay testimony is sufficient to establish only those things that are purely factual in nature or thought to be in the common knowledge of laymen." *Drummond v. Buckley*, (above) 627 So.2d at 268.

1. Layman's Exception:

Beginning at the end, and as the third point, of Plaintiff's argument on appeal, Dotson argues a "layman's" exception as a reason why the trial court should not have granted Dr. Jackson's motion for summary judgment. Plaintiff argues that even if it were to be found that she failed to establish a case of medical negligence through expert testimony, "...then **the Court should hold that the nature of the injury and facts of the case are such that a layman could conclude that Dr. Jackson's actions were negligent**. The question for a fact finder to decide is simply **should the bladder be cut in a hysterectomy**." **(App Br 6)**. **(Emphasis** added). Plaintiff argues that, "It does not take a doctor to figure out that if cutting the bladder was a regular part of the surgery, then **there would be no need to have another surgeon to repair it.** Additionally, **the bladder is not part of the female organs that is removed during a hysterectomy**. A ninth grade biology student knows that the **bladder is not part of the reproductive system**." **(App Br 6)**. **(Emphasis** added).

First, the argument of a "layman's exception should not be considered by this Court, because Plaintiff never asserted that argument nor raised that issue to the trial court. It is well established in Mississippi law that appellate courts do not consider issues raised for the first time on appeal. Accordingly, that issue and argument should not be addressed. *Jones v. Fluor Daniel Services Corp.*, 959 So.2d 1044, 1048, ¶15 (Miss. 2007); *Stephens v. Miller*, 970 So.2d 225, 227, ¶9 (Miss. App. 2007).

However, even if it is addressed, Plaintiff's argument of a layman's exception is fallacious. Suffice it to say that there is no evidence in the record as to what any "ninth grade biology student" knows, even if that were to be relevant. As to Dr. Curry's assisting Dr. Jackson in repairing the cystotomy, surgeries often require more than one medical specialty; but laymen rarely if ever know from common sense or every day experience why a particular surgeon or medical specialist is needed. It is, however, a fact that in a woman, the bladder is located in the pelvis, just in front of the vagina, and next to the uterus. By definition, a hysterectomy is the surgical removal of all or part of the uterus. The uterus is the very organ that is removed in a hysterectomy, like the one Dr. Jackson performed on Ms. Dotson on August 8, 2000.

It is precisely because the bladder is located next to the uterus that an injury to the bladder is recognized as a possible complication of a hysterectomy. Plaintiff's own expert witness, Dr. Norman Reiss, twice acknowledged that possible complication in his affidavit. (**SR 37**). Whether or not "laymen", or even most ninth grade biology students, know that the bladder is not part of the female reproductive system, most lay persons may very well not know that a female's bladder is located next to the uterus. So surely it is also beyond the knowledge and common experience of laypersons to know whether or not a cystotomy (laceration of the bladder) is a possible complication of a hysterectomy. See *Latham v. Hayes*, 495 So.2d 453, 457, 459 (Miss. 1986).

For those reasons, Plaintiff's argument of a layman's exception, as to why the trial court should not have granted summary judgment, should not be considered or addressed; if it is to be addressed or considered, it should fail. So, attention must be turned to Plaintiff's other arguments, considering the timeliness and sufficiency of her expert's testimony.

2. Timeliness of Plaintiff's Expert's Affidavit:

First, Plaintiff argues that, "In the instant case, the trial court granted summary judgment because **it found that no expert affidavit was timely filed. In so doing,** the trial court erred." **(App Br 3).** (**Emphasis** added). Although Plaintiff's expert affidavit was, in fact, untimely, not being filed until nine days after the hearing on the motion for summary judgment; and despite Dr. Jackson's motion to strike the affidavit ,which was not granted, the Court's ruling on Dr. Jackson's motion for summary judgment came a week after Plaintiff submitted her expert's affidavit, and there was no finding of untimeliness by the trial court. **(R 275).**

Although there may be no magic form to which a plaintiff's expert's opinion must conform, (so long as the opinion is apparent), the testimony of a plaintiff's expert must nevertheless establish the requisite elements of a *prima facie* case of medical negligence. In *Busby v. Mazzeo*, 929 So.2d 369, 372, ¶10 (Miss. App. 2006), the *Busby* court held:

> The law is clear that Busby must support her claims "by facts sworn to on personal knowledge in depositions, answers to interrogatories or affidavits, or through such other appropriate forms as stipulations of fact or admissions procured under Rule 36 [of the Mississippi Rules of Civil Procedure]." .....In order to establish a *prima facie* case in a medical malpractice action, Busby **must establish** that the defendants were negligent **through medical testimony that shows they failed to use ordinary skill and care**.....Busby has **the burden of establishing the details of the standard of care to which a physician is held**. (Citations omitted). (**Emphasis** added).

Even though Dr. Reiss' affidavit was untimely, it was filed a week before the Court's ruling; and there is no finding or indication that the Court did not consider Dr. Reiss' affidavit (on the basis of its timeliness) before granting of Dr. Jackson's Motion for Summary Judgment.

Plaintiff next argues that Dr. Jackson "...would not have been prejudiced in any way had the trial court allowed Plaintiff **additional** time to **resubmit** an affidavit." (**Emphasis** added) **(App Br 4).** Yet Plaintiff never moved the Court to resubmit any additional affidavit of Dr. Reiss after

Plaintiff provided Dr. Reiss' affidavit on June 14, 2006.

Plaintiff also argues that, "If the trial court found that the proffered affidavit was insufficient or needed supplementation, then a continuance should have been granted pursuant to Rule 56(f) of the Mississippi Rules of Civil Procedure." **(App Br 4)**. Again, Plaintiff never moved for a continuance to submit a second affidavit of Dr. Reiss; and there is no requirement or rule of law for the Court to have requested a supplemental affidavit of Dr. Reiss. Nevertheless, the fact is that Plaintiff got the very relief she sought: additional time to submit Dr. Reiss' affidavit after the hearing on the motion for summary judgment. **(SR 4; Tr 15, 17)**. Plaintiff had every opportunity to make Dr. Reiss' affidavit as complete and as sufficient as she wanted or needed it to be, all of which was [also] Plaintiff's burden and responsibility, not the trial court's.

Very similar to Plaintiff in this case, the plaintiff in *Busby* (above) only minutes before the hearing on Dr. Mazzeo's motion for summary judgment, filed a letter from a physician who was purportedly Busby's expert witness. The *Busby* court noted that the letter did not constitute sworn proof of the expert, nor did the letter state the appropriate standard of care. *Busby*, 929 So.2d at 371, ¶6.

The same thing occurred in this case, when only an hour or so before the hearing, Dotson produced a copy of a letter (more than four years old) from Dr. Reiss, but the letter did not constitute or contain sworn testimony from Dr. Reiss. Nine days later, Dotson did file an affidavit of Dr. Reiss, but notwithstanding the untimeliness of its filing, Dr. Reiss' affidavit was [also] insufficient expert testimony to establish a *prima facie* case of negligence to avoid summary judgment.

3. Sufficiency of Plaintiff's Expert's Affidavit:

Dr. Reiss' affidavit twice states that the standard of care requires that a surgeon who is to perform a hysterectomy should anticipate a "**possible bladder injury**" and "**possible complication of cutting the bladder**." (**SR 37**). (**Emphasis** added). Obviously, even according to Dr. Reiss, not only is the bladder in the pelvis, the area of the human anatomy which involves a hysterectomy, but an injury to the bladder – a laceration or cutting of the bladder, a "cystotomy" – is known and recognized as a possible complication of a hysterectomy. That is, Dr. Reiss' affidavit is expert testimony that a laceration of the bladder, "**cutting [of] the bladder**", a "**possible bladder injury**", is a "**possible complication**" of a vaginal or abdominal hysterectomy, exactly as Dr. Jackson encountered with Ms. Dotson on August 8, 2000. (**SR 37**). (**Emphasis** added).

It is disingenuous for Dr. Reiss to opine that the occurrence of a possible (and, therefore, recognized) complication of a hysterectomy is evidence of negligence. A "possible complication" of a surgery is just that – a possible complication. All surgery involves risks and possible complications; however, the occurrence of a complication or risk, by itself, is insufficient to prove medical negligence or substandard medical care. See *Latham v. Hayes*, 495 So.2d 453, 457 (Miss. 1986). Dr. Reiss' affidavit provides no proof that just because the possible complication occurred, Dr. Jackson was, therefore, negligent.

In Mississippi, physicians have a duty to employ "reasonable and ordinary care" in treating their patients. Commonly stated, that duty has been defined as "...reasonable diligence, patience, skill, competence and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options." *Drummond v. Buckley* (above), 627 So.2d at 268 (Citations omitted). Dr. Reiss' affidavit fails to articulate the standard of care applicable to

Dr. Jackson, and it fails to prove that Dr. Jackson failed to act in accordance with reasonable and ordinary care of an obstetrician/gynecologist in his treatment of Ms. Dotson. *Erby v. North Miss. Med. Center* (above), 654 So.2d at 500.

Next, Dr. Reiss' affidavit states that not only is a bladder laceration a possible complication of a hysterectomy, but "...that the operating surgeon **should anticipate possible bladder injury** during the performance of a vaginal or abdominal hysterectomy... ." **(R 37)**. **(Emphasis** added). In fact, the medical records reflect that Dr. Jackson did just that; that is, prior to the surgery Dr. Jackson did anticipate and did prepare for the possibility of the complication of a cystotomy, a laceration of the bladder, as is clearly shown in his operative note. **(R 82)**.

Dr. Jackson's operative note, dictated the same date of his surgery, states: "A circumferential incision was made and the peritoneum was entered anteriorly and posteriorly **after the bladder had been filled with a dilute Methylene blue solution which served as a marker for inadvertent cystotomy." (R 82)**. **(Emphasis** added). His note continues, stating: "Shortly after entering the peritoneum anteriorly, **blue dye was seen to flow from a cystotomy in the bladder... Attention was then turned toward the bladder**. The edges of the cystotomy were grasped with an Allis clamps and a closure was done in layered fashion". **(R 82)**. **(Emphasis** added).

The second page of Dr. Jackson's operative note **(R 85)** continues, stating:

> "The mucosa was closed with a running interlocking 2-0 chromic suture. The muscularis was closed with running interlocking suture of 2-0 Vicryl suture and the serosal was closed with a running interlocking 2-0 Vicryl suture. Following this, cystoscopy was done. The patient was given five ccs of Indigo Carmine. A 19 French 30 degree cystoscope was inserted through the urethral meatus. There was prompt reflux of dye through the right ureter, but none through the left. The closure appeared to be close to the left urethral orifice did not appear to be watertight. **At this point, consultation with Dr. Curry was done and the procedures done by Dr. Curry will be dictated by him. Following repair of the cystotomy and reimplantation of the left ureter, closure was done**." **(R 85)**. **(Emphasis** added).

The medical records evidence that Dr. Jackson did, in fact, anticipate and prepare for the recognized risk of the possible complication of an "inadvertent cystotomy," by filling the bladder with a methylene blue solution to serve as a marker for that selfsame "possible complication", a cystotomy, a laceration of the bladder. Dr. Curry, a urologist, was also consulted by Dr. Jackson, and a successful repair of the cystotomy was achieved. (**R 76-77**). The medical records indicate nothing but good medical care, in accordance with ordinary skill and care.

Dr. Reiss' affidavit also alleges that Dr. Jackson "failed to conduct a proper examination of Ms. Dotson"; yet it does not state how or in what way or manner that Dr. Jackson's examination of Ms. Dotson was "improper"; nor does it state of what a "proper" examination would consist. Dr. Reiss' affidavit does not prove (or even state) that Dr. Jackson failed to use ordinary skill and care in his examination of Ms. Dotson, much less establish the details of what that examination should [but allegedly did not] consist. See *Travis v. Stewart*, 680 So.2d 214, 218 (Miss. 1996); *Boyd v. Lynch*, 493 So.2d 1315, 1318 (Miss. 1986); and *Sheffield v. Goodwin*, 740 So.2d 854, ¶5 (Miss. 1999).

Dr. Reiss' affidavit does not state how or in what way Dotson was causally injured as a result of Dr. Jackson's alleged violation of the standard of care; nor does it state what her alleged injuries are. The affidavit mentions nothing about any subsequent problem with her bladder, and it fails to mention anything whatsoever about meralgia paresthetica or any nerve related problem. Not only does Dr. Reiss' affidavit fail to provide any proof of a causal connection between Dr. Jackson's alleged negligence and the cause of any of Plaintiff's alleged bladder or nerve complaints, neither do Ms. Dotson's medical records. What Ms. Dotson's medical records do show is that she had had complaints about her bladder [leakage] in 1998, two years before her hysterectomy, which problems even in 1998 were [also] treated by Dr. Curry. (**R 78**).

Finally, Dr. Reiss' affidavit does not mention anything about lack of informed consent, as alleged in the Complaint and Amended Complaint. Even in a case of alleged lack of informed consent, and even if alleging only lack of informed consent, a plaintiff still has the burden to prove more than mere allegations that the physician did not obtain informed consent. In order to succeed on such a claim, a plaintiff must prove, through expert testimony, the two "subelements of causation": that a reasonable patient would have withheld consent had the patient been properly informed of the risks (of which they were allegedly not properly informed); and that the treatment was the proximate cause of the worsened condition. As noted by the Mississippi Supreme Court in *Jamison v. Kilgore*, 903 So.2d 45, 49 (Miss. 2005) in affirming both the trial court and Court of Appeals' decisions therein:

> ...expert testimony is necessary to inform the fact-finder of exactly what information the doctor should have communicated to the patient, thus explaining what constituted the breach of care. ...Expert testimony was needed on the issues of breach, proximate cause and injury. *Jamison* cannot survive summary judgment by making mere allegations of lack of informed consent. ...We find the resolution of this appeal turns ...on the need for expert testimony to establish the duty owed by a doctor to the patient.

See also *McMichael v. Howell*, 919 So.2d 18 (Miss. 2005); *Whittington v. Mason*, 905 So.2d 1261 (Miss. 2005); *Johnson v. Burns-Tutor*, 925 So.2d 155 (Miss. App. 2006); and *Latham v. Hayes*, 495 So.2d 453 (Miss. 1986).

"In a summary judgment proceeding, the plaintiff must rebut the defendant's claim...by producing supportive evidence of *significant* and *probative* value; this evidence must show that the defendant breached the established standard of care, and **that such breach was the cause of [plaintiff's] injury**." *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1355 (Miss. 1995). (**Emphasis** added). Dotson never produced any significant or probative evidence of either requisite element in her claim against Dr. Jackson, particularly not any such evidence proving

causation.

Even considering Dr. Reiss' untimely affidavit, there is simply no expert testimony, in that affidavit or elsewhere in the record, that establishes that Dr. Jackson did anything more [or less] than encounter a known, recognized possible complication of Ms. Dotson's surgery – which, alone, does not prove negligence or violation of the standard of care. There is certainly no evidence that Plaintiff's hysterectomy was not indicated; the medical records reflect just the opposite. There is also no evidence from the medical records that shows any act of omission by Dr. Jackson which violated the appropriate standard of care. To the contrary, the medical records indicate that Dr. Jackson treated Ms. Dotson with all reasonable, ordinary and due care.

There is also no expert testimony that Dr. Jackson failed to use ordinary skill and care in any of his treatment of Ms. Dotson. Finally, there is no evidence, particularly not any expert testimony, that the occurrence of the possible complication of a cystotomy during Dotson's hysterectomy was the result of any negligence; nor that any negligence of Dr. Jackson "caused [Ms. Dotson's] bodily functions not to work properly or caused her any other injury", as Plaintiff argues. (**App Br 5**).

CONCLUSION

Numerous events beyond Dr. Jackson's control occurred after this lawsuit was filed. First, Dr. Jackson's counsel never received Plaintiff's designation of experts until well after Plaintiff's expert witness designation deadline, and also not until after Dr. Jackson filed his motion for summary judgment. Shortly thereafter, Dr. Jackson's counsel learned that Dr. Jackson had filed for bankruptcy, which resulted in a stay of the case. Subsequently, the trial judge informed counsel that she had been a patient of Dr. Jackson's for some twenty years, which was followed by Plaintiff's counsel's motion for the trial judge to recuse herself.

Only after repeated, numerous efforts by counsel for Defendants did Dr. Jackson's counsel

learn from the court administrator that the trial judge had recused herself. Shortly after learning that, Dr. Jackson's motion for summary judgment was renoticed before the new trial judge on a date and at a time for which Plaintiff's counsel had indicated their availability. Dr. Jackson's Re-Notice of Hearing of the motion was timely served well before the date that the motion was set to be heard.

Dr. Jackson's counsel heard nothing from Plaintiff's counsel until the day of the hearing. At the hearing Plaintiff produced no sworn expert testimony to establish the requisite elements to maintain a *prima facie* case of negligence against Dr. Jackson. Nevertheless, nine days after the hearing, but a week before the trial court granted Dr. Jackson's motion for summary judgment, Plaintiff submitted the affidavit of an expert witness, Dr. Norman Reiss.

Plaintiff had no less than nine attorneys, all with the same law firm, assisting her with her case. Plaintiff's counsel had ample time to discuss her case with her, and to prepare for the hearing on the motion for summary judgment. Plaintiff also never sought any relief in either regard from the Court before the hearing on the motion. Nevertheless, despite the fact that Plaintiff did not submit her expert's affidavit until after the hearing on the motion for summary judgment, the Court did not grant Dr. Jackson's motion to strike the affidavit. Instead, the trial court ruled that Plaintiff failed to meet her burden of establishing through expert testimony that Dr. Jackson was negligent as alleged in her Complaint. That ruling was proper, considering, if nothing else, the inadequacies of Dr. Reiss' affidavit and the absence of any other expert proof to sustain Plaintiff's claim.

Plaintiff was in no way prejudiced, hindered or restricted by time or assistance of counsel. She had every opportunity and ample time to have either submitted an expert affidavit before the hearing on the motion for summary judgment, or to have moved the Court for a continuance of the hearing before actually appearing at the hearing; she did neither. However, she did, although belatedly, submit an affidavit of her expert witness, which the Court did not strike despite Dr.

Jackson's motion [for the Court] to do so.

Plaintiff got the very relief she sought, and she was given every consideration she was due. She simply never produced any expert testimony sufficient to establish the requisite elements of her claim in order to avoid summary judgment. At best, Plaintiff's expert's affidavit was untimely; at worst, it was insufficient. In either case, it failed to meet Plaintiff's burden of expert proof in this case

As the Mississippi Supreme Court has recognized in prior cases, "At some point the train must leave." *Bowie v. Montfort Jones Memorial Hospital*, 861 So.2d 1037, 1043 (Miss. 2003). That point in this case was reached when the trial court, considering the evidence in the record before it, as considered herein, particularly Plaintiff's lack of sufficient expert proof, found that Plaintiff had failed to meet her burden of expert proof to establish her claim of negligence against Dr. Jackson, and entered summary judgment accordingly. The ruling of the trial court was correct, and it should not be reversed.

RESPECTFULLY SUBMITTED, this the 12th day of March, 2008.

DEFENDANT/APPELLEE
PAUL D. JACKSON, M.D.

BY: _____
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CERTIFICATE OF SERVICE

I, Clinton M. Guenther, of counsel to Defendant/Appellee, Paul D. Jackson, M.D., hereby certify that I have mailed by U. S. Mail, postage prepaid, a true and correct copy of the Brief of Defendant/Appellee, Paul D. Jackson, M.D., to:

Hon. Isaac K. Byrd, Jr.
Hon. Suzanne G. Keys
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Hon. Richard A. Smith
Circuit Judge
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Greenwood, MS 38935-1953.

SO CERTIFIED this the 12th day of March, 2008.

CLINTON M. GUENTHER, [redacted]
Of Counsel to Defendant/Appellee, Paul D. Jackson, M.D.

CERTIFICATE OF FILING

I, Clinton M. Guenther, certify that I have this day delivered via U.S. Mail, postage prepaid, the original and three copies of, and a CD containing the Brief of Defendant/Appellee, Paul D. Jackson, M.D., on March 12th, 2008, addressed to Ms. Betty Sephton, Post Office Box 249, Jackson, MS 39205-0249.

CERTIFIED this the 12th day of March, 2008.

CLINTON M. GUENTHER, [redacted]
Of Counsel to Defendant/Appellee, Paul D. Jackson, M.D.