IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-00173

BETTY G. HARTEL
And Husband, WALDO HARTEL — **APPELLANTS**

VS.

JACK B. PRUETT, M.D., SPECTRUM EMERGENCY CARE, INC. d/b/a SEC/EM CARE, EMERGENCY CARE, INC., BILOXI REGIONAL MEDICAL CENTER, a/k/a BILOXI HMA, INC. — **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

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2) The Honorable Kosta N. Vlahos
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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The trial of this medical malpractice case was a classic example of competing experts. The experts for the Plaintiffs and the Defendants disagreed on the standard of care for treatment of mild diverticulitis. The jury heard extensive evidence from the experts and, in the end, agreed with the defense experts. The Plaintiffs, on appeal, raise no novel issues; however, these Defendants welcome the opportunity to present their oral arguments before this Court.

STATEMENT OF THE CASE

This is an appeal to the Supreme Court of Mississippi from the Final Judgment entered on June 30, 2005, and the subsequent denial of the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial. The presiding judge was the Honorable Kosta N. Vlahos, Circuit Court Judge for Harrison County, Mississippi.

Betty G. Hartel and her husband, Waldo Hartel (hereinafter, "Hartel" or "Hartels"), filed their initial Complaint on September 20, 1999, against Jack B. Pruett, M.D., and Spectrum Emergency Care, Inc. d/b/a SEC/EM Care, Emergency Care, Inc. ("EM Care") alleging medical negligence in the treatment of diverticulitis. (R. 12). The Hartels alleged Jack B. Pruett, M.D., an ER physician, was negligent by failing to perform an adequate examination to determine the severity of Mrs. Hartel's diverticulitis, consult a surgeon to evaluate her diverticulitis, and other acts of negligence to be shown at trial. (R. 14). The Hartels attempted to hold EM Care liable for negligence based on the theory of *respondeat superior*. (R. 15). Mrs. Hartel alleged as a result of this negligence, she suffered a perforated sigmoid colon resulting in a temporary colostomy being performed. Mr. Hartel alleges that as a result of this negligence, he suffered the loss of society and companionship with his wife as well as anguish of seeing her cope with this ordeal. (R. 15). On May 12, 2000, the Hartels filed their First Amended Complaint alleging EM

Care negligently hired and/or negligently entered into a contract with Co-Defendant, Jack B Pruett, M.D., to provide emergency room services to Biloxi Regional Medical Center. (R. 40, 41). The Second Amended Complaint also filed May 12, 2000, named Biloxi HMA, Inc. d/b/a Biloxi Regional Medical Center ("Biloxi Regional") as an additional defendant alleging the hospital was responsible via *respondeat superior* for Pruett's alleged negligence. (R. 56).

On June 14, 2005, Defendants filed a Motion for Separate Trial on the issue of corporate negligence pursuant to Rule 42(b) of the Mississippi Rules of Civil Procedure. The trial court accepted the argument that if the medical negligence claim was found in favor of the defendants, that it would dispose of the second issue of corporate negligence. (R.E. 16, 17).

On June 17, 2005, Defendants filed a *Motion in Limine* to exclude Hartels' introduction of numerous medical articles in their case in chief. Counsel for Defendants received at their respective offices a 97-page faxed document consisting of journal articles on June 19, 2005, the day before trial was scheduled to start. Several years earlier. the Defendants propounded discovery specifically asking the Hartels to provide all medical articles to be used in their case in chief. (R.E. 18). Counsel for the Hartels originally sent a list of the names of the articles he intended to use five days before trial on June 15, 2005. The trial judge agreed with the Defendants that there was untimely production; however, the Hartels used these journal articles extensively at trial on cross-examination of several defense witnesses. (R. 41).

The trial court further ruled *in limine* that the Hartels' edited video deposition of Defendant Dr. Pruett could not be played in lieu of adversely calling Dr. Pruett to the stand. There was much discussion on the admissibility of the altered video deposition. Defendants said they did not object to the video deposition being played before the jury, but that the entire video must be played and not cherry picked portions pursuant to Miss. R. Civ. P. 32(a)(2). (R.E. 36). The trial court preferred not to use parts of a video deposition from two years before instead of

live testimony of the Defendant, but tuled it would be proper to use the video deposition for impeachment purposes. (R.E. 39-40).

At trial, the Hartels chose to pursue one narrow argument supporting their claim of negligence by Pruett. They admitted he made the correct diagnosis of acute mild diverticulitis when she presented to the ER at Biloxi Regional. The Hartels further conceded Pruett made the correct decision to prescribe antibiotic therapy and release Mrs. Hartel. Their entire criticism was that Pruett should have prescribed a broader spectrum of antibiotics for treatment of Mrs. Hartel's disease flare-up. The experts for the Hartels and the Defendants disagreed on this narrow question, leaving the jury to decide the weight of the evidence.

After a full trial on the merits of the issues presented to a duly impaneled jury in the Circuit Court of the Second Judicial District of Mississippi, before the Honorable Kosta N. Vlahos, the jury, having heard and considered all of the evidence, returned a verdict in favor of the Defendants.

STATEMENT OF FACTS

On or about May 12, 1998, Plaintiff/Appellant, Mrs. Hartel was admitted to the emergency room at Biloxi Regional Medical Center with a complaint of severe lower abdominal pain. She arrived at the hospital around six or seven o'clock at night after her family physician's office had closed for the day. Mrs. Hartel's husband retrieved a wheelchair for his wife to sit in during the examination. The nurses in triage began the examination by finding Mrs. Hartel had normal fever, normal pulse rate, normal respiratory rate, and mildly elevated blood pressure. (R.E. 61). Dr. Pruett, the ER physician present, then began the examination by asking Mrs. Hartel to point out exactly where the tenderness was in her abdomen. He testified he then physically examined Mrs. Hartel, including her abdomen. (R.E. 56). Per Dr. Pruett's handwritten notes in her chart, Mrs. Hartel had tenderness in her lower abdomen but had no

rebound tenderness or signs of a hernia. Therefore, her abdomen was not examined further. (R.E. 57, 58). It is submitted that Pruett properly examined and diagnosed Mrs. Hartel with mild diverticulitis of the left colon. The Hartels concede this point in their brief. (Appellants' Brief p. 2). Dr. Pruett prescribed Cipro, a broad spectrum antibiotic, and wrote instructions for a liquid diet, general rest, and a follow-up by her family physician. Mrs. Hartel did not follow her instructions and call her family physician, Dr. Morris, the next morning after her emergency room visit. (R.E. 103). Soon after, Mrs. Hartel's abdominal pain subsided, and she felt better for the following two days, May 13th and 14th. (R.E. 102). Unfortunately, three days after her visit to the emergency, May 15th, she awoke in pain. (R.E. 104, 112). It was not until this point that Mrs. Hartel called her family physician, Dr. Morris. (R.E. 104). That physician determined she should see a gynecologist. (R.E. 105). Mrs. Hartel described this pain as different and more severe than her previous pain on May 12. (R.E. 106, 110). She testified that it felt like she had a brick and a sharp pain in her vaginal area. (R.E. 110, 111). Mrs. Hartel, subsequently, underwent surgery, including a colostomy that has since been reversed. (R.E. 107-109).

The complaint of the Hartels is not that Dr. Pruett misdiagnosed Mrs. Hartel with acute mild diverticulitis. On the contrary, they admit this was the correct diagnosis; however, they contend two forms of antibiotic should have been given. (R.E. 49). Mrs. Hartel claims that an antibiotic that covers anaerobic bacteria should have been given along with the prescribed Cipro, which was for aerobic type bacteria. (R.E. 49).

Defendants presented testimony from two qualified expert witnesses who both testified as to the appropriate standard of care for an emergency room doctor treating diverticulitis. Emergency room physician, Dr. Michael Stodard, stated that Dr. Pruett met the standard of care that was owed to Mrs. Hartel when she presented at Biloxi Regional on May 12, 1998. "He treated her exactly as I would have treated her under the same circumstances." (R.E. 125). Dr.

Stodard practiced in family medicine for six years and has then practiced solely in emergency medicine since 1990. (R.E. 122). He has been credentialed in emergency medicine at Jeff Anderson Hospital in Meridian, a regional medical center with about 250 beds, since 1982. (R.E. 123). Dr. Stodard also has worked in the emergency rooms of Riley Memorial Hospital, River Oaks Hospital, Central Mississippi Medical Center, St. Dominic Hospital, and Baptist Hospital. (R.E. 124).

Dr. George McGee, a board certified general surgeon, also testified that Dr. Pruett met the appropriate standard of care. (R.E. 133-134). He was in private practice as a general surgeon from 1982 until August of 2004, when he started working for Forrest General Hospital in full trauma and emergency surgery. (R.E. 131). Dr. McGee testified that he had treated hundreds of patients with mild diverticulitis and performed several hundred surgical resections for diverticulitis in 23 years of practice. (R.E. 132). Dr. McGee confirmed that Cipro is routinely prescribed to effectively treat mild diverticulitis, and said he would not change anything in Dr. Pruett's treatment plan of Mrs. Hartel. (R.E. 133-134).

The Hartels put on two expert witnesses in an effort to establish the standard of care of an emergency room physician treating diverticulitis. Dr. Bobby Kleier is currently not recertified in the board of surgery and practices at a 25 bed hospital that averages only about 30 people in its emergency room over a 24 hour period. (R.E. 89, 90). In 2003, only eight inpatient surgeries were performed the entire year at that hospital where, according to Dr. Kleier, "A great majority of the surgery is ambulatory outpatient surgery, elective." (R.E. 91). Less than six outpatient surgeries per month take place at that hospital. (R.E. 92). The vast majority of the surgeries performed at the hospital where Dr. Kleier is on staff are not similar to Mrs. Hartel's emergency situation. (R.E. 92). Dr. Kleier also admitted he has not performed a colon resection of diverticulitis since 2002. (R.E. 92).

The jury also heard testimony from Dr. Joseph Blackston, a physician in internal medicine also licensed to practice law in Mississippi. (R.E. 93). Dr. Blackston acknowledged he practiced law for a year after medical school. (R.E. 95). He is currently medical director for the Central Mississippi Correctional Facility and six months prior to trial also began acting as the regional director for the State of Mississippi. (R.E. 94). Dr. Blackston admitted he often deals with "medical legal issues;" his resume included, *inter alia*, presentations concerning risk management and the "Politics of Tort Reform in Mississippi." (R.E. 100-101).

At the conclusion of a week-long trial, the case was submitted to the jury and a verdict rendered for the Defendants thereon.

ARGUMENT

1. The Trial Court Correctly Prohibited Plaintiffs From Introducing Untimely Disclosed Medical Treatises and Journal Articles.

A. Mississippi Rules Of Evidence Require Seasonable Supplementation.

On April 17, 2000, five years before trial, written discovery was propounded to Plaintiffs requesting them to identify "all treatises to be relied upon by his experts in direct examination." (R.E. 2). Plaintiffs responded they "will respond and supplement in strict accordance to Miss. R. Evid. 803(18)." (R.E. 5). They then failed to identify any medical treatises until the Wednesday before trial. The actual documents were not produced until after the Defendants filed a *motion in limine* based upon Plaintiffs' failure to seasonably disclose the treatises. On the eve of trial, Sunday, June 19, 2005, Plaintiffs sent ninety-seven pages via facsimile containing the full text of the articles and treatises to be used at trial. (R.E. 19-20). Their counsel admitted he had not narrowed down the faxed documents to what was going to be specifically used. (R.E. 29). Hartels' counsel claimed the late identification was excused because it had not been apparent to him until right before trial that he would need the aforementioned articles to support his experts

and that the evidence was seasonably produced after he realized the need for these articles. (R.E. 30).

The Rules of Civil Procedure are designed, in part, to prevent trial by ambush and to encourage parties to seasonably supplement discovery, including all information upon which an expert will rely regarding opinion testimony. *Nichols v. Tubb*, 609 So. 2d 377, 384 (Miss. 1992); *Irby v. Travis*, 935 So.2d 884, 931 (Miss. 2006). The Hartels argue that the trial court committed reversible error by not allowing their experts to testify regarding medical texts and journal articles to support their case. (A.B. 21). They contend that this evidence should be admitted pursuant to Rule 803(18) Miss. R. Evid. and presentation of proper notification of the articles. (A.B. 22). For the reasons as more fully set forth below, this argument is completely without merit.

Although Miss. R. Evid. Rule 803(18) provides that learned treatises may be read into evidence, it also requires the treatises "must be disclosed to opposing parties without charge pursuant to discovery." Following the rules concerning discovery, "A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony." (Rule 26(f)(1) Miss. R. Civ. P.).

In support of their argument Hartels cite to *Scafidel v. Crawford*, in which counsel did not receive a copy of a pathology report until the morning of trial. 486 So. 2d 370 (Miss. 1986). The Court noted that the conduct of not furnishing the pathology report until the day of trial "falls squarely within the well established rules governing conduct of trials which prohibit this type of last minute response," but affirmed allowing the evidence based on the facts that the

appellant's own expert had a copy of the tissue slices from which the report was written well in advance of trial, and that neither party had received the report until immediately prior to trial. *Id.* at 373. Therefore, the delayed supplementation did not prejudice the appellant because both parties were in the same position with regard to the findings. There had been suffered no unfair advantage, surprise or ambush at trial. *Id.* The Supreme Court admonished, "We trust this opinion will not be construed as a retreat from our previous decisions mandating strict compliance with the rules of discovery regarding expert testimony." *Id.* The critical difference is that in *Scafidel* both parties received the document at the same time prior to trial. In the case *sub judice*, Hartels had five years in which to discover the treatises and medical journals and did not disclose these documents until a few days before trial.

The Hartels also cite *Williams v. Dixie Elec Power Assn.*, in which surveillance films were obtained by Dixie Electric the Thursday evening before trial. 514 So. 2d 332, 335 (Miss. 1987). The Court reversed the trial court and held that revealing the films' existence for the first time the succeeding Wednesday at trial was a violation of discovery rules. 514 So. 2d 335-337 (Miss. 1987). Mississippi courts are "committed to the discovery rules because they promote fair trials. Once an opponent requests discoverable material, an attorney has a duty to comply with the request regardless of the advantage a surprise may bring." *Id.* *Williams* does not constitute justification for eleventh hour disclosures.

In the present case, the trial court did not abuse its discretion by prohibiting Plaintiffs' experts to testify regarding untimely disclosed medical texts and journal articles. The Mississippi Supreme Court has developed strict discovery rules in order to avoid trial by ambush and to insure each party has a reasonable time to prepare for trial. *Busick v. St. John*, 856 So. 2d 304, 320 (Miss. 2003); *Choctaw Maid Farms, Inc. v. Hailey,* 822 So.2d 911, 917 (Miss. 2002). Trial counsel must be afforded time prior to trial to prepare for a particular defense or contention

requiring specialized knowledge to grasp and understand, and this is certainly true in medical malpractice cases. *Nichols v. Tubb*, 609 So. 2d 377, 384 (Miss. 1992). According to Rule 26(f)(1) Miss. R. Civ. P., a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. Timely disclosures of the substance of expert testimony have long been required by this Court. *Boyd v. Lynch*, 493 So. 2d 1315, 1320 (Miss. 1986); *Square D v. Edwards*, 419 So. 2d 1327 (Miss. 1982); *Huff v. Polk*, 408 So. 2d 1368 (Miss. 1982). In *Blanton v. Bd. of Sup'rs of Copiah County*, the Court found that a supplemental expert witness disclosure filed six days prior to trial was not seasonable under Rule 26(f)Miss. R. Civ. P.; was prejudicial to the opposing party; and that the trial court's exclusion of the supplemental report was proper. 720 So. 2d 190, 195-96 (Miss. 1998). The Supreme Court stated that "seasonableness must be determined on a case by case basis looking at the totality of the circumstances surrounding the supplemental information the offering party seeks to admit." *Id.* at 196. According to the Court in *Nichols*:

> If truth is to be attained in the trial process, it is imperative that the attorneys and experts testifying be fully knowledgeable as to the other party's contentions and claims well in advance of trial . . . Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand."

609 So. 2d at 384.

Hartel then relies upon *Congleton v. Shellfish Culture, Inc.*, which case also dealt with a videotape and not a learned treatise. 807 So. 2d 492 (Miss. Ct. App. 2002). Such reliance is misplaced as the videotape was disclosed on August 29 and produced at the end of December, well before trial began in February. *Id.* at 495-96. Clearly the facts in *Congleton* cannot be compared to dense academic papers being produced only five days before trial.

Hartels' counsel did not disclose these articles in time for defense counsel and experts to adequately review. The Hartels claim the ninety-seven pages of unmarked articles were straightforward and the issues were not the least bit complicated. (A.B. 23). However, during the hearing of June 20, 2005, counsel's explanation to the judge for taking so long to do the research was "he is just a poor ole country lawyer and not a medical doctor." (R.E. 31). This statement to the trial court was an admission that it takes significant time to digest technical medical treatises. Production to counsel opposite the day before trial only exacerbates that fact. Simply put, Hartel did not identify the treatises in a seasonable manner.

B. Plaintiffs Suffered No Harm As There Was Reference To Untimely Disclosed Articles Throughout Trial.

Notwithstanding the correct ruling by the trial court, Hartels' counsel was allowed to use the medical treatises during trial. Counsel thoroughly cross-examined the Defendant, Dr. Pruett, and defense expert Dr. McGee regarding the aforementioned articles; The articles were displayed to the jury on a projector and screen with portions highlighted supposedly supporting Plaintiffs' theory of the case. (R.E. 65-67; 68-69; 72-73; 74-76; 78-80; 81-82; 136-138). The jury saw and heard all of the pertinent statements contained within the medical articles. The Hartels suffered no prejudice from the trial court's ruling.

The inability of the Hartels to present their articles on direct examination of their own experts did not prejudice them in any way or adversely affect a substantial right. It is well established the standard of review for the trial court's admission or suppression of evidence, including expert testimony, is within the discretion of the trial judge and will not be reversed absent an abuse of discretion. *Tunica v. Matthews*, 926 So. 2d 209, 212 (Miss. 2006) (*citing Mississippi Transportation Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003)). Thus, the Hartels herein **must** demonstrate that the trial judge abused his discretion by not allowing the evidence to be presented in the manner they preferred. This Court gives great deference to

discretion of the trial judge. "Unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." *Tunica*, 926 So. 2d at 212, 213 (*citing Crane Co. v. Kitzinger*, 860 So. 2d 1196, 1201 (Miss. 2003)). Furthermore, in order to reverse an evidentiary decision by the trial court, it must be shown that "the error must result in prejudice and harm, or adversely affect a substantial right of a party." *Busick v. St. John*, 856 So. 2d 304, 308 (Miss. 2003)(*citing Terrain Enters, Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995)).

2. The Trial Court Correctly Refused To Allow A Defense Expert To Testify Regarding The New England Journal Of Medicine.

According to Rule 803(18) Miss. R. Evid., statements from learned treatises, periodicals, or pamphlets on a subject of medicine are only admissible after (1) the witness testifies that the treatise is reliable, (2) another expert so testifies, or (3) the court takes judicial notice. On cross, defense expert Dr. Stodard admitted the New England Journal of Medicine was respected in the medical community but could not agree the Journal was generally authoritative or relied upon by the medical community. (R.E. 128, 129). The trial court correctly ruled that the test provided in the Rules of Evidence had not been met. (R.E. 129-30).

As previously discussed, the admission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of discretion. Thus, the Hartels must demonstrate that the trial judge abused his discretion by not allowing the evidence to be presented. Furthermore, in order to reverse an evidentiary decision by the trial court, it must be shown that the error "must result in prejudice and adversely affect a substantial right of the aggrieved party." *Wal-mart Stores, Inc. v. Frierson*, 818 So. 2d 1135, 1139 (Miss. 2002). In the present case, the trial court did not abuse its discretion in not allowing such evidence. In view of the fact that Plaintiffs put before the jury the statements from the New England Journal of Medicine through the cross-examination of Dr. McGee, absolutely no prejudice to Plaintiffs

resulted by not allowing Dr. Stodard to discuss this article; and no substantial right of Plaintiffs was adversely affected. (R.E. 136).

3. The Trial Court Correctly Allowed Defendant Dr. Pruett To Testify Regarding The Griffith's Periodical.

Hartels also contend the trial court should not have allowed Dr. Pruett to testify regarding the contents of Griffith's 5 Minute Clinical Consult over their objections. (A.B. 25, R.E. 88). While the Defendants' designation of experts did not identify Griffith's 5 Minute Clinical Consult, Hartels' counsel opened the door for this evidence during his examination when he specifically asked Dr. Pruett:

> I want you to cite me one article that you're relying on for that testimony which has not been provided. I want to know one article that you're citing that says Cipro alone is just as effective for diverticulitis treatment as aerobic and anaerobic coverage. You don't have one recent article that says that, do you?

(T.R. 352).

Based on this line of questioning and the fact that counsel freely used the untimely disclosed articles during his examination of Dr. Pruett, the Court's ruling should not be disturbed. Moreover, Griffith's 5 Minute Clinical Consult was presented solely to rebut Hartel's question suggesting there are no articles to support Dr. Pruett's view. Even though Hartel's counsel objected to the article, he later used the same document as support for his clients' case. (R.E. 96-99).

The issue of whether a party opened the door for an opposing party to inquire about otherwise inadmissible evidence lies within the sound discretion of the trial court. *APAC-Mississippi, Inc. v. Goodman*, 803 So. 2d 1177, 1185 (Miss. 2002) (*citing Duckett v. Troester*, 996 S.W. 2d 641, 649 (Mo. Ct. App. 1999). Thus, the Hartels must demonstrate that the trial judge abused his discretion. The Court gives great deference to the discretion of the trial judge. "Unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an

abuse of discretion, that decision will stand. *Tunica v. Matthews,* 926 So. 2d at 212, 213 (*citing Crane Co. v. Kitzinger*, 860 So. 2d 1196, 1201 (Miss. 2003)). Furthermore, in order to reverse an evidentiary decision by the trial court, "the error must result in prejudice and harm, or adversely affect a substantial right of a party." *Busick v. St. John*, 856 So. 2d 304, 308 (Miss. 2003)(*citing Terrain Enters, Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995)). In the present case, the trial court acted well within its discretion by allowing Defendant Dr. Pruett to present an article in direct response to a question by counsel opposite.

4. The Trial Court Correctly Excluded Use Of An Edited Video Deposition Of Dr. Pruett.

The week before trial, Defendants' counsel received a facsimile from Hartels' counsel stating his intention to use an edited video deposition of Dr. Pruett in lieu of calling him live to testify. This facsimile contained a list of page numbers and lines that were to be used in the video that could only be played by having a special program, SANCTIONS. (R.E. 14). However, the actual edited video deposition was never produced to either Defendant. (R.E. 51). After exhaustively analyzing Rule 32, Miss R. Civ. P., the trial court ruled that the video deposition could not be used in the manner proposed. He set forth several reasons for the ruling: (1) the seasonableness of the disclosure; (2) Rule 403 and the "potential of taking matters out of context;" and (3) the trial setting as the place where evidence is produced as opposed to months earlier in a deposition. (R.E. 52).

Hartels' counsel declared calling the witness live would interfere with "the free flow of my presentation." (R.E. 37). The Defendants objected to the self-edited video deposition on grounds that the rules require the modified deposition to be played in its entirety and the untimely disclosure of the self-edited video deposition. (Miss. R. Civ. P. 32(a)(4); Miss. R. Evid. 106). Moreover, neither Defendant had ever seen the edited video. The trial judge correctly sustained the objection. (R.E. 53).

A decision regarding admission of deposition testimony must be demonstrated to have been prejudicial for it to constitute reversible error. *Mutual Life Ins. Co. of New York v. Estate of Wesson*, 517 So. 2d 521, 538 (Miss. 1987). The Hartels suffered no prejudice as their counsel repeatedly referred to the deposition throughout his examination of Dr. Pruett. (R.E. 54, 55, 59, 60, 62-64).[1] On the other hand, the Defendants would very much have been prejudiced by the playing of a spliced video deposition that did not allow the jury to hear all the statements in full context. The Mississippi Supreme Court has confirmed that the point is governed by a combined reading of several provisions of the Mississippi Rules of Civil Procedure and Mississippi Rules of Evidence. *McMillan v. King*, 557 So. 2d 519, 525-26 (Miss. 1990).

Rule 32(a) Miss. R. Civ. P, states in pertinent part:

> (a) *Use of Depositions.* At the trial or upon the hearing of a motion on an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or had reasonable notice thereof, in accordance with any of the following provisions:
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any purpose permitted by the Mississippi Rules of Evidence.
>
> (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership, or association or governmental agency which is a party, may be used for an adverse party for any purpose.

Rule 801(d)(2) Miss. R. of Evi. provides in pertinent part:

> (d) A statement is not hearsay if...
> (2)(A) the statement is offered against a party and is his own statement, in either his individual or a representative capacity....

A literal reading of these rules does support the Hartels' contention that a deposition can be used instead of live testimony. However, it is submitted that the trial court also has to take

[1] If Hartels' counsel had introduced Dr. Pruett's deposition, they would not have had the opportunity to mention the aforementioned medical articles during their case in chief.

Rule 106 of the Mississippi Rules of Evidence and Rule 32(a)(4) Miss. R. Civ. P., into consideration. Rule 106 states, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 32(a)(4) states, "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce other parts." Miss. R. Civ. P.; *McMillan v. King*, 557 So. 2d at 526 n.4.

In *McMillan*, the Court held it was harmless error not to allow a video deposition because the appellant presented before the jury the same points he proffered via cross examination of the witness. 557 So. 2d at 526; *See also Fenstermacher v. Philadelphia National Bank*, 493 F. 2d 333, 338 (3rd Cir. 1974). The record disclosed that pertinent testimony was elicited from the adverse witness and that when trial testimony differed from the deposition, counsel was freely allowed to impeach the witness with the parts of the deposition he wished to enter into evidence. *Id.* Importantly, the Court also noted that had the circuit court allowed plaintiff's counsel to admit and use the proffered parts of the deposition, the defendant would have been entitled upon request at that time to introduce any other part of the deposition which ought in fairness be considered contemporaneously with it. *Id.*; see also *Huddleston v. Herman & MacLean*, 640 F. 2d 534, 553 (5th Cir. 1981); *Westinghouse Electric Corp. v. Wray Equipment Corp.*, 286 F. 2d 491, 494 (1st Cir. 1961).

In support of their argument, Hartels cite *Sandridge v. Salem Offshore Drilling*, in which the Fifth Circuit held a trial court did not abuse its discretion in not permitting employer's counsel to ask during *dire* if the prospective jurors would give more weight to a videotaped deposition over a written deposition. 764 F. 2d 252 (5th Cir. 1995). Hartels say that the Fifth

Circuit "recognized early on that video testimony, when admissible, should not be treated as second class evidence." (A.B. 26). While the opinion does reference Wright and Miller, Hartels failed to quote the entire sentence referenced by the Fifth Circuit, which is, "**Though live testimony is preferred**, depositions, when admissible, are not to be treated as a form of second class evidence." *Sandridge*, 764 F. 2d at 259(emphasis added). Regardless, the issue in *Sandridge* concerned the weight a jury can place on written versus video deposition, with the issue in the instant case being a spliced video deposition versus the entire video deposition. There is no argument regarding the weight or credibility of the video deposition. Thus, this case cited by Hartels is clearly distinguishable from the case *sub judice*.

Another case cited by Hartels is *Keller v. Keller*, 763 So. 2d 902 (Miss. Ct. App. 2000). Following the analysis of the Court in *McMillan v. King*, the Mississippi Court of Appeals affirmed that the deposition of a party is admissible for any purpose. *Id.* at 905. The distinguishing factor is the deposition entered into evidence in *Keller* was a written transcript, as opposed to the case *sub judice*, in which the Hartels' counsel wished to introduce an edited video deposition of the party and refused to enter the entire unedited version of the deposition. (T.R. 60). *Robinson v. Lee*, another opinion by the Court of Appeals cited by Hartels, has no bearing upon the issues herein. It reversed admission of deposition testimony because of failure by offering party to comply with Miss. R. Civ. P. 32(a). 821 So. 2d 129, 134 (Miss. Ct. App. 2000).

Finally, the Hartels cite two out of state opinions for authority on this issue. In *Castaneda v. Redlands Christian Migrant Assoc.*, the District Court of Appeals of Florida held a deposition was admissible regardless of availability of the witness based on that state's rules of evidence. 884 So. 2d 1087, 1091 (Fl. 4th Dist. Ct. App. 2004). Similar to *Keller*, a distinguishing factor is the deposition entered is a written transcript and not a self-edited video deposition.

The Hartels also point to a North Carolina federal court's denial of a motion for protective order requesting that the continuation of a deposition not be videotaped when the initial portion was only transcribed. The court allowed videotaping because of alleged evasion by the witness during the initial part of the deposition. *Riley v. Murdock*, 156 F.R.D. 130, 131(E.D.N.C. 1994). *Riley* has no bearing on the case *sub judice* because it does not involve admission of depositions at trial. All of the cases cited by the Hartels are clearly distinguishable from the case *sub judice.*

As in *McMillan*, the Hartels suffered no prejudice as they were able to employ the deposition during cross examination. On the other hand, Defendants would have incurred prejudice from introduction of an untimely disclosed, edited video deposition into evidence and were entitled to introduce any part of the deposition which ought in fairness be considered contemporaneously with the rest. Based on the Court's precedent in *McMillan*, the Hartels have failed to meet their burden on appeal, and the trial court's ruling does not constitute reversible error.

5. The Trial Court Correctly Ruled Certain Testimony Of Defense Witnesses Was Not Hearsay.

Dr. Pruett and a defense expert witness testified based upon their knowledge, training, skills, and experience that exclusively prescribing Cipro for patients with mild diverticulitis was within the standard of care. In support of their testimony, Dr. Pruett and the expert testified of their personal knowledge that colleagues followed a similar treatment regimen. (R.E. 77, 134). Each witness was not trying to quote other doctors, but rather was explaining the emergency room practice he had personally witnessed on a routine basis for many years. (R.E. 134). This testimony was not hearsay; it comprised part of the basis of the standard of care as understood by the witnesses.

This Court has long held that physicians are bound to adhere to standards of care and have a duty to exercise reasonable and ordinary patient care. *Palmer v. Biloxi Reg. Med. Ctr. Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990). In order to prove a medical malpractice claim, the plaintiff must prove the standard of care and this is generally presented through expert testimony. *Id.* at 1355; *Kelly v. Frederic* 573 So. 2d 1385, 1387 (Miss. 1990). In the seminal case of *Hall v. Hillbun*, this Court explained what forms the standard of care:

> (E)ach 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.

466 So. 2d 856, 873 (Miss. 1985).

In the case *sub judice*, the defense witnesses were explaining their understanding of the standard of care for an emergency room physician treating diverticulitis. The testimony provided by the defense witnesses was related to the standard of care and proper procedures followed by emergency room doctors in similar situations and did not introduce statements by other personnel. Thus, the testimony was not hearsay.

While citing several cases, the Hartels principally rely on *Hickox v. Holleman* and several out-of-state cases. (A.B. 32). However, *Hickox* and the other cases are certainly distinguishable from the case *sub judice*. *Hickox* involved a situation in which the expert witness was asked to present opinion testimony based on a hypothetical question. The Court held, "no expert should be permitted to express an expert opinion on a hypothetical question which omits necessary facts, or fails to give sufficient factual basis for the expert witness to express a valid opinion." 502 So. 2d 626, 638 (Miss. 1987). That is not what happened in the case *sub judice*, where the defense witnesses were never asked a hypothetical question. Response was made to counsel based upon personal knowledge and experience within the emergency room environment.

In *Morley v. Jackson*, the defendants were trying to introduce evidence of a non-testifying appraiser through questioning their own expert witness. 632 So. 2d 1284, 1293, 1294 (Miss. 1994). The Court found this line of questioning was solely to present to the jury that an appraiser was hired by the plaintiffs who found a negative result. *Id.* In the case *sub judice*, Dr. Pruett and Dr. McGee were not trying get evidence in "through the backdoor." The defense witnesses' testimony only mentioned the practice followed by other doctors of which they had personal knowledge in their own practices. Such statements are not direct quotes of other doctors or written materials. They are a description of what practice actually constitutes the standard of care.

Similarly, *Chandler v. Graffeo* also involved an attempt to enter the opinion of a non-testifying expert. In *Chandler*, the trial court erred by allowing a physician expert witness to recite the opinion of a non-testifying physician concerning the permissibility of discharging the patient from the hospital. 268 Va. 673, 682, 604 S.E. 2d 1, 5 (Va. 2004). As with *Morley*, the facts in *Chandler* are different from what is presented in the instant case. Just as in *Morley*, the defendant in *Chandler* attempted to show specifically what a non-testifying expert said concerning the matter at issue. Again, that is not at all what occurred in the case *sub judice*. The statements based on the witnesses' personal knowledge are relevant and are not hearsay as they were not offered to prove the matter asserted, but rather to show whether proper procedures were followed and the appropriate standard of care was met.

The Plaintiffs' reliance on the Tennessee decision of *Godbee v. Dimick*, 213 S.W. 3d 865, 896 (COA Tenn. 2001), is misplaced. In that case, the trial court correctly excluded portions of a doctor's deposition where he speculated regarding the standard of care. Specifically, in the excluded portion of the deposition, the doctor testified as to what he "thought" as to the standard of care and what he "believed" other surgeons were doing in the treatment of patients with

similar conditions. By contrast, the testimony in this case was limited to personal knowledge of the standard of care for treatment of patients with mild diverticulitis.

As previously discussed, the admission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of discretion. Thus, the Hartels must demonstrate that the trial judge abused his discretion by allowing the evidence to be presented. Furthermore, in order to reverse an evidentiary decision by the trial court, it must be shown that "the error must result in prejudice and harm, or adversely affect a substantial right of a party." *Busick v. St. John*, 856 So. 2d 304, 309 (Miss. 2003)(*citing Terrain Enters, Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995). The Hartels have failed to meet this heavy burden.

In the present case, the trial court did not abuse its discretion in allowing such evidence. Rule 401 Miss. R. Evid. favors the broad admissibility of evidence. The physicians' personal knowledge of the procedure followed by emergency room physicians in the community is absolutely relevant as to standard of care. Rule 403 Miss. R. Evid. would then allow the evidence because the extremely probative value of the evidence of the procedure followed by other physicians in the community was not substantially outweighed by any prejudicial effect. *Id.*

The Mississippi Supreme Court has said, "It is inherent that nearly all evidence is prejudicial to a party in one way or another. The inquiry as it regards admissibility is whether that prejudice is unfair." *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975, 981 (Miss. 2003)(*citing* Miss. R. Evid. 403). The trial court's decision to allow Dr. Pruett and Dr. McGee to testify based on their personal knowledge of general emergency room practice did not affect Hartels' substantial rights. It actually defies common sense to suggest that physicians testify to the standard of care while being ignorant of what physicians do in certain circumstances. Dr.

Pruett and Dr. McGee were testifying from their extensive experience, and the jury certainly had the right to know how the witnesses' experiences had helped form their opinions.

For these reasons, the trial court did not abuse its discretion by admitting this testimony regarding the applicable standard of care.

6. The Trial Court Correctly Granted Directed A Verdict for Spectrum Emergency Care, Inc. d/b/a SEC/EMCare, Emergency Care, Inc.

The Plaintiffs falsely contend Spectrum Emergency Care, Inc. ("EM Care") admitted vicarious liability in pleadings filed with the trial court.

EM Care denied vicarious liability in its Answer to all complaints including the Second Amended Complaint. (R. 71). In its Answer, EM Care referenced the Emergency Services Agreement with Biloxi Regional, a copy of which is in the pleadings. The Agreement provides that the relationship between EM Care and emergency room physicians is one of independent contractor. The agreement further states that EM Care shall not exercise control of any nature over the manner or means in which the physicians perform their professional duties. (R. 109). All of the pleadings filed by EM Care with the trial court denied vicarious liability for the acts and omissions of Dr. Pruett. (R. 23, 24, 70, and 71).

The only admission of EM Care was its duty of contractual indemnity to Biloxi Regional for claims of the Plaintiffs based upon the theory of *respondeat superior*. (R. 158 - 160). EM Care's admission of contractual indemnity to Biloxi Regional was not an admission of vicarious liability for Dr. Pruett's acts or omissions. Contractual indemnity for claims of Biloxi Regional were separate and distinct from the claims of the Plaintiffs. (R. 98 - 101).

The Plaintiffs are unable to reference any admission by EM Care in the record that it was vicariously liable for the acts or omissions of Dr. Pruett. The trial court conducted a careful consideration and analysis of these issues before granting EM Care's Motion for Directed Verdict. (R.E. 113-121 and 139-150). EM Care moved for a directed verdict after the close of

the Plaintiffs' case in chief. After extensive discussion and inquiry, the trial court reserved ruling on the motion. (R.E. 116). The trial court asked the court reporter to review the entire transcript of the Plaintiffs' case in chief for any reference to Spectrum Emergency Care, Inc. d/b/a SEC/EMCare or Emergency Care, Inc. Those Defendants were not mentioned in the record anywhere. (R.E. 120). The Plaintiffs failed to put on any proof purporting to establish any relationship between Dr. Pruett and EM Care and, thus, did not make any attempt to prove vicarious liability of EM Care for the acts or omissions of Dr. Pruett.

By reserving a ruling, the trial court gave the Plaintiffs ample opportunity to establish vicarious liability during the Defendants' case in chief. Nevertheless, the Plaintiffs made no attempt to do so, and the EM Care Defendant was not mentioned in the Defendants' case in chief. The Plaintiffs did not make any attempt to reopen their case as such an effort would have been futile since there was no proof tending to show EM Care was liable for the acts or omissions of Dr. Pruett under the doctrine of *respondeat superior*.

At the close of the Defendants' case in chief, the trial court again gave Plaintiffs' counsel an opportunity to show what evidence existed establishing vicarious liability against EM Care. The Plaintiffs were unable to offer any evidence. Counsel for EM Care reminded the court that numerous requests had been made of the Plaintiffs prior to trial to drop their claims against EM Care. At no time was there ever any admission by EM Care that it was vicariously liable for the acts or omissions of Dr. Pruett. (R.E. 149).

The Plaintiffs' desire to keep EM Care in the case remains a curiosity to this day. At trial, Biloxi Regional admitted vicarious liability for the acts and omissions of Dr. Pruett, and both Defendants had sufficient insurance benefits to satisfy a Plaintiffs' verdict. EM Care was a nominal defendant to begin with as proven by Plaintiffs' failure to reference EM Care during the course of the trial.

Whether to grant a directed verdict is a decision of law. *Fox v. Smith*, 594 So. 2d 596, 603 (Miss. 1992). The trial court is required to take a claim from a jury and grant a directed verdict if any verdict other than the one directed would be erroneous as a matter of law. *McKinzie v. Coon*, 656 So. 2d 134, 137 (Miss. 1995). When deciding upon a motion for directed verdict, the trial court is to look to the testimony offered on behalf of the opposing party. If such testimony along with all reasonable inferences which can be drawn therefrom could support a verdict for that party, the claim should not be taken from the jury. If on the other hand, the testimony and evidence offered with all reasonable inferences could not support a verdict against a particular party, the motion should be granted. *Murray Envelope Corp. v. Atlas Envelope Corp.*, 851 So. 2d 426, 429 (Miss. Ct. App. 2003).

The record is bereft of any admission or evidence of EM Care's alleged vicarious liability. The trial court, as revealed by the transcript, carefully considered all of the evidence presented at trial and analyzed the pleadings in the case before correctly concluding at the end of the trial that EM Care's Motion for Directed Verdict should be granted. The jury had no evidence presented to them from which they could find against EM Care. The jury never heard EM Care's name mentioned in the trial. The trial court's decision should be upheld.[2] See, *Murray*, 851 So. 2d at 429 (directed verdict should have been granted as there was not even a scintilla of evidence).

7. The Trial Court Correctly Denied The Request For A New Trial.

The standard of review for deciding whether or not a jury verdict is against the overwhelming weight of the evidence is that this Court "must accept the evidence which supports the verdict as the truth and will reverse only if convinced that the lower court abused its discretion in not granting a new trial." *Richardson v. Derouen*, 920 So. 2d 1044, 1047-48 (Miss.

[2] Plaintiffs' claims against EM Care for negligent hiring of Dr. Pruett were bifurcated and are not part of the appeal.

Ct. App. 2006) (*citing Price v. State*, 898 So. 2d 641, 652 (Miss. 2005)). A new trial will not be ordered, "unless we are convinced that the verdict is so contrary to the overwhelming weight of the evidence, that, to allow the verdict to stand, would be to sanction an unconscionable justice." *Richardson* 920 So. 2d at 1048 (*citing Pearson v. State*, 428 So. 2d 1361, 1364 (Miss. 1983)).

According to the Mississippi Supreme Court, this high standard is necessary because "any factual disputes are properly resolved by the jury not by an appeals court." *McNeal v. State*, 617 So. 2d 999, 1009 (Miss. 1993). Factual disputes as to what the jury should believe are decided by the jury. *Id.* Mississippi has a long standing policy of trusting the jury's verdict. *Waterman v. State*, 822 So. 2d 1030, 1033 (Miss. Ct. App. 2002). Jurors decide the credibility of the evidence and the witness's testimony, the court has no say with regard to this matter. *Id.* In the case *sub judice*, not only was evidence presented by Biloxi Regional and Dr. Pruett that contradicted Plaintiffs' contentions, but the greater weight of the credible evidence overwhelmingly supports the jury's verdict.

The jury's verdict is well supported by substantial evidence from qualified physicians. Dr. Mike Stodard, an emergency room physician, explained the standard of care that would apply to an emergency room physician treating a patient with similar symptoms. (R.E. 125-127). Dr. Stodard had treated "hundreds" of patients with diverticulitis over the past twenty-two years. (R.E. 127). Similarly, Dr. George McGee, a practicing general surgeon, stated his familiarity with the standard of care relating to the treatment of patients who have mild diverticulitis. (R.E. 132). Dr. McGee testified he has treated hundreds of patients with mild diverticulitis and done several hundred surgical resections for diverticulitis in his 23 years of practice. (R.E. 132). He testified that Dr. Pruett met the standard of care for an emergency room physician in his treatment of Mrs. Hartel. (R.E. 133). Dr. McGee readily admits to routinely prescribing Cipro for a patient with acute mild diverticulitis. (R.E. 133). He ardently believes in Cipro's

effectiveness and notes it is used by the other emergency room physicians at this hospital.[3] When asked whether he would have changed anything in regards to the treatment plan including the antibiotic coverage, Dr. McGee states, "I would not have changed anything.....this is a very accepted form of treatment for me, and I approve it." (R.E. 135). Dr. Pruett, an experienced emergency room physician, also stated prescribing only Cipro or similar antibiotic meets the standard of care regarding what medicine is given to a patient with acute mild diverticulitis. (R.E. 87).[4]

Hartels basically claim that the standard of care is proven through literature in this case, though there were conflicting guidelines in the literature. The standard of care actually comes from physicians practicing in the field. It is submitted that the jury chose to believe the Defendants' experts instead of the Hartels', and such choice is the essence of a jury trial.

The jury was presented with ample evidence to support its verdict. The verdict was reasonable based on the evidence that was before it, and there was absolutely no indication that it evinced bias, passion or prejudice which would cause this Court to overturn the jury's verdict. *Gaines v. K-Mart Corp.*, 860 So. 2d 1214, 1218 (Miss. 2003)(*citing McIntosh v. Deas*, 501 So. 2d 367, 369 (Miss. 1987)). For these reasons, the verdict of the jury in the case *sub judice* should not be overturned.

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[3] According to Dr. McGee, Forest General is the second busiest emergency room in Mississippi. (R.E. 134).

[4] Dr. Pruett graduated from the University of Tennessee Medical School in 1977. He completed his residency in general surgery and practiced in this field from 1982 to 1996. In 1997, he began practicing solely in the emergency room. (Tr. 378-380).

CONCLUSION

It has been continuously said that to require reversal of a trial ruling, the error must be of such magnitude as to leave no doubt that the appellant was unduly prejudiced. *Davis v. Singing River Electric Power Assoc.*, 501 So. 2d 1128, 1131 (Miss. 1987). The Hartels were entitled to a fair trial, not a perfect one, and they received a very fair trial in the case *sub judice*. The jury heard from several expert witnesses and determined their respective credibility. The jury weighed the evidence and found in favor of Dr. Pruett and Biloxi Regional Medical Center. Without question, the Hartels had a fundamentally fair and impartial trial. Simply put, the Hartels lost this case not because of any particular error, or an accumulation of errors, but because they failed to demonstrate to the jury by a preponderance of the evidence that Dr. Pruett was negligent in his treatment of Mrs. Hartel.

For these reasons, Appellees herein, respectfully submit that the Appellants' assignment of errors on appeal is without merit and that the verdict of the jury should be affirmed.

RESPECTFULLY SUBMITTED, this the 28th day of December, 2007.

BILOXI REGIONAL MEDICAL CENTER

BY: Mark P Car
MARK P. CARAWAY (MSB NO. [redacted])

JACK B. PRUETT, M.D., SPECTRUM EMERGENCY CARE, INC. d/b/a SEC/EMCARE, and EMERGENCY CARE, INC.

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CERTIFICATE OF SERVICE

We, MARK P. CARAWAY and L. CLARK HICKS, JR., do hereby certify that we have this day caused to be served via U. S. Mail, a true and correct copy of the above and foregoing document to:

L. Christopher Breard, Esquire
BREARD LAW FIRM, LTD.
Post Office Box 7676
Gulfport, Mississippi 39506-7676

THIS the 28th day of December, 2007.

MARK P. CARAWAY

L. CLARK HICKS, JR.