SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-00173-SCT

BETTY G. HARTEL and WALDO HARTEL — APPELLANTS

VERSUS

JACK B. PRUETT, M.D., et al. — APPELLEES

REPLY BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellants, L. Christopher Breard, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal. The persons are:

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Respectfully submitted this the 25th day of February, 2008.

By: _____
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STATEMENT OF THE ISSUES

(AS PER ORIGINAL BRIEF)

I. The Trial Court erred in ruling the Hartel experts would not be allowed to sponsor and testify medical texts and journal articles supporting the theory of the case.

III. The Trial Court erred in refusing to allow the Hartels to call Dr. Pruett adversely via his video deposition as allowed by the Mississippi Rules of Civil Procedure.

IV. The Trial Court erred in allowing Defendant and his expert witnesses to testify what they did and what other doctors did in the community relative to prescribing antibiotics for acute mild diverticulitis.

ARGUMENT AND AUTHORITIES

I.

THE TRIAL COURT ERRED IN RULING THE HARTEL EXPERTS WOULD NOT BE ALLOWED TO SPONSOR AND TESTIFY MEDICAL TEXTS AND JOURNAL ARTICLES SUPPORTING THE THEORY OF THE CASE.

Appellees on page 10 of their brief misquoted and took out of context a statement by counsel for Appellants by stating:

> "He is just a poor old country lawyer and not a medical doctor," (R.E. of Appellees 31). Appellees claim this was an admission by counsel that it takes a significant amount of time to digest technical medical treatises and counsel for Appellees did not have time to do so. The quote was actually: "Well, when it takes time to go over to LSU and do the research when you are not a medical doctor you know, you are just a poor old country lawyer like me,..." (R.E. Appellees 31).

That statement was not intended to admit or infer this case involved a technical medical issue. In fact it was never alleged this case involved was a technical medical issue but to the contrary it is one which is simple, straight forward and consistent throughout the medical literature. (Rp 463-596) The statement was made to indicate, for a sole practitioner who does not have the resources or access of a medical doctor or defense attorney, it takes time to gather this information when you are on your own. (TR. 41, 42)

Mr. Caraway assured the Court:

> "We are not planning to ask our experts do you have literature that supports your position or does the general non-specific literature support your position. That's something we weren't going to bring up at all." "I think Chris is going to rebut such a tactic. I can represent to the Court we don't plan on doing that. We're just putting our expert witnesses up there to say they (sic) way they think medicine should be practiced (TR. 42).

However that is what they ultimately did by inference and the use of Griffiths Five Minute Clinical Practice. Often there is sharp controversy in the medical literature on how to treat a specific problem. In this instance of acute mild diverticulitis the literature was and has been consistent in requiring antibiotic coverage for both aerobic and anaerobic bacteria. In this case it became clear to counsel that Defendants' experts were willing to take whatever position was necessary to defend this doctor including, ignoring clear medical guidelines which existed across a broad spectrum of medical specialties. Appellants' experts were not necessarily intending to rely upon this medical literature to form the basis of their testimony, but in fact counsel for Appellants was offering it to show that the position wasn't just "made up". It became necessary to present the truth.

In the absence of the medical authority and acknowledgement that the medical literature was in fact reasonably reliable and widely accepted, it allowed experts for Appellees to say whatever they pleased without fear of reprisal or consequences and that is just what they did. The Court acting as a gate keeper should remain objective when viewing scientific evidence. The Court and literature in this case acting as gate keeper regarding the basis and validity of expert medical testimony stated:

> "All I'm saying is when you talk about literature the credibility of literature at least in my eyes is shaky at best from the medical community. I think it is an evolving thing just like we are doing." "I don't know if you were out there. When I grew up, you put cold on a sprained ankle. Then as I grew older, you put hot. Then as I grew even older, it got back to cold-hot. So they flip-flopped all the way. And I think the jury understands that or some people do." (TR. 42)

For the Court, under the circumstances of this case and with the extent of literature presented it is distressing for this analogy to be made. Appellants believe this

analogy and decision by the Court to ignore the substance and credibility of the medical literature was arbitrary and an abuse of discretion.

Counsel for Appellees in page 10 of their brief states they had inadequate time for counsel and experts to adequately review the medical authority presented by the Appellants. This is simply not true. In fact on page 6 of their brief, they also indicate, it appeared as though it was only Sunday, June 19, 2005, on the eve of the Trial that they had the full text of the articles and predices. While counsel for Appellees did transmit those documents via fax to counsel as stated, it should be noted that counsel for Appellees had the documents in hand well in advance for their experts to actually review. As stated by Appellees' expert Dr. Michael Stodard:

> "I was provided by Mr. Caraway late last week a stack of articles that Mr. Caraway told me had come from Mr. Breard that they were going to use.
>
> I actually did not read those articles until over the weekend..." (TR. 701)

There can be no question, counsel for the Defense had these articles prior to delivery by Appellants and each of the Defendant doctors had the opportunity to review those articles. As is shown by the articles themselves this is not a technical issue. It is simply a case of whether or not a broad spectrum antibiotic covering both aerobic and anaerobic bacteria is called for treatment of Mrs. Hartel's condition. Appellees simply did not want to acknowledge this literature or the guidelines since it was contrary to their position and they really did not have a good explanation for why they disagreed with the literature other than basically saying "that's one way of doing it, but it's not our way."

The ruling by the Court was certainly harmful to Appellants in that it did not effectively allow Appellants to show the opinions of Appellees experts were completely at odds with a mountain of sound medical authority.

It allowed them to question the authoritativeness of the articles and texts and even the PDR and prevented counsel from having Appellants' experts verify their credibility and authoritativeness. Appellees continued to assert Appellants showed no harm by the decisions of the Court in disallowing this testimony. When Appellees were then allowed to testify regarding Griffiths Five Minute Clinical Consult the damage was clearly compounded. The Court in allowing Appellants in particularly, Dr. Pruett, to testify regarding Griffiths Five Minute Clinical Consult is directly at odds with the ruling regarding Appellants medical literature. Appellants designation of experts show Pruett filed an amended designation of experts which did not identify any medical literature whatsoever. Appellants' counsel did not open the door to this testimony because based on the disclosures there was no door to open. It is easy for Appellees to claim there was no prejudice or harm because they received a favorable verdict. Had the shoe been on the other foot, there is no doubt we would be hearing a different argument. These issues of error need to be viewed in the context of their overall effect.

III.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE HARTELS TO CALL DR. PRUETT ADVERSELY VIA HIS VIDEO DEPOSITION AS ALLOWED BY THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

Appellees on page 17 of their brief, after acknowledging the admissibility of the video deposition in general, assert a fall back position regarding this point of error

asserting that the Hartels suffered no prejudice as they were able to employ the depositions of Dr. Pruett during cross examination. Appellants believe this Court can take judicial notice of the fact if a deposition is otherwise admissible there is no good substitute for a videotaped deposition in conveying to the jury the demeanor, responsiveness and accurate testimony of the witness. The reason Appellees did not want that deposition played is because they did not want the jury to see the marked distinction between Dr Pruett's pre-trial deposition testimony versus his cleaned-up practiced trial testimony. The Jury was deprived of the information on the video and it is only self-serving for Appellees to state refusal to allow the videoed deposition of Pruett was only harmless error. If the video had been played then there would have been no mention of Griffiths Five Minute Clinical Practice at least in Appellants case in chief. This certainly gave Pruett an opening he would have otherwise not had to inject, albeit erroneously, a medical reference he asserted supported his actions. There would not have been the confrontation and need to impeach as the video testimony was "in the can" and what Appellants denied to show the Jury. This brings the error and prejudice of the Courts ruling into clear prospective.

IV.

THE COURT ERRED IN ALLOWING DEFENDANT AND HIS EXPERT WITNESSES TO TESTIFY WHAT THEY DID AND WHAT OTHER DOCTORS DID IN THE COMMUNITY RELATIVE TO PRESCRIBING ANTIBIOTICS FOR ACUTE MILD DIVERTICULITIS.

While Appellants stand on the arguments and legal authorities made in their original brief, it should be noted that Appellees again have asserted that allowing their

experts to testify about what other doctors did in the community did not prejudice or adversely affect the rights of the Hartels. When the Hartels or any other party are not put on notice that an expert is going to rely on what other doctors do in his local community in a specific situation, the party is not capable of discovering the basis or validity of that particular opinion. One does not have the opportunity to discover if the comparison is accurate, if it is relevant, if it is even true, or admissible into evidence. You lose the opportunity to question the doctor or doctors who are being referred to if the testimony is deemed admissible, which it is not. Simply because a physician may have personal knowledge of what another physician may have done in a particular situation, does not make it admissible evidence or set the standard of care. *Godbee v. Dimick,* 213 S.W. 3d 865, 895, 896 (COA Tenn 2001) In the case before the Court, it should be patently clear that the Appellees' experts were using this tactic to improperly bolster their otherwise unsubstantiated opinions, opinions which were clearly in conflict with authoritative medical guidelines. In this particular case, under these particular facts, the testimony was particularly harmful because it was used to diffuse Appellants' case and confuse the Jury. It diffused the impact of the medical literature which unfortunately could only be used on cross examination if accepted by the Appellees' experts, and the Jury could not have it in the jury room to examine for themselves and read in proper context. There should be no doubt this was particularly highly prejudicial to Appellants.

CONCLUSION

Viewing these issues of error as a whole, even in the light most favorable to Appelees, should require a finding of prejudicial error and demand this case be remanded for a New Trial.

Respectfully submitted this the 25th day of February, 2008.

Betty G. Hartel and ~~Waldo~~ Hartel

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CERTIFICATE OF SERVICE

I, L. Christopher Breard, do hereby certify that I have on this date mailed a true and correct copy of the foregoing **Appellants' Reply Brief** to:

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by depositing a copy of same with the United States Postal Service, postage prepaid.

So certified on this the 21st day of February, 2008.

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