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

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**No. 2007-CA-00173**

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**BETTY G. HARTEL and WALDO HARTEL** — **APPELLANTS**

**VERSUS**

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

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# BRIEF OF APPELLANTS

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**ORAL ARGUMENT REQUESTED**

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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:

1. Honorable Kosta N. Vlahos
   Circuit Court Judge
   Post Office Box 7575
   Gulfport, MS 39506

2. L. Christopher Breard, Esquire
   Breard Law Firm, Ltd.
   1643 East Pass Road, Suite A
   Gulfport, MS 39506

3. Mark Caraway, Esquire
   Lynda C. Carter
   Wise, Carter, Child & Caraway
   Jackson, Mississippi 39205-0651

4. L. Clark Hicks, Jr., Esquire
   Gunn & Hicks
   Post Office Box 1588
   Hattiesburg, MS 39403

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I.

## STATEMENT OF THE ISSUES

1. Whether the trial court erred in ruling the Hartels' experts would not be allowed to sponsor and testify regarding medical texts and journal articles supporting their theory of the case;

2. The trial court erred in refusing to allow Appellee's expert Dr. Stoddard to testify on cross examination regarding the New England Journal of Medicine.

3. 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.

4. 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.

5. The trial court erred by granting a directed verdict for Spectrum Emergency Care, Inc. d/b/a SEC/EM Care, Emergency Care, Inc.

6. The jury's verdict was against the overwhelming weight of the evidence and the Trial Court erred in not granting a new trial.

II.

## STATEMENT OF THE CASE

The initial Complaint of medical malpractice was filed by Betty G. Hartel and husband, Waldo Hartel, against Jack B. Pruett, M.D., and Spectrum Emergency Care, Inc. d/b/a SEC/EM Care, Emergency Care, Inc. on September 20, 1999 alleging Jack B. Pruett, M.D. negligently failed to appropriately evaluate and treat Ms. Hartel's acute diverticulitis and treat her with proper antibiotic therapy. (R. 12). The diverticulitis progressed and the infection resulted in multiple surgeries and the removal of a segment of her colon. The issue before the jury was not that there was a misdiagnosis but rather inadequate antibiotics were prescribed for outpatient treatment of mild acute diverticulitis .

It was alleged Spectrum Emergency Care, Inc. d/b/a SEC/EM Care, Emergency Care, Inc., hereinafter referred to as "EM Care", provided emergency room physicians to Biloxi Regional Medical Center, hereinafter referred to as "Biloxi Regional". Jack B. Pruett, M.D. hereinafter referred to as "Pruett" was initially believed to be an employee of EM Care. (R. 13). On October 22, 1999, Pruett filed his Answer to the Complaint denying the allegations of negligence and while denying EM Care was Pruett's employer he admitted EM Care provided emergency physicians to Biloxi Regional. (R. 17, 18). EM Care filed its Answer on October 22, 1999 denying negligence and also denied it was the employer of Pruett, however, EM Care admitted it provided emergency room physicians to Biloxi Regional. (R. 22, 23).

Betty and Waldo Hartel filed their First Amended Complaint on May 12, 2000 alleging Pruett was employed or under contract or the agent of EM Care who was under contract with Biloxi Regional to provide emergency room doctors making EM Care responsible for the acts and omissions of Pruett under the theory of *respondent superior*. (R. 39, 40). In the interim, on

May 12, 2000, a Second Amended Complaint was filed, adding as a defendant, Biloxi Regional and alleging Biloxi Regional was responsible via *respondent superior* for the actions of Pruett. (R. 56, 58). It was again alleged in the Second Amended Complaint Pruett was employed and/or under contract and/or the agent of EM Care and that EM Care was also responsible for Pruett's actions via *respondent superior*. (R. 59). It was also separately alleged EM Care and Biloxi Regional were separately liable in tort for the negligent hiring of Pruett as an emergency room physician. (R. 60, 61).

In filing his Answer to the Second Amended Complaint on June 12, 2000, Pruett again admitted EM Care provided emergency room physicians to Biloxi Regional, but denied EM Care was his employer. (R. 63, 65). EM Care filed its Answer to the Second Amended Complaint on June 12, 2000 again admitting EM Care provided emergency room physicians to Biloxi Regional, but denying it was the employer of Pruett. EM Care also admitted it entered into a contract with Biloxi Regional the terms of which speak for themselves. Biloxi Regional filed its Answer and Cross Claim on January 16, 2002. In doing so Biloxi Regional admitted EM Care entered into a contract with Biloxi Regional to provided its emergency room physicians. (R. 90, 92, 93). In Biloxi Regional's Cross Claim against Pruett and EM Care they alleged contractual and common law indemnification and specifically referred to the emergency services agreement with EM Care to provide emergency room physicians to Biloxi Regional including Pruett. (R. 97-100). A copy of the emergency services agreement was attached as Exhibit "A" to the cross claim. (R 103). In Pruett and EM Care's Answer to the Cross Claim of Biloxi Regional filed February 26, 2002, it was specifically admitted that EM Care had a duty of indemnification based on the theory of *respondent superior*. (R. 157, 158). EM Care also admitted to the averments of Biloxi Regional in Paragraph 4 of the Cross Claim as it related to the emergency

services agreement and again admitted contractual indemnification based on *respondent superior*. (R. 160). Clark Hicks, Esquire who represented both Pruett and EM Care admitted to the court in argument EM Care was the contracting company that placed Pruett at Biloxi Regional. (R. 2).

On March 1, 2005, Plaintiff designated experts, Joe Blackston, M.D., board certified in internal medicine and Ernest B. Kleier, Jr., M.D., general surgeon. (R. 185). On March 18, 2005, Pruett filed his Designation of Experts including Pruett and George E. McGee, a surgeon from Hattiesburg. (R. 224). Biloxi Regional on April 21, 2005, filed its Designation of Experts including Michael O. Stoddard, M.D. of Madison, Mississippi, and Robert K. Collins, M.D., Mississippi State, Mississippi. (R. 226). Collins was not called as a witness. Defendants Pruett and EM Care filed an Amended Designation of Experts on April 26, 2005, detailing the anticipated testimony of George E. McGee, M.D. (R. 230). There was no mention any literature to be used at trial in the designation by Hartel, Pruett, EM Care or Biloxi Regional.

On June 14, 2005, Biloxi Regional filed a Motion for Separate Trials requesting a separate trial of the corporate negligence claim from the underlying medical malpractice claim. (R. 308). It was claimed issues of fairness and judicial economy required separate trials on the issue of medical negligence and vicarious liability before any corporate liability for negligent hiring was tried. (R. 310). Pruett and EM Care joined in that motion (Tr. 341) and the Court ultimately granted the Motion for Separate Trials. (Tr. 19).

On June 15, 2005, at 2:26 p.m., counsel for Hartels timely notified both counsel for Pruett, EM Care and Biloxi Regional of their intent to use various medical texts and/or articles and guidelines in their case in chief. (R. 320, 606, 607). On June 17, 2005, Pruett and EM Care

filed a Motion in Limine seeking to exclude the medical articles, texts and treatises proposed to be used by Plaintiffs' counsel. (R. 313).

While this case was actually scheduled for trial Monday, June 20, the Court instead heard Motions in Limine that day. (Tr. 1 and 2). The Court heard argument on Appellees' Motion in Limine regarding the Hartels' use of medical literature to support their position. The peer reviewed material supported the fact that a case of mild acute diverticulitis required antibiotic coverage for both aerobic (air breathing) and anaerobic (non-air breathing) bacteria and that approximately 90% of the patients properly treated don't progress to surgery. (Tr. 26, 27). In this case, Pruett prescribed only the antibiotic Cipro which kills only aerobic bacteria. He did not prescribe an antibiotic that killed anaerobic bacteria. (Tr. 26, 27, 302, 304, 305, 306).

The Court considered whether the Hartels timely supplemented discovery with the articles. (Tr. 21). There was clearly an admission by Mr. Hicks he had no objection to the articles being used for cross examination but only to their admission in direct exam of Hartels' experts. (Tr. 21, 22). Counsel for Hartels made it clear that the articles were being used to show that appropriate conservative therapy with both aerobic and anaerobic coverage would result in 90% of the patients not requiring surgery. If the Hartels' experts sponsored the articles it would prevent Pruett and the defense experts from attempting to testify they were not familiar with the articles or refuse to recognize them as authoritative and thus avoid having to comment on them. (Tr. 27, 28). After lengthy arguments including a showing the literature was seasonably provided to Appellees, the Court ruled Appellants could not use the literature out on direct but could use it in cross. (Tr. 41). Counsel for Pruett and EM Care assured the Court they were not planning on asking their experts if they had literature that supported their position or ask if the

general non-specific literature supported their position. (Tr. 42). It was at that time the Court expressed doubts in general regarding the credibility of literature from the medical community. (Tr. 43).

The Court further ruled in limine the video deposition of Pruett could not be used in lieu of calling Pruett live adverse. It was explained the video deposition had been placed on a video disc and the actual transcript had been synchronized to scroll the testimony of doctor on the video like closed captioning. (Tr. 60). Clark Hicks, counsel for Pruett, admitted the video deposition could be used under the Rules of Procedure and case law, but he wanted the entire deposition introduced. Counsel for the Hartels had no objection to Mr. Hicks putting anything he wanted from the deposition into evidence but only after the Hartels had presented their portion of the deposition. (Tr. 65, 66). There was never an allegation that any portion of the deposition offered by the Hartels was misleading or taken out of context. (Tr. 71). The trial judge stated his personal belief that there was something inherently wrong with using a deposition when the party was available live, obviously ignoring the importance of the demeanor of the party in the video deposition. (Tr. 74). A copy of the proposed deposition was offered to the Court to read the night before the trial was to begin. (Tr. 75). A copy of exactly what was proposed to be played and the part excluded by the court or agreement was again offered to the Court before testimony began. (Tr. 182). The Court was aware that portions of the video to be offered were identified on June 13 to the Appellees. (Tr. 186). Hartels' counsel even agreed if necessary to play the whole video as requested by Appellees. (Tr. 202).

The Court acknowledged there was no allegation of the proffered video being taken out of context. (Tr. 207). The Appellees admitted they had not looked at the actual video and had not asked for it. (Tr. 187). Again the Court ruled that Pruett had to be called live and the

deposition could be used only to impeach and contradict him. The Court then cautioned Hartels' counsel on the appropriate use of the deposition for impeachment. (Tr. 204). The Court set forth the rational for its decision in the record which expressed the Court's own personal views and not that of case law or the Rules of Evidence or Procedure. (Tr. 206- 213).

Testimony began with Waldo Hartel, husband of Betty Hartel. (Tr. 241-301). He described the events leading to the treatment by Pruett and the events ultimately leading to surgery and removal of Ms. Hartel's colon. Appellants next called Pruett live adverse due to the inability to use his video deposition. (Tr. 301). Pruett admitted Cipro, the antibiotic he prescribed, is not effective against anaerobic bacteria. (Tr. 302). He admitted the culture showed moderate growth of four different anaerobic organisms and Cipro was not effective against any of those. (Tr. 304). Pruett testified at trial he could give a specific reason why he chose not to place Ms. Hartel on a combination of Cipro and Flagyl to cover both aerobic and anaerobic bacteria. (Tr. 305). However, at his deposition, when asked why he didn't order an anaerobic antibiotic in conjunction with Cipro – his answer was "I just didn't". At the time he didn't feel it was necessary to add to the Cipro although it would be another option. However, when asked is there any specific reason why you chose not to do it in Ms. Hartel's case he answered no. (Tr. 306, 307).

Pruett agreed 90% of patients with acute mild diverticulitis who were appropriately treated with appropriate antibiotics would recover without the need for hospital or surgery. (Tr. 307). When Ms. Hartel was examined by Pruett she was sitting in a wheelchair. (Tr. 308). Pruett testified in his deposition he didn't have a memory of Ms. Hartel and had to rely on his medical records, but at trial testified that his medical records had refreshed his memory but he did not supplement his deposition testimony. (Tr. 315). The Court sustained an objection and did not

allow counsel to question Pruett regarding the reading and signing of his deposition. (Tr. 315).

Appellant attempted to cross examine Pruett using his deposition to establish how long he took to examine Ms. Hartel and his inability to conduct lengthy examinations on each patient due to Biloxi Regional's high volume of patients. The Court sustained an objection that the deposition was improperly used to impeach Pruett even though it contained a response of Pruett regarding the length of time his examination took and why. (Tr. 322). After giving another explanation Pruett finally admitted Biloxi Regional was a high volume emergency room patients need to be seen quickly. (Tr. 323, 324). Pruett explained what peridiverticulitis was. (Tr. 325).

Pruett recognized "Emergency Medicine Comprehensive Study Guide" as being reasonably reliable (Tr. 128, R. 464) and acknowledged it stated the treatment for diverticulitis is broad spectrum antibiotic covering both aerobic and anaerobic bacteria. (Tr. 330). This Guide is used by emergency room doctors to study for board certification. He would not agree the recommendation was for all diverticulitis . (Tr. 330). Pruett agreed that a local infection from diverticulitis if not treated appropriately with antibiotics can cause the infection to proceed through the wall of the colon and lead the infection outside the colon (Tr. 327) and that the infection includes both aerobic and anaerobic bacteria. Pruett testified there was a discrepancy in the way the texts stated diverticulitis is treated due to a difference in severity of symptoms. (Tr. 331, 332). Pruett acknowledged his testimony differed from what the Comprehensive Study Guide recommended. (Tr. 332). The wording in the Emergency Medicine Comprehensive Study Guide had not changed from 1996 to 2000. (Tr. 336).

Pruett admitted Cecil Textbook of Medicine is generally reliable and that Cecil's Textbook

stated the initial therapy for treatment in mild cases of diverticulitis is broad spectrum oral antibiotics including both aerobic and anaerobic coverage. (Tr. 336, 337, R. 474). Pruett again stated he didn't believe he had to treat each and every individual with anaerobic antibiotic coverage, although he admitted none of the material he had seen so far said it was okay to treat just with aerobic coverage. (Tr. 337).

Pruett testified according to his designation of experts and what had been presented, he was not relying on any specific texts for his opinions, only his clinical experience and what he had seen other physicians. (Tr. 337). Pruett did state there were a lot of other reference texts and guides and inferred they supported his position. (Tr. 338). Pruett agreed Sabistan's Surgical Text is a very reliable text. (Tr. 338). Sabistan's states the antibiotic regime for diverticulitis should provide coverage of normal colonic flora which includes aerobic and anaerobic bacteria. (Tr. 339, 340, R. 478). Pruett continued to testify he thought the antibiotics should be prescribed for each individual patient, although Sabistan's recommended coverage for aerobic and anaerobic bacteria. (Tr. 340, 341).

Pruett testified voluntarily and in a self serving fashion that if you poll several emergency room physicians and ask them whether, in milder cases of diverticulitis, they would use Cipro and Flagyl or just Cipro or some other antibiotic, some would use it and some wouldn't. Other physicians practicing in the same community here on the Coast would use it or not utilize it. That testimony was objected to by counsel for the Hartels as improper bolstering of Pruett's testimony. (Tr. 342). It was clearly hearsay.

Pruett considered "Archives of Surgery" to be a well respected publication. The article presented was "Guidelines for Clinical Care: Anti-infective Agents for

Intra-abdominal Infection. A Surgical Infection Society Policy Statement". (Tr. 344, R. 487). That article also calls for coverage of both aerobic and anaerobic bacterial coverage in cases of acute diverticulitis. (Tr. 345, 346, R. 487). Pruett was further asked about "Practice Guidelines Diagnosis and Management of Diverticular Disease of the Colon in Adults" published by the American Journal of Gastroenterology in 1999 and he recognized it as an authoritative journal. (Tr. 346, 347, R. 494). This Journal too recommends broad spectrum oral antibiotic with activity against aerobic and anaerobic bacteria in cases of acute diverticulitis. (Tr. 348, 349, 350).

When counsel for the Hartels questioned Pruett over the fact he had not provided one single article which would indicate aerobic coverage alone as acceptable treatment the Court sustained Mr. Hick's objection. (Tr. 350, 351). Pruett admitted Ms. Hartel did not respond to his antibiotic therapy and that her disease progressed. (Tr. 351). Counsel for Hartel asked Pruett if he could cite one article that says Cipro alone is just as effective for diverticulitis treatment as aerobic and anaerobic coverage and he responded he didn't have one to contrast them, he didn't have that specific article. (Tr. 352). He did testify he had some other articles that are guides that emergency room physicians go by, although he was not relying on the documents for his opinions. (Tr. 352, 353). An objection was then made regarding Pruett testifying about articles which he may not be relying upon which have not been produced in terms of designation of experts. (Tr. 353). However, the Court allowed Pruett to testify based on an open ended question. (Tr. 353, 354). Pruett then seemed to indicate there was authority for the proposition that it's more important to have antibiotics on board whether they include aerobic or anaerobic coverage. (Tr. 354). Pruett admitted he did not give anaerobic antibiotic coverage. (Tr. 362).

After Pruett was tendered and while the jury was out Mr. Hicks, attorney for Pruett, asked the Court for permission to ask Pruett about a medical book that he contended supported his

point of view in the case claiming counsel for Hartel had opened the door. (Tr. 364, 365). Appellant argued that if Pruett was allowed to testify regarding this new medical handbook then the Hartels' articles should be allowed to be discussed by their experts especially since the article Pruett wished to testify about was first handed to counsel for Hartel after Pruett's adverse examination. (Tr. 366-368). The Court overruled the Hartels objection and allowed Pruett to testify about the medical handbook called "Griffiths 5 Minute Clinical Consult". (Tr. 368-371, R. 538-541).

It was also brought to the Court's attention at that time that Dr. Kleier, Plaintiffs' expert, had been present for Pruett' testimony and he should be able to at least testify relative to the articles mentioned by Pruett during his testimony. (Tr. 373). However, the Court rejected that argument. (Tr. 373). Mr. Caraway indicated to the Court he had not had a lot of time to look at the articles submitted by the Hartels and try to come up with a response since he didn't actually see them until Thursday before the trial. (Tr. 375, 376). At the same time it is evident Pruett was not provided a copy of the Hartels' articles by his lawyer to prepare him for his testimony even though they were available. (Tr. 376, 377). The Court again sustained Defendants' Motion excluding the Hartels' medical articles stating they had not been timely divulged to the Defendants so they could question their experts regarding them. (Tr. 377). However, the Court still allowed Pruett to testify to his 5 Minute Clinical Consult article.

Counsel for Pruett decided to cross examine Pruett in Plaintiffs' case in chief as opposed to waiting until Pruett's defense. (Tr. 378). Pruett had completed a surgical residency and then became an emergency room doctor. (Tr. 379). Pruett explained how diverticulitis can occur and sets up infection in the colon. (Tr. 386). Pruett's examination by Mr. Hicks proceeded to

reference enumerable unidentified articles that espouse a different point of view regarding treatment of diverticulitis. Counsel for Hartel objected but the objection was overruled by the Court. (Tr. 412). Pruett was asked whether he had any personal knowledge of what other emergency room physicians in Mississippi prescribe for mild diverticulitis over the objection of Plaintiffs' counsel for bolstering and hearsay and the Court overruled the objection. (Tr. 413). Pruett then proceeded to testify regarding what other physicians do in similar circumstances. (Tr. 414, 415).

Pruett then testified about the "Griffiths 5 Minute Clinical Consult" to which the Hartels had previously objected and how it supported his position. (Tr. 415). Pruett testified on redirect by Hartels' counsel that he had seen the Griffiths 5 Minute Clinical Consult, 1997 version, for the first time the day before. (Tr. 423). Pruett testified Griffiths 5 Minute Clinical Consult indicated the use of Cipro alone would be acceptable in acute mild diverticulitis. Pruett was then cross examined at length about the appropriate interpretation in reading the statement contained in Griffiths 5 Minute Clinical Consult and Pruett's misinterpretation and/or misreading of that statement. (Tr. 423, 424, R. 506).

Pruett was then questioned regarding the "Journal of Gastroenterology Clinics of North America" and an article entitled "Diverticular Disease in the Elderly" and in particular that broad spectrum oral antibiotics with activity against anaerobics were recommended. (Tr. 423, 424). Pruett agreed that that article was at odds with Pruett's interpretation of Griffiths 5 Minute Clinical Consult. (Tr. 426). Pruett admitted he did not gather the information from Griffiths 5 Minute Clinical Consult himself. (Tr. 427). He did not ask someone to obtain research to defend himself either. (Tr. 428). Due to time constraints for Dr. Kleier's testimony Pruett was not

asked about the other articles proffered by the Hartels.

It was after the lunch recess and redirect of Pruett that Plaintiffs' first expert, Ernest Kleier was called. (Tr. 428). Dr. Kleier testified as to the importance of broad spectrum appropriate antibiotic coverage in acute mild diverticulitis including coverage for both aerobic and anaerobic bacteria. (Tr. 440-442). Dr. Kleier testified Pruett breached of the standard of care in not ordering appropriate antibiotic therapy. (Tr. 445-447). Dr. Kleier further explained there was leeway in choosing antibiotic therapy so long as both aerobic and anaerobic infections were covered. (Tr. 448, 449). Dr. Kleier testified that appropriate antibiotic therapy being provided there was a 90% probability Ms. Hartel's diverticulitis would have resolved with antibiotics alone and no surgery or resection of the colon would have been necessary. (Tr. 455, 456). He testified Ms. Hartel required surgery to have her colon removed, had a colostomy and then had several surgeries for a hernia, all of which would not have occurred. (Tr. 456).

After arguing objections outside the presence of the jury there was a discussion about whether to recess for the day while Dr. Kleier was still on the stand. (Tr. 489). There was a clear indication Dr. Kleier had a commitment for the next day and could not stay till the morning. (Tr. 490). There was a sense essence of urgency by counsel for Hartels to conclude the testimony as quickly as possible since Dr. Kleier could not stay till the next day due to scheduling problems. This would not have been a factor had the case started on Monday as scheduled.

As cross examination continued, counsel for Pruett questioned Kleier as to whether he knew what board certified physicians in Mississippi were prescribing for patients who had mild diverticulitis. Counsel for Hartel objected to such a broad and improper standard of care

question and the Court overruled the objection. (Tr. 492). Again the question was asked of Dr. Kleier by counsel for Pruett if Cipro alone was prescribed for mild diverticulitis by a Mississippi doctor would this be breaching the standard of care. The Court overruled the objection and Kleier testified that they would be deviating from the standard of care. (Tr. 492, 493). Even though the Court had sustained counsel for Pruett's objection regarding the Hartels questioning their own expert on their articles, counsel for Pruett proceeded to ask Kleier questions generally about the selected guidelines and journals. (Tr. 493, 494). Counsel for Hartel objected but the Court overruled.

On cross examination Mr. Caraway questioned Dr. Kleier about being asked to leave St. Louis and not perform surgery to which Mr. Hartel's counsel objected. The Court sustained the objection, however, there continued to be prejudicial arguments in front of the jury over the issue even though the same issue had been discussed and ruled on by the Court as it related to Pruett. (Tr. 509).

When questioned on redirect about "Guidelines for Clinical Care: Anti-infective Agents for Intra-abdominal Infection" Dr. Kleier testified there was evidence from invitro data animal studies in clinical trials that has lead to widespread acceptance of the need to use both aerobic and anaerobic agents. (Tr. 515, 517).

The Hartels next called Dr. Joseph Blackston. (Tr. 520). Dr. Blackston was tendered as an expert in internal medicine and emergency medicine capable of testifying on the issues of standard of care and causation as they apply in this case. No objection was voiced to Dr. Blackston as tendered. (Tr. 533). Dr. Blackston testified as to microperferations being the early

stage of diverticulitis (Tr. 539) and it is at that stage that antibiotics are used to treat acute mild diverticulitis. (Tr. 540). Dr. Blackston testified treatment with antibiotics that cover both aerobic and anaerobic bacteria is what the standard of care requires. (Tr. 541). An objection was made by Mr. Hicks as to Dr. Blackston's testimony as to whether or not that the lack of appropriate antibiotics caused or contributed to Ms. Hartel's need for surgery and subsequent surgeries. (Tr. 542). The trial court sustained the objection but allowed Dr. Blackston to testify outside the presence of the jury Pruett's failure to prescribe aerobic and anaerobic bacterial coverage substantially increased the likelihood she would need to undergo a surgical procedure. (Tr. 546). The Court asked the defense how Dr. Blackston's testimony would have prejudiced their ability to defend on the issue of causation (Tr. 547) and the defense was unable to articulate any prejudice. (Tr. 548, 551-553). Even though the Court expressed doubt the Court sustained the objection. (Tr. 556). Dr. Blackston was allowed to testify if appropriate antibiotic coverage was not instituted the infection can progress and inflammation can spread. (Tr. 558).

Dr. Blackston testified he was familiar with Griffiths 5 Minute Clinical Consult. (Tr. 558). He testified the standard for prescribing aerobic and anaerobic coverage in the case of acute mild diverticulitis has not substantially changed in the last ten to twelve years. (Tr. 560). Dr. Blackston's interpretation of Griffiths 5 Minute Clinical Consult was that it called for the use of a combination of antibiotics and not Cipro alone to insure coverage for anaerobic bacteria contradicting Pruett's interpretation of Griffiths. (Tr. 561).

Dr. Blackston was asked on cross examination if he had personal knowledge as to whether any surgeons or emergency room physicians in Mississippi are prescribing Cipro to patients who have mild diverticulitis and he stated he had no personal knowledge. (Tr. 567). Dr. Blackston testified although there was not one authoritative book regarding mild diverticulitis, the premises

of good medical care is provided in many medical books and references, which is to provide both aerobic and anaerobic antibiotic coverage. (Tr. 571). Dr. Blackston testified that some patients, approximately 10%, would get worse even if their given appropriate antibiotics. (Tr. 573, 574). Dr. Blackston testified some people might get better on their own without antibiotics, but Ms. Hartel did not necessarily fall into that category. (Tr. 576). Dr. Blackston testified on redirect that many useful articles and texts forming a consensus can help set the standard of care. (Tr. 587).

Betty Hartel, Plaintiff, was next called to testify (Tr. 597-654) regarding Pruett's examination and treatment, as well as her injuries and how the loss of a portion of her colon has effected her life (Tr. 618-628). At the close of Ms. Hartel's testimony Plaintiff rested. (Tr. 654).

At that time, Mr. Hicks for EM Care moved for a directed verdict claiming no evidence establishing a relationship between Pruett and EM Care that vicarious liability had been established. (Tr. 655, 656). Despite previous admissions, counsel for Hartels asked to reopen to establish any contractual relationship between Pruett and EM Care. Despite the admissions the Court granted EM Care's directed verdict on the issue of vicarious liability. (Tr. 663).

The defense began its case by calling emergency room physician Michael Stoddard, M.D. who was examined by Mr. Caraway. (Tr. 664, 665). Stoddard testified based on Ms. Hartel's findings, Pruett met the standard of care and did not require him to treat her any differently than he did. (Tr. 671). Stoddard agreed that the physician's desk reference is relied upon for medical information as it relates to drugs by doctors all over the country. (Tr. 679). Stoddard agreed Cipro is not active against B-fragilis which is the most common anaerobic bacteria in the colon. (Tr. 680). He admitted there was no reference in the PDR about Cipro being used to treat

diverticulitis of any form. (Tr. 680, R. 534). The PDR stated for complicated intra-abdominal infections Cipro could be used in combination with Metronidazole, which is Flagyl, and that covers anaerobic bacteria. (Tr. 681, R. 534).

On cross examination, Dr. Stoddard admitted he was familiar with the New England Journal of Medicine, but did not know how widely it was read. (Tr. 682). He could not speak how well respected it was throughout the country, however, he did not deny that he respected it. (Tr. 683). He admitted there were some articles that he may agree with and some that he didn't. (Tr. 684). He admitted the New England Journal of Medicine was one of the many well respected journals. (Tr. 685). Mr. Caraway objected to cross examination of Dr. Stoddard with the New England Journal of Medicine article. (Tr. 685). The article in question was published May 21, 1998 about diverticulitis. (Tr. 685, R. 528). An argument over the use of the journal article in cross examination was had outside the presence of the jury. (Tr. 685). Mr. Caraway objected Dr. Stoddard had not recognized the article as authoritative and it was not sponsored by any of the Plaintiffs' expert witnesses in direct. (Tr. 687).

The Court seemed to be suspect of the journal because of the media's interest in it. (Tr. 692). It was brought to the Court's attention this type of objection and argument was exactly what Plaintiff was trying to avoid by having Plaintiffs' experts sponsor the articles. (Tr. 693, 695). The Court refused to take judicial notice of this New England Journal of Medicine being widely respected. (Tr. 695). It was brought to the Court's attention Pruett had testified there was no difference in the standard of care today than it was then as it relates to aerobic and anaerobic coverage. (Tr. 696). The Court ruled it must be established that the periodical is reliable according to the witness. (Tr. 698).

Dr. Stoddard admitted he had been given a stack of articles from Mr. Caraway last week

and he read them over the weekend prior to the trial. (Tr. 701). He testified generally the New England Journal of Medicine is reliable and well respected. (Tr. 701, 702). That he refused to testify that it is generally reliable among all physicians in the United States or generally reliable among physicians in general. (Tr. 702).

It was noted in argument outside the jury's presence that it had previously been stated the defense did not have the articles in their hands until Sunday, one day before the trial was to commence, however, Dr. Stoddard testified he had been given the stack of articles the week before. (Tr. 703, 704). The Court ruled it still did not believe production of the Hartels' articles was timely. (Tr. 705). Dr. Stoddard refused to say the New England Journal of Medicine was generally reliable in the medical community that he knows. (Tr. 705). Even though Stoddard had previously stated it was generally reliable (Tr. 701-702) the Court sustained the objection for the use of the New England Journal of Medicine article. (Tr. 706). It was requested counsel be able to question Dr. Stoddard about the New England Journal of Medicine as it goes to his education, training and experience. (Tr. 706). The Court would not allow it. (Tr. 707). The Court again commented on the New England Journal of Medicine and media hype. (Tr. 708). The Court again sustained both objections. (Tr. 709).

The defense next called Dr. George McGee, a practicing general surgeon who was examined by Mr. Hicks. (Tr. 713). Dr. McGee testified he routinely prescribed Cipro in patients with acute mild diverticulitis because it was effective. (Tr. 719). He was also asked whether he had personal knowledge of other physicians prescribing drugs like Cipro for mild acute diverticulitis to which an objection was made by Hartel's counsel regarding bolstering the witness's testimony as to what other people do. The Court overruled the objection. (Tr. 720). Dr. McGee proceeded to testify his encounters with emergency room physicians over 22 years

and what different percentages the physicians would do. (Tr. 720, 721). He testified this was a very subjective form of treatment to him. (Tr. 721). Dr. McGee testified as to the small range of individuals who would fail treatment and progress to surgery regardless of the treatment. (Tr. 722, 723). He also testified as to his evaluation of the literature for 22 years showing there was no advantage of one particular regime over another. (Tr. 723). None was identified.

On cross examination, Dr. McGee agreed if an antibiotic does not cover and kill an anaerobic bacteria, it doesn't make any difference how much is prescribed, it's not going to kill that anaerobic bacteria. (Tr. 732). On cross examination about Griffiths 5 Minute Clinical Consult setting the standard of care, Dr. McGee did not consider any publication to set the standard of care and admitted he did not use it. (Tr. 735). Dr. McGee admitted the American Journal of Surgery is a peer of any scientific medical journal. (Tr. 737). He admitted the New England Journal of Medicine is also a scientific medical journal which is peer reviewed. (Tr. 738, 739). He admitted articles presented in the American Journal of Surgery (R. 541) and articles in Surgical Laparoscopy and Endoscopy Journal become the overall part of the medical literature that's developed through treatment. (Tr. 739). That would include the Physician's Desk Reference. (Tr. 739). He admitted the New England Journal of Medicine is a respected journal and recognized nationally and internationally (Tr. 739) and routinely cited in medical texts. (Tr. 739, 740). He admitted the New England Journal of Medicine becomes a body of peer review of articles that helps tell doctors how they should treat patients. (Tr. 742). He refused to say the New England Journal of Medicine is generally considered to be reliable in articles cited as authoritative. (Tr. 742). Mr. Hicks again objected to Dr. McGee being cross examined relative to the New England Journal of Medicine, however, the Court overruled the

objection. (Tr. 744).

The Court then sent the jury out injecting its own objection to the article being presented on an overhead projector in front of the jury to cross examine Dr. McGee. (Tr. 745). A discussion then ensued over whether the article could be placed into evidence or must be placed into evidence before being shown to the jury. (Tr. 746-754). The Court ruled that the jury should only on the screen that which has been admitted into evidence. The Court further commented it ought to be sponsored by a witness and introduced into evidence and go back to the jury room. (Tr. 754).

Dr. McGee was questioned regarding the New England Journal of Medicine, Volume 338, No. 21 entitled "Current Concept Acute Diverticulitis". (Tr. 755, R. 538). That article stated antibiotic coverage should include coverage against aerobic and anaerobic bacteria to which Dr. McGee testified he did not agree. (Tr. 755). When questioned about "Archives of Surgery", Volume 127, 1992, "Guidelines of Clinical Care: Anti-infective Agents for Intra-abdominal Infection" as Surgical Infections aside a Policy Statement Dr. McGee agreed with the recommendation of coverage for both E. Coli and bacteroides fragilis only in the sense that it may be used. (Tr. 756, 757, R. 487). Dr. McGee on redirect testified rather than relying on articles he was relying on "his" clinical experience because it was the best guide he had. (Tr. 760). After the testimony of Dr. McGee the defense rested. (Tr. 764).

The directed verdict for EM Care was reurged. (Tr. 765). Counsel for the Hartels brought to the Court's attention the cross claim filed by Biloxi Regional. (Tr. 769, 770). In the Answer they admit and acknowledged liability for the *respondent superior* allegations only. (Tr. 771, 773). Mr. Hicks was unable to tell the Court whether or not the contract EM Care had with

Biloxi Regional was exclusive. (Tr. 775). Even though it was argued by Plaintiffs' counsel the pleadings speak for themselves along with the contract and admissions, the Court again sustained the Motion for Directed Verdict as to EM Care. (Tr. 776).

The Court granted and gave Defendants' Jury Instruction D-2 over the objection of Plaintiffs' counsel as it related to its failure to address the issue of national standard of care especially since there was continued testimony about how local doctors would have treated Ms. Hartel. (Tr. 802, 804, 805). Counsel for Hartel objected to Jury Instruction D-3(c) which was given and based on the fact that it was abstract and confusing. (Tr. 807). Again, counsel for Hartel objected to D-3 based on it being abstract. (Tr. 815). The Court refused it as written and ultimately gave Jury Instruction D-3(c). (Tr. 816, R. 389).

The jury rendered a verdict for the Defendants on June 24, 2005. (R. 436). Final Judgment was entered July 1, 2005. The Hartels filed their Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial on July 12, 2005. (Tr. 440). The Court entered its Order Denying Plaintiffs' Motion for JNOV and for New Trial the 28th day of December, 2006, just before Judge Vlahos retired from the bench, without making findings of fact and conclusions of law. (R. 782). Notice of Appeal was timely filed in this matter on January 25, 2007. (R. 783).

## III.

## ARGUMENT OF AUTHORITIES

1. **The Trial Court erred in ruling the Hartels' experts would not be allowed to sponsor and testify regarding medical texts and journal articles supporting theory of the case.**

Rule 803(18) of the Mississippi Rules of Evidence allows the use of learned treatises:

> To the extent called to the attention of an expert witness upon cross examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as reliable authority and by the testimony or the admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements made be read into evidence but may not be received as exhibits. Treatises used in direct examination must be disclosed to opposing parties without charge pursuant to discovery.

(Emphasis added).

It is clear from the facts and evidence Pruett was placed on notice as of June 15 with an actual listing of the articles expected to be used. (Tr. 23, R. 320, 375, 376, 606, 607). He was also given actual copies. The trial was to begin June 20, but actually began June 21. Pruett was not given a copy of the articles by his lawyer even though he had them. Dr. Stoddard admitted having been given a stack of the medical articles from Mr. Caraway the week before the trial and read them over the weekend. (Tr. 701).

Rule 803(18) does not state when the learned treatises must be produced other than to say "pursuant to discovery". It was not until March 18, 2005, when Pruett filed his designation of experts (R. 224) and April 21, 2005 when Biloxi Regional filed its designation of experts that counsel for Plaintiffs decided there was probably a need to support expert opinions with medical literature. It was decided, without medical authority, Pruett's experts could testify to whatever they wanted to even though their testimony was adverse to the medical literature from multiple medical disciplines. After being personally gathered at the LSU Medical library in New Orleans by counsel for the Hartels the articles were actually sent to Dr. Kleier on or about May 9 and Dr.

Blackston approximately June 9. (Tr. 23). Drs. Kleier and Blackston were not able to give their final approval of the articles until June 15. (Tr. 24). As soon as the approval was received counsel opposite was notified of their existence and intent to be used at trial.

In *Williams v. Dixie Electric Power Association*, 514 So. 2d 332 (Miss. 1987) surveillance films were obtained by Dixie Electric the Thursday evening before trial. The Court ruled Dixie had a duty to seasonably tender them to Plaintiff's attorneys at that time instead of waiting until the trial began. *Williams* at 336, 337. The Court did not find Dixie should have conducted surveillance earlier in order to obtain the evidence earlier. The duty to seasonably supplement was triggered once the discoverable material was obtained. See also *Congleton v. Shellfish Culture, Inc.*, 807 So. 2d 492 (Miss. Ct. App. 2002). See also *Scafidi v. Crawford*, 486 So. 2d 370, 372, 373 (Miss. 1986). This is exactly what was done in this case. The Defendants in this case had ample opportunity to provide these medical articles and treatises to their experts and defendant Pruett for view and comment. The issue for which the guidelines and articles were offered was very straight forward and not the least bit complicated. Therefore, there was ample opportunity for the defense to rebut or question the articles. If there was such a wide body of medical literature supporting Appellees position as Dr. McGee testified to (Tr. 723) then he should have been able to obtain at least one such unequivocal peer reviewed article on very short notice. Certainly Pruett should have been able to locate one such article to support his position. Since McGee and others testified to what other unnamed physicians do in treating mild diverticulitis (Tr. 727) it became even more imperative that the medical literature be explained by Plaintiffs' experts to assist in establishing the actual standard of care. Due to the Hartels' inability to obtain the requisite recognition required by the Court regarding the reliability of the New England Journal of Medicine by Dr. Stoddard, he was able to avoid testifying about the

article even though he admitted it was generally reliable authority. (R. 701, 702). This limited the Hartels' ability to present to the jury the vast and comprehensive medical consensus that mild acute diverticulitis, such as Ms. Hartel's, required antibiotic coverage for both aerobic and anaerobic bacteria. Stoddard's obstinance unfairly diminished the credibility and value of the article as it relates to this case, by insinuating the literature lacked medical respectability. Between Drs. McGee, Pruett and Stoddard, Plaintiff was hampered in the ability to fairly present a clear, concise, uninterrupted presentation of the medical literature which conclusively supported the Hartels' primary position that proper antibiotic therapy must include coverage for both aerobic and anaerobic bacteria.

2. **The trial court erred in refusing to allow Appellee's expert Dr. Stoddard to testify on cross examination regarding the New England Journal of Medicine.**

Even though Dr. Stoddard testified the New England Journal of Medicine was generally reliable and well respected (Tr. 701-702), Stoddard attempted to qualify his testimony regarding the New England Journal of Medicine, Hartels would argue Rule 803(18) of the Mississippi Rules of Evidence regarding learned treatises clearly supports the Hartels' position Stoddard should have been allowed to be cross examined on the New England Journal of Medicine article regarding acute diverticulitis.

The Defendants' designation of experts show Pruett filed an amended designation of experts April 26, 2005 which did not identify any medical literature to support his position or opinions. (R. 230). After the adverse cross examination of Pruett by counsel for Hartel, counsel for Pruett produced for the first time the quick reference text called Griffiths 5 Minute Clinical Consult. (Tr. 367, 368, 415). Pruett was familiar with Griffiths 5 Minute Clinical Consult for

his work in the emergency room (Tr. 415) although he testified he saw the 1997 version for the first time the day before. (Tr. 423). The Court allowed Pruett to testify regarding the contents of the Griffiths 5 Minute Clinical Consult text over the Hartels' objections. Hartels' strenuously argued Pruett took Griffiths out of context and twisted its clear meaning in order to support his position. (Tr. 538, 541, Ex. B). Based on *Williams v. Dixie Electric Power Association,* Id. and *Congleton v. Shellfish Culture, Inc.,* Id., the Griffiths 5 Minute Clinical Consult text was definitely produced in an untimely fashion and should not have been allowed. However, if it was to be allowed, the Court should have reversed its earlier ruling excluding the Hartels experts from testifying to their medical literature especially since Dr. Kleier had been in the courtroom and heard Pruett's testimony. By untimely producing the Griffiths 5 Minute Clinical Consult, especially since it was asserted Pruett was not going to rely on any medical literature, and then using it in such a twisted fashion, tortuously interpreting its meaning Defendants were able to create confusion and assert it was appropriate to use Cipro alone to treat acute mild diverticulitis even though it admittedly would not kill any anaerobic bacteria. The mere fact a certain of percentage of patients with very mild acute diverticulitis who did not seek medical treatment may possibly have their disease process resolve without any treatment, certainly cannot be used to prove inappropriate antibiotic coverage meets the standard of care.

By allowing Pruett to testify regarding Griffiths 5 Minute Clinical Consult and manipulating its clear meaning Plaintiffs' counsel with left with one of two choices, either cross examine Pruett's emergency room expert Stoddard on Griffiths 5 Minute Clinical Consult entirely or let it stand unchallenged and not bring it up with him which is what ultimately what was done. This placed Plaintiffs' counsel in a very untenable position and prejudiced his presentation. It had to be assumed Stoddard would adopt the tortured interpretation of Griffiths

by Pruett and thereby wrongly reinforce its value. This would only compound the inappropriate inference in the minds of the jury bolstering the credibility and value of the Griffiths 5 Minute Clinical Consult text. The Court surely abused its discretion in allowing this evidence especially since it was completely contradictory of the Court's prior ruling regarding the use of Hartels medical literature.

3. **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.**

The Hartels had taken a videotaped deposition of Defendant Pruett on December 10, 2003. (R. 638). Plaintiffs on June 13, 2005, the week before the trial, had notified Defendants of his intent to use Pruett's video deposition and that it had been converted to the Sanctions II program displaying the trial transcript synchronized with the video via the court reporter's ASCII disc. (R. 764). Neither Defendant asked to review edited the video. The original video tape had been available since the deposition. (Tr. 184-187).

Rule 32(A)(2) of the Mississippi Rules of Civil Procedure clearly indicates the deposition of a party may be used by an adverse party for any purpose. Even the defense did not dispute the Rule allowed use of the deposition. (Tr. 64, 69). It was the trial court's belief that there was something inherently wrong with using the deposition of the party when the party was available live to testify and indicated it may not be wrong to the Supreme Court but the trial court felt there was something amiss there. (Tr. 74). The 5th Circuit in *Sandridge v. Salem Offshore Drilling Co.*, 764 F.2d 252, 259 (1985) recognized early on that video testimony, when admissible, should not be treated as second class evidence. It is a valuable tool to gauge attitude and credibility. Id. at 259. During discussions on this point, the trial court did not enumerate a

justifiable reason for excluding the adverse deposition of Pruett in whole or in part. (Tr. 191-213). The trial court clearly was simply personally against using depositions at trial as opposed to live testimony regardless of what the rule allowed. (Tr. 213).

The Mississippi Appellate Court in *Keller v. Keller*, 763 So. 2d 902, 905 (Miss. Appellate 2000) reaffirmed the plain reading of Mississippi Rules of Civil Procedure 32(A)(2) that the deposition of a party may be used by an adverse party for any purpose. Id. at 905. The Court of Appeals in *Robinson v. Lee*, 821 So. 2d 129 (Miss. Ct. App. 2000) also addressed the issue of Mississippi Rules of Civil Procedure 32(A) as it relates to depositions of witnesses. The Court found the party offering the deposition must show it fits into one of the stated exceptions allowing admission and while admission of evidence is within the sound discretion of the trial judge, that discretion is not without limits. In particular, when the exercise of the court's discretion is not supported by the evidence an abused discretion will be found. *Robinson* at 134.

As determined by the Florida court, a trial court should not have the discretion to arbitrarily ignore the rules of evidence in civil procedure especially when it comes to provisions which are clear and unambiguous as is the case with the use of depositions at trial. *Castaneda v. Redlands Christian Migrant Association, Inc.*, 884 So. 2d 1087, 1092, 1093 (Fla.App. 4 Dist. 2004).

The United States District Court for the Eastern District of North Carolina explained in detail the importance of the way people communicate in facial expressions, voice inflection intonation and body language. In *Riley v. Murdock*, 156 Federal Rules Decisions 130, 131 (EDNC 1994). – the court noted in footnote 3:

> A recent film "My cousin Vinnie" made this point. When accused of a homicide, a character incredulously questioned "I killed (the victim)?" The typed transcript of this remark

> became a confession: "I killed (the victim)." Although the transcript was completely accurate in reporting the words said, it was totally inaccurate in conveying the message of the speaker because it did not report the intonation.

*Riley* at 131.

In this particular case, counsel for Hartel had a very specific line of questioning including Pruett's demeanor he had hoped to present to the jury through the deposition testimony. By offering the video, counsel at that time would not run the risk of counsel for Pruett taking him on cross examination and, therefore, avoid having to call him in his case in chief. By knowing exactly what is going to be presented in the deposition Plaintiff has limited the cross examination of Pruett in Plaintiff's case in chief and streamlined the evidence presenting a picture of Pruett through his demeanor and responses given at the deposition. Pruett at his deposition was substantially different than at trial after he had been coached and prepared for trial testimony in front of the jury.

Another problem which occurred through cross examination with the deposition was exhibited in the record at Page 320. Pruett in his response to a question at Page 63 of his deposition gave a more detailed explanation of why his examination didn't take long, particularly as it related to the busy emergency room. That question asked by Hartel's counsel was interrupted by the court without objection from Pruett's counsel. Plaintiff's counsel was chastised in front of the jury as misusing the deposition for cross examination when, in fact, this issue would have never been brought up or contested inn front of the jury had the deposition been played as requested. (Tr. 322). The question was finally answered (Tr. 323), but not after having the flow of the testimony on cross examination unnecessarily interrupted and Plaintiff's counsel's presentation challenged.

When a deposition of a party is used adverse, the scope of the examination is limited to the four corners of the admissible transcript. If the party is called live, adversely, Plaintiff's counsel is completely unable to control the scope of the examination or cross examination due to changes in testimony and voluntary statements made by the witness after being coached. The additional issue is, as happened in this case, that counsel for Pruett or the other Defendant is able to examine Pruett in Plaintiffs case in chief. This obviously potentially allows the defense to defuse and disrupt Plaintiff's case which could not have happened had the deposition been used . Unfortunately, Plaintiff has no way of knowing whether one or both defense counsel will cross examine an adverse party in Plaintiff's case in chief until they ask the questions of the adverse witness. The use of the deposition limits the cross examination in Plaintiff's case in chief.

In this case, Plaintiff had intended to introduce through the deposition testimony Pruett's contract employment with EM Care which had otherwise been admitted to in the pleadings. (See Pruett proffer depo testimony R. 643, 644). The failure to ask those particularly questions on adverse live examination helped lead to the erroneous directed verdict for EM Care even though Plaintiff does not believe it was absolutely necessary to avoid a directed verdict.

It should also be noted Pruett in his deposition interjected new and greater detail as to why he refused to order antibiotics which covered both aerobic and anaerobic. In his deposition he did not articulate a reason why he did not cover both aerobic and anaerobic bacteria. (R. 729). At trial he did provide a reason insinuating it was because her diverticulitis wasn't that serious. The medical literature makes no such distinction.

Regardless the Hartels should not have the presentation of their case arbitrarily and prejudicially interfered with in direct contradiction to the Rules of Civil Procedure and the Rules

of Evidence simply because the trial judge disagrees with the rules. If the rules are not reasonably and uniformly enforced then the residents of this state are not going to get consistent rulings or justice from the court on a case to case basis. Trial courts should not be allowed to arbitrarily change the rules of evidence or procedure on a whim and to do so should constitute reversible error.

Juries not only access the credibility of witnesses by their actions , but they also access the credibility and actions of lawyers by how they act and how they are treated by the court. If a lawyer's presentation and strategy is unreasonably tampered with by the trial court, there is no way with certainty after the fact to determine what type of damage that may or may not have caused. It is easy to say it was "harmless error" when in fact it was not. Courts should be mindful of what it was like to try a case in front of a jury. When the jury has not been given the opportunity to see the video deposition of a party which is clearly admissible at trial, there is no way, after the fact, to determine how that witness' demeanor, responses and credibility in the deposition versus his demeanor responses and credibility live at trial actually affected the jury's overall impression of the testimony. To say this was harmless error ignores the clear concise uncontradicted interpretation of the Rules. Rules are rules or there is no reason to have them. In this case, credibility of the witnesses becomes all important especially when the defense had little basis for their opinions other than their own testimony unsupported by the volume of guidelines, medical literature produced supporting Plaintiff's position. It is impossible to effectively try a case if you can't rely on a consistent application of the rules.

4. **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.**

Pruett testified in a voluntary and self-serving fashion that if you poll several emergency room physicians and ask them whether in milder cases of diverticulitis if they would use Cipro and flagil or just Cipro or some other antibiotic some would use it and some wouldn't. His testimony was allowed over Plaintiff's objection (Tr. 342). Dr. McGee for the defense was asked on direct whether he had personal knowledge of other physicians prescribing drugs like Cipro for mild diverticulitis. His testimony was allowed over objection of Hartel's counsel. (Tr. 720). He then proceeded to testify as to his encounters with emergency room physicians over 22 years and what different physicians would do. (Tr. 720, 721). Testimony regarding what other unidentified doctors do to treat mild cases of diverticulitis not only was used to bolster the testimony of Defendant's experts, but also violated the hearsay rule, Mississippi Rules of Evidence 802. This testimony did not meet any of the recognized exceptions of Rule 803, Mississippi Rules of Evidence.

Allowing this testimony was also outside the designation of Defendant's expert witnesses and the substance and basis of their experts' opinions. (R. 224, 226, 230). This surprise testimony effectively prevented counsel for the Hartels the ability to prepare for cross-examining the witnesses relative to the basis of their testimony. These witnesses were virtually allowed to give testimony regarding other instances of acute diverticulitis which may or may not have been involved in and without being required to verify whether these cases were the same or similar to that of Mrs. Hartel and without the Hartels being able to discover any differences of the cases, unless blindly doing so in front of the jury. It was classic hearsay and anecdotal at best. No

expert should be allowed to express an expert opinion based on a hypothetical question or otherwise which contains insufficient factual information. *Hickox v. Holleman*, 502 So. 2d 626, 638 (Miss. 1987). The Court in *Hickox v. Holleman* also found expert testimony could not be had relating to medical records where no proper foundation was laid. *Hickox* at 638. See also *Kim v. Nazarian*, 576 N.E.2nd 427, 434, 435 (Ill.App. 2 Dist. 1991). The same should be true as it relates to testimony of an expert as to what other doctors in the community may do. This testimony should not be allowed when no proper foundation has been laid as it relates to the cases being the same or similar and where no disclosure has been made relative to those opinions or the basis therefore. It is particularly improper for an expert to give obvious hearsay testimony, especially when it is designed to bolster his own testimony in the absence of medical literature and impeach the testimony of Plaintiffs' expert witnesses. See *Morley v. Jackson Redevelopment Authority*, 632 So. 2d 1284, 1293, 1294 (Miss. Sup. Ct. 1994). This becomes even more important when counsel for Defendants cross examined Hartels' experts as to their lack of knowledge of what local doctors do in prescribing antibiotics for acute mild diverticulitis. (Tr. 492, 493, 567). The statements given by Defendant's experts were for no other reason than to bolster their testimony that Defendant Pruett had complied with the appropriate standard of care and constituted prejudicial hearsay especially in the absence of the support of the medical literature. See *Chandler v. Graffeo*, 604 SE. 2d 1, 5 (Va. 2004).

In holding that is directly on point, a trial court in Tennessee properly excluded an expert's testimony regarding the practice of "most spinal surgeons in the community". The Tennessee Supreme Court stated:

> 'Recognized standard' means a standard recognized and accepted generally by the profession and not merely the particular standard of a single practitioner or group. The testimony of a physician as

> to what he would do or his opinion of what should have been done does not prove the statutory standard of medical practice. *Lewis v. Hill*, Tenn.App. 1998, 770 S.W.2d; *Crawford v. Family Vision Center, Inc.*, No. 01-A-01-9005CV00184, 1990 WL 177351 at *2 (Tenn.Ct.App. Nov. 16, 1990). Furthermore, "what 'a majority of physicians in a community would consider to be reasonable medical care in that community' is not the meaning of standard of care. If this were the case, it would require a poll of physicians practicing in a community to determine the standard of care. The standard of care is determined by whether a physician exercises the reasonable degree of learning, skill, and experience that is ordinarily possessed by others of his profession. See *Hurst v. Dougherty*, 800 S.W.2d 183 (Tenn.App. 1990); *Hopper v. Tabor*, No. 03A01-9801-CV-00049, 1998 WL 498211, at *3 (Tenn.Ct.App. Aug. 19, 1998).

*Godbee v. Dimick*, 213 S.W.3d 865 at 895, 896 (COA Tenn. 2001).

Therefore, allowing Pruett and his experts to bolster their testimony with hearsay and anecdotal testimony of what they would have done or more importantly what other, unknown and unidentified doctors in Mississippi do, is prejudicial testimony and reversible error.

5. **The trial court erred by granting a directed verdict for Spectrum Emergency Care, Inc. d/b/a SEC/EM Care, Emergency Care, Inc.**

On May 22, 2000, Mr. and Mrs. Hartel filed their Second Amended Complaint. (R. 77). It was alleged Pruett was employed and/or under contract with or an agent of EM Care, who was under contract with Biloxi Regional to provide emergency room doctors. It was also alleged EM Care is responsible for the acts and omissions of Pruett via *respondent superior*. (Tr. 80). Biloxi Regional admitted EM Care entered into a contract with it to provide emergency room physicians. (R. 93).

Biloxi Regional in its Answer to the Second Amended Complaint filed a cross claim against Pruett and EM Care. (R. 97). Biloxi Regional set forth its claim for contractual

indemnity showing EM Care provided physician coverage to the emergency room of Biloxi Regional. (Tr. 98). A copy of that contract was attached as Exhibits "A" and "B". (R. 103, 113). Pruett and EM Care filed their Answer to the Cross Claim of Biloxi Regional on February 26, 2002. (R. 157). There was an undeniable admission as it related to the existence of the emergency services agreement as attached to the cross claim (R. 158) and, in particular, there was an admission of EM Care's contractual duty of indemnification to Biloxi Regional, but only for the claims based upon *respondent superior*. (R. 159, 160). There is a clear admission in the pleadings establishing the *respondent superior* liability of EM Care and Biloxi Regional for the negligence of Pruett if Pruett was found negligent.

In further proof of Plaintiffs' position, see the Motion of Biloxi Regional Medical Center for Separate Trials in which it was stated that at all times pertinent to the litigation Pruett was an employee of Spectrum Emergency Care, Inc. ("Spectrum"). It was also stated that at the time Spectrum contracted with Biloxi Regional to furnish physicians to staff the emergency room at the hospital. (R. 308). Spectrum joined in the Motion of Biloxi Regional Medical Center and specifically incorporated by reference and adopted the factual assertions made by Biloxi Regional. (R. 341).

In addition, it was admitted to the Trial Court by attorney for Pruett and EM Care, Clark Hicks when he stated in open court that Spectrum/EM Care was the contracting company that placed Pruett at Biloxi Regional. (R. 2). The Hartels will further show that had they been allowed to present the video deposition of Pruett as planned and requested, this issue would have been presented to the jury since at Pages 6 and 7 of Pruett's deposition he specifically acknowledged that he worked for EM Care. (R. 643, 644).

MRCP 50(a) provides the guidelines for the granting of a directed verdict. The rule commentary states the following:

> In ruling on the Motion for a Directed Verdict, the Court should proceed along the guidelines and standards that have governed prior preemptory instruction and directed verdict practice in Mississippi: The court should look solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences which can be drawn there from, could support a verdict for that party, the case should not be taken from the jury.

In this case, its not the testimony as much as it is the direct admissions of the party which would prevent the granting of a Motion for Directed Verdict. It was certainly sufficient proof and admissions to prevent a directed verdict for EM Care. See *Entrican v. Ming*, 962 So. 2d 28 (Miss. COA 2007).

There can be no question based on the evidence in record and transcript there were conclusive admissions by Pruett and EM Care of a *respondent superior*/vicarious liability relationship and should Pruett be found liable for medical negligence EM Care as well as Biloxi Regional would be liable vicariously for the negligence of Pruett. Based upon the admissions in the pleadings and statements of record there was no need for separate testimony from Pruett to prove the point.

6. **The jury's verdict was against the overwhelming weight of the evidence and the Trial Court erred in not granting a new trial.**

Based on the overwhelming weight of the evidence, including but not limited to the testimony of Plaintiffs' experts, Kleier and Blackston, as well as the examination of Pruett, and his experts and the medical literature presented, the Hartels would show the applicable standard

of care was clearly and convincingly breached by Pruett. His failure to appropriately treat Ms. Hartel's acute mild diverticulitis by failing to provide proper antibiotic coverage for both aerobic and anaerobic bacteria was overwhelming proved, especially had Pruett and his experts not been allowed to give anecdotal testimony of what other unknown Mississippi doctors would do. The evidence further clearly and convincingly shows had appropriate antibiotic coverage been provided Ms. Hartel's condition more likely than not would have resolved without the need for the resulting multiple surgeries and the removal of her colon. 90% don't proceed to surgery if properly treated. A plethora of authoritative, reliable medical literature either used by Plaintiff or attempted to be used is proffered in the Hartels Motion for New Trial. (R. 441). They are physically attached as exhibits beginning at (Tr. 463-595). With any kind of reasonable interpretation, even Defendant's own medical authority Griffiths 5 Minute Clinical Consult both for 1997 and 1998 supported the Hartels' position. (Tr. 541-543).

It is seldom that medical literature across various medical disciplines is as consistent as it is in the treatment of mild acute diverticulitis such as Ms. Hartel's, requiring antibiotic therapy covering both aerobic and anaerobic bacteria. That is because both aerobic and anaerobic bacteria live in the colon. The Comprehensive Study Guide published by the American College of Emergency Physicians, according to testimony, is the guide book which emergency room physicians use to study for their board certification exam. The Physician's Desk Reference is used to identify medication and their use by physicians. This includes the antibiotic Cipro that Pruett prescribed. The PDR and the "Guidelines for Clinical Care: Anti-infective Agents for Intra-abdominal Infection" published in the Archives of Surgery along with the other referenced medical literature constitute irrefutable and refutable authoritative medical literature on the

subject of appropriate antibiotic therapy in acute mild diverticulitis. This medical literature along with the medical testimony, clearly proves the jury verdict was against the overwhelming weight of the evidence and was probably prejudiced by the inadmissible testimony of Defendant's experts as to what local doctors would have done. The Defendants failed to provide any reasonable, admissible support for their position.

The Supreme Court in *White v. Yellow Freight System, Inc.*, 905 So. 2d 506 (Miss. 2004) affirmed the granting of a new trial, acknowledging a new trial may be granted in a number of circumstances including where the verdict is against the substantial or overwhelming weight of the evidence. Id. at 511. The trial judge, as in *White,* should have found Defendant's experts testimony was substantially impeached based upon the facts and evidence. Id. At 512. The Appellate Court must consider the evidence in the light most favorable to the non-moving party and will reverse upon review of the entire record, if the court is left with a firm definite conviction that if the verdict were allowed to stand it would work a miscarriage of justice. Id. 511. Even though there was a conflict in testimony presented at the trial in *White* the trial court's grant of a Motion for New Trial was found to be appropriate. Also see *Blossman Gas v. Shelter Mut. General Ins. Co.*, 927 So. 2d 422 (Miss. 2006).

The Hartels argued viewing the record as a whole a new trial should have been granted in this case.

## CONCLUSION

The court should recognize in a case such as this, once it became apparent to counsel for the Hartels the defense was not going to support any of their opinions with medical literature, a search of the literature by the Hartels was in order. Based on Rule 803(18) of the Mississippi

Rules of Evidence and the facts shown in this case the literature was timely produced to the defense and the Hartels' experts should have been allowed to sponsor and comment upon it especially after Pruett's testimony. The inability of the Hartels' experts to sponsor and comment on the medical literature allowed the defense the freedom to avoid and confuse the value of the literature which overwhelmingly, clearly and convincingly showed Pruett's antibiotic therapy failed to meet the standard of care. Certainly it was prejudicial under the circumstances to allow Pruett and his experts to testify as to the Griffiths 5 Minute Clinical Consult as they did. This coupled with the refusal of Defendants' medical experts to acknowledge many of Plaintiffs' medical authorities as reliable only confused the jury and hindered the ability to show the peer reviewed medical literature proved the defenses' position was scientifically wrong.

It is further clear, in a case such as this, which ultimately hinged on the credibility of various medical experts, the Hartels' inability to use the video deposition of Pruett, adverse, greatly prejudiced their presentation. Without question there was a difference in demeanor and response to questions at trial versus the deposition. Calling Pruett live also resulted in testimony in the Hartels case in chief that would have been avoided had the video deposition been allowed. One would have to speculate, as a mere possibility, that the inability to use the video deposition of Pruett was only harmless error. The Rules of Procedure and Evidence should not be arbitrarily ignored by trial courts and applied without some manner of consistency. Practicing trial lawyers should be able to reasonably rely on a fair and uniform application of the rules.

It should be painfully obvious that it is hearsay and inappropriate bolstering of testimony for a defendant and his experts to testify as to what other anonymous physicians in a particular community are doing as it relates to treatment of a particular disease. This is an attempt to set

the standard of care in a local community with individuals and facts that are incapable of being verified at trial. In this particular case, it was even more egregious due to the fact in the defendants' designation of experts there was no mention that the physicians were going to use these fictionalized, hypothetical, unidentified doctors as a basis for their opinions on the standard of care. (Tr. 230) *Godbee v. Dimick*, 213 S.W.3d 865, 895, 896 (COA Tenn. 2001).

A review of the record and the uncontradicted admissions contained therein it is clear EM Care was vicariously liable for the acts of Pruett and a directed verdict for EM Care was erroneously granted.

Viewing this case as a whole, even if viewed in the light most favorable to Appellees, should require a finding the jury's verdict was against the overwhelming weight of the evidence and certainly a new trial should be granted for the reasons stated herein.

Respectfully submitted this the 25th day of September, 2007.

BETTY G. HARTEL AND ~~WALDO~~ HARTEL

L. CHRISTOPHER BREARD
MSB [redacted]

## 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 pleading to:

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

So certified on this the 25th day of September, 2007.

L. Christopher Breard

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