IN THE SUPREME COURT OF MISSISSIPPI

WILLIAM A. CAUSEY, M.D. **APPELLANT**

V. **CASE NO. 2006-CA-01697**

REITHA SANDERS, Individually and on Behalf of all Wrongful Death Beneficiaries of Ersel Allen **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED BY APPELLANT

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REPLY

I. Appellee's Experts Were Unqualified to Testify as to the Standard of Care Applicable to Dr. Causey.

The parties appear to agree that the appropriate standard of care for medical malpractice cases is as follows:

> Mississippi physicians are bound by nationally-recognized standards of care; they have a duty to employ 'reasonable and ordinary care' in their treatment of patients. . .[G]iven the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, 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.

McAllister v. Franklin County Memorial Hosp., 910 So.2d 1205, ¶ 15 (Miss. App. 2005), Emphasis added (citing *Palmer v. Biloxi Regional Med. Ctr., Inc.*, 564 So.2d 1346, 1354 (Miss. 1990); *Hall v. Hilbun*, 466 So.2d 856, 873 (Miss. 1985)). Dr. Causey's issue with Appellee's trial experts turns on the fact that these experts were not, as Mississippi law requires, practicing in the same specialty or general field of practice as Dr. Causey. While probably well-qualified in their respective fields, these experts were not at all qualified to testify as to the appropriate standard of care for a hospice because, by their own admissions, they have absolutely no experience in the speciality of palliative medicine and have never practiced in this field. Exhibit D-41, p. 11, lines 6-13; p. 13, line 9; p. 24, lines 3-7; p. 75, line 23; p. 76, line 4. See also trial testimony of James Garriot, Ph.D., T. 316, 318 and 324.

Further, Appellee has even cited case law which wholly bolsters Dr. Causey's argument. For example, Appellee quotes *Troupe v. McAuley*, "[t]he rule is that the expert must exercise the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." 955 So.2d 848, ¶ 25 (Miss. 2007) (quoting *Poole v. Avara*, 908 So.2d 716, ¶ 16 (Miss. 2005))(citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 37-38 (Miss. 2003)). This statement goes to the very heart of Dr. Causey's issue with the Appellee's experts, namely, that none have exercised the same level of intellectual rigor that characterizes the practice of Dr. Causey in the field of palliative medicine.

Appellee also discusses the professional achievements and accolades of each of her experts and rather summarily states that because of these achievements, the experts were all qualified to testify. Appellee, however, ignores the fact that the expert in *Troupe*, a neurosurgeon, who undoubtedly had impressive credentials in the field of neurosurgery, was, nevertheless deemed incompetent to testify against a neuro-otolaryngologist. Essentially, there is absolutely no difference in what occurred in this trial with regard to Appellee's experts and a trial court permitting a pediatrician to testify as an expert against a vascular surgeon.

Appellee maintains that there is no separate standard of care for a hospice. Despite this, there is a nationally recognized sub-specialty for palliative medicine and end of life care. For instance, Dr. Gerry Ann Houston, a defense expert, is Board Certified in Hospice and Palliative Medicine. D-52. Also, Dr. Melvin Gitlin, another defense expert, is Board Certified in Pain Management and Pain Medicine. D-53. Dr. Michael Byers, the Co-Medical Director of Hospice, is both an infectious disease specialist and an internist. By contrast, not one of Appellee's expert witnesses had any specialized training or board certifications in the fields of palliative medicine, pain medicine, hospice

medicine and pain management. Dr. Causey submits that the only proper way to judge a hospice is through the eyes of those persons actually specializing in the treatment of the dying. This is what Mississippi law requires, and the trial court abused its discretion in allowing Appellee's experts, who lacked the requisite experience in the separate field of palliative medicine, to testify against Dr. Causey.

II. The Trial Court Erred in Improperly Limiting Dr. Causey's Experts.

Appellee, in response to Dr. Causey's argument regarding this issue, grossly oversimplifies the trial court's restrictions upon Dr. Causey's expert witnesses and even goes so far as to liken it to a "duel between the experts." Dr. Causey submits that if this was, in fact, a duel, his experts were forced to participate blindfolded and with their hands tied behind their backs. Further, Appellee fails to recognize the compound error created by the trial court in allowing Appellee's unqualified experts to testify, virtually unchecked, while Dr. Causey's experts were impermissibly limited.

Appellee's experts were permitted to testify ad nauseam about the appropriate dosages of pain medicine for *acute* patients; however, the Court would not allow the defense experts to discuss standard dosages for *chronic* patients. Appellee's experts discussed dosages which were recommended in the *Physician's Desk Reference* or other publications and which were inapplicable to chronic patients such as Ms. Allen. *See* argument of counsel before the Court pretrial at T.33-37. For example, James Garriot, a toxicologist who testified for Appellee, testified that he got his information on proper dosages from "*Micromedix Healthcare Series,*" an on-line manual used by physicians. T.281-282. The Court repeatedly heard from Appellee's experts about the "optimum dosage," without regard to the patient's condition, chronic or otherwise.

On the other hand, Ronnie Bagwell, the pharmacist who testified on behalf of Hospice, testified that he was a member of the Interdisciplinary Team (IDT) which made decisions for patients, including, specifically, the decedent, Ersel Allen. T.426. The Court, consistent with its rulings of refusing to recognize the uniqueness of hospice care, sustained an objection of Appellee that Mr. Bagwell be recognized as a specialist in hospice pharmacy. Mr. Bagwell testified in detail regarding the administration of drugs to Ms. Allen, and he testified as to the appropriateness of dosages given to her throughout her Hospice stay. He testified that he disagreed with the statements of Appellee's experts that the dosages which were given would be "lethal." T.455. When asked if he was involved in consultation regarding a patient's condition similar to Ms. Allen, Bagwell stated that he had, but despite this, the Court refused to allow him to testify that other patients were getting similar dosages. T.456. Consequently, the Appellee's experts, though wholly unqualified, were permitted to misrepresent appropriate dosages of pain medication for chronic patients by extrapolating those dosages which would be appropriate for an acute patient. However, every instance that Dr. Causey's experts attempted to explain the error in using such an extrapolation, the trial court refused to allow an explanation. In short, Dr. Causey's experts were not permitted to explain to the jury that chronic patients require higher levels of pain medication than acute patients, and that the dosages which Ersel Allen received are routinely given to others in her condition, with no adverse effects.

As stated in Dr. Causey's original brief, the rulings of the trial court restricting Dr. Causey's experts would, in and of themselves, warrant reversal, but those rulings, coupled with the gate being held wide open for Appellee's experts, amount to extreme prejudice, and further buttress Dr. Causey's arguments to reverse and render in his favor.

III. The Trial Court Erred in not Allocating Fault to the University of Mississippi Medical Center.

In response to Dr. Causey's argument that the trial court erred in refusing to allocate fault to the University of Mississippi Medical Center, Appellee makes the rather ludicrous assertion that this was proper in light of the fact that UMMC was not a joint tortfeasor. *Black's Law Dictionary* defines a joint tortfeasor as "[T]wo or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit." Also, according to *Granquist v. Crystal Springs Lumber Co.*, "The term 'joint tort feasors' means that two or more persons are the joint participants or joint actors, either by omission or commission, in the wrongful production of an injury to a third person. There the act or omission of each is his own act or omission, **but the acts or omissions are concurrent in, or contribute to, the production of the wrongful injury, so that each actor is, on his own account, liable for the resulting damages.**" Emphasis added, 1 So.2d 216, 218 (Miss. 1941).

Further, this Court has previously explained that "the term 'party' as used . . ." in Miss. Code Ann. § 85-5-7 "refers to **any participant to an occurrence which gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial.**" *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, ¶ 44 (Miss. 1999), Emphasis added. Also, "[U]nder Miss. Code Ann. § 85-5-7(7), absent tortfeasors who **contributed** to a plaintiff's injuries 'must be considered by the jury when apportioning fault.'" *Blailock ex rel. Blailock v. Hubbs*, 919 So.2d 126 (Miss. 2005), Emphasis added (citing *Smith v. Payne*, 839 So.2d 482, 486 (Miss. 2002) (citing *Estate of Hunter*, 729 So.2d 1264 (Miss. 1999))). Joint tortfeasors are not necessarily participants to the same occurrence causing the injury to a claimant. For example, if a tortfeasor pushes a claimant into the street, and

the claimant is hit by a speeding car driven by another tortfeasor, these tortfeasors are jointly liable for the claimant's resulting injuries because it is foreseeable that a car which is exceeding the speed limit might hit the claimant. Under Appellee's theory of the case, it was foreseeable that Ersel Allen would not receive proper treatment, which was precisely what Appellee's chief standard of care witness testified. See discussion of Dr. Hookman's scathing criticism of UMMC below. Similarly, it was foreseeable that Ersel Allen would eventually die when she was certified by UMMC for admission to Hospice.

This Court should take notice that Appellee joined UMMC in this lawsuit for alleged medical malpractice in its treatment of Ersel Allen. R. 8, 14. Also, it is rather curious that Appellee would argue against joint and several liability and fault apportionment in light of her very own wording in the original and First Amended Complaints, "Plaintiff demands a trial by jury and request (sic) judgment against all defendants: the University of Mississippi Medical Center, Hospice Ministries, Inc., . . **jointly and/or severally**, and for compensatory, incidental and consequential damages." R. 12, 18, Emphasis added. As a result, Appellee is bound by her pleadings.

Appellee's own expert, Dr. Hookman, made UMMC's negligence a continuing theme throughout this trial. When asked the specific question of whether he believed UMMC was negligent in their care and treatment of Ms. Allen, stated, "[I]'m saying, if negligence is defined as putting somebody in a hospice to die, then this was negligent, when it was not necessary." Exhibit D-41, p. 109, lines16-19. In addition, he volunteered, "Now, I said before, you don't have to be a rocket scientist to tell you -- you who treated her at the University of Mississippi, did, indeed, breach the standard of care." *Id.* at 108, lines 24-25 and p. 109, lines 1-33. This testimony clearly reveals

that UMMC, whether negligent or not, was certainly a party to the events which brought about this litigation, and within the meaning of the term as espoused by Miss. Code Ann. § 85-5-7.

As outlined in Dr. Causey's brief, but for the cancer diagnosis made by UMMC, Ms. Allen would never have been a patient of Dr. Causey. Also, Appellee has continually missed the mark on its characterization of Hospice. Hospice is not a diagnostic facility. Rather, it is solely concerned with rendering end of life care to the dying. Once Ersel Allen darkened the door of Hospice, the only medical treatment she and her family could have expected to receive is that which was intended to ease the pain of her illness, be it cancer or otherwise.

Also, the trial court contradicted itself in that Dr. Causey was given credit for UMMC's pre-trial settlement, yet fault was not allocated to UMMC. R. at 494.[1] Therefore, on some level, the trial court must have recognized that UMMC was, in fact, a joint tort feasor to the events giving rise to this litigation.

Dr. Causey submits that the Appellee's attempt to characterize UMMC as something other than a joint tort feasor is simply a classic case of splitting hairs. In fact, Appellee had absolutely no qualms about accepting a settlement from UMMC for its alleged role in this lawsuit. In short, Appellee lays blame upon UMMC only when to do so is convenient and profitable for her. Unfortunately for Appellee, Mississippi law does not agree and mandates that the jury should have been instructed on the apportionment of fault. The trial court's failure to so instruct the jury constitutes reversible error.

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1 The Final Judgment on Jury Verdict reflects that Dr. Causey was given a credit of $1,015,000.00; however, the trial court does not explain the complete source of this credit. $1,000,000.00 was paid by Hospice Ministries, Inc. to settle its claim, and $15,000.00 was paid by UMMC.

IV. The Trial Court Erred in Failing to Conduct an Evidentiary Hearing on the Issue of Punitive Damages.

Appellee confuses this issue and suggests that the automatic submission of the issue of punitive damages to the jury was appropriate because **the jury** should not have been subjected to a repeat of testimony and evidence on this issue. This argument is, respectfully, illogical. Mississippi law does not require and Dr. Causey does not argue that **the jury** should have conducted a separate hearing on punitive damages. By contrast, it was the trial court's absolute responsibility to conduct this hearing prior to submitting punitive damages to the jury. Despite this Court's instruction and guidance in *Bradfield v. Schwartz*, the trial court determined before this trial ever began that punitive damages were an issue in this lawsuit and would be submitted to the jury. In fact, the trial judge even said as much on the record. T. 41, lines 7-8.

This Court was explicit in *Mariner v. Health Care, Inc. v. Estate of Edwards ex rel. Turner*, when it held, "[T]he failure to conduct an evidentiary hearing on punitive damages, where the plaintiff has sought such damages and the jury has awarded compensatory damages, constitutes reversible error." 964 So.2d 1138, ¶ 23 (Miss. 2007)(citing *Bradfield v. Schwartz*, 936 So.2d 931, ¶ 21 (Miss. 2006)). The trial court did not endeavor to conduct any hearing on punitive damages before this was given to the jury, and Appellee simply cannot explain away the trial court's failure in this regard.

V. The Trial Court Erred in Failing to Grant Dr. Causey's Motion for Remittitur.

Dr. Causey freely acknowledges that calculating damages is not an exact science. The damages awarded Appellee, however, stretch the bounds of even basic reality. The final judgment entered against Dr. Causey was in the amount of $3,485,00.00. R. 494. The only evidence related

to actual damages put on at trial surfaced during the Reitha Sanders' testimony when she explained that her mother's funeral expenses were $6,300.00. T.392. Also, there was testimony that Ms. Allen's family missed her. T.372 (Testimony of Jo Carroll). As such, the jury's $4,000,000.00 verdict was awarded in an effort to compensate the Appellee for the $6,300.00 in funeral expenses and the loss of society and companionship of Ms. Allen.

The ratio of actual damages to the amount of the jury's verdict in this case is approximately 634 to 1. This ratio shocks the conscience, is against the overwhelming weight of the evidence and is far beyond other verdicts which have been remitted and affirmed by appellate courts in Mississippi. The trial court, thus, should have granted Dr. Causey's Motion for Remittitur and erred in failing to do so.

VI. The Trial Court Erred in Failing to Instruct the Jury as to Mississippi Law Regarding "Chance of Recovery."

The Appellee contends that were it not for Dr. Causey's alleged malpractice, Ersel Allen would still be alive today. Appellee is disillusioned with Ersel Allen's ultimate prognosis, which to say the least, was extremely grim even if she did not have pancreatic cancer. Ms. Allen's medical records paint a very disturbing picture of health. She was a chronically ill woman who had lost massive amounts of weight before her UMMC admission. Exhibit D-54, p. 23, lines 24-25 and p. 24, line 1. She had severe emphysema, was malnourished and catchectic. T. 888, lines 1-9. She suffered from constant abdominal pain and was jaundiced. *Id.* The physicians who actually rendered care to Ms. Allen, Drs. Causey and Duddleston, estimated that she had less than six months to live and testified to as much at trial. T. 899, lines 14-16; Exhibit D-54, p. 23, lines 24-25.

Dr. Causey submits that the chance of recovery doctrine was created for precisely this type of situation. Even had Mrs. Allen never set foot inside either UMMC or Hospice, she would not be alive today. For these reasons, the jury should have been instructed on the chance of recovery doctrine, and it was erroneous for the trial court to refuse such an instruction.

VII. Public Policy

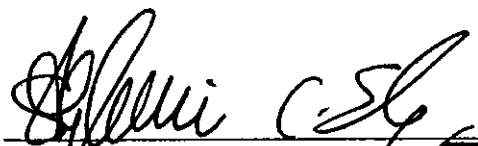
While the issues presented in this appeal are certainly of importance to Dr. Causey, the significance does not end with him. The decision of this Court will, no doubt, have national repercussions in the field of palliative medicine. The Appellee has sought to transform Hospice into a general medical facility. Such a transformation, according to Appellee, requires a hospice to rediagnose admitted patients and to administer only those levels of pain medication which would be appropriate in an acute care setting, such as an emergency room.

Should the Court find in favor of Appellee, the physicians who have devoted their careers to helping ease the pain for those at the end of their lives, will be at immediate risk for an untold number of lawsuits. Furthermore and even more alarming is the fact that hospices will effectively cease to exist because specialists will be prevented in providing palliative end of life care to their patients.

CONCLUSION

The Appellee has failed to sufficiently rebut Dr. Causey's arguments and in many instances, has even bolstered Dr. Causey's appeal. For the foregoing reasons, Dr. Causey respectfully requests that this Court reverse and render in his favor. Dr. Causey further requests any additional relief this Court deems appropriate.

RESPECTFULLY SUBMITTED, this the 28th day of January, 2008.



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CERTIFICATE OF SERVICE

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