IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00852

JAMES A. NEELY AND GENEVA NEELY, INDIVIDUALLY AND AS HEIRS-AT-LAW AND THE WRONGFUL DEATH BENEFICIARIES OF JAMES E. NEELY, DECEASED — APPELLANTS

V.

NORTH MISSISSIPPI MEDICAL CENTER, INC., NORTH MISSISSIPPI HEALTH SERVICES, INC., AND JOHN DOES 1-5 — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

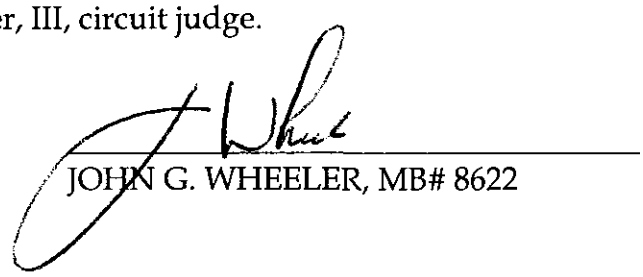
The undersigned counsel of record for appellees, North Mississippi Medical Center, Inc. and North Mississippi Health Services, Inc., certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. James A. Neely, plaintiff/appellant;
2. Geneva Neely, plaintiff/appellant;
3. Dale Danks, Jr., attorney for plaintiffs/appellants;
4. Pieter Teeuwissen, attorney for plaintiffs/appellants;
5. Michael B. Gratz, Jr., attorney for plaintiffs/appellants;
6. North Mississippi Medical Center, Inc., defendant/appellee;
7. North Mississippi Health Services, Inc., defendant/appellee;

8. John G. Wheeler, attorney for defendants/appellees;

9. Mitchell, McNutt and Sams, P.A., attorneys for defendants/ appellees;

10. Honorable Thomas J. Gardner, III, circuit judge.



JOHN G. WHEELER, MB# 8622

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STATEMENT OF ISSUES

Whether North Mississippi Medical Center, Inc. and North Mississippi Health Services, Inc. were required to submit an affidavit from a medical expert negating negligence in order to place the burden on the plaintiffs, James A. Neely, *et al.*, to come forward with production of an affidavit from a competent medical expert in order to avoid summary judgment.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

The plaintiffs, James A. Neely and Geneva A. Neely, as wrongful death beneficiaries of James E. Neely, deceased ("Neely"), filed this action in the Circuit Court of Lee County against North Mississippi Medical Center, Inc. ("NMMC"), North Mississippi Health Services, Inc. ("NMHS"), and five "John Doe" defendants, alleging that employees of NMMC were negligent in the health care services they provided to the plaintiffs' decedent, James E. Neely, a patient of NMMC, and that such negligence proximately caused Mr. Neely's death. The "John Doe" defendants were never named nor served. Following extensive discovery, NMMC and NMHS, on September 16, 2005, filed a motion for summary judgment on the ground that Neely had failed to adduce evidence sufficient to sustain his burden of proof, in that Neely had failed to produce evidence from a health care expert to support his theory of medical negligence. [R. 146, 150.] Neely responded to the defendants' dispositive motion and filed a designation of experts, but did not furnish an affidavit from the expert with the designation. [R. 164, 170.] In response to the dispositive motion, filed September 26, 2005, Neely represented that an affidavit from his designated expert could be and would be procured and produced within fourteen days, and he requested that the court grant him that additional time to obtain such an affidavit. [R. 171-73.] On August 1, 2006 (almost one year later), the trial court entered an order setting a hearing on the defense's motion for summary judgment on October 23, 2006. [R. 193.] Neely did not submit an expert affidavit prior to the hearing on the motion, notwithstanding his assurance that such

would be produced over a year earlier. After the hearing (and over a year after NMMC and NMHS filed their motion for summary judgment pointing out the lack of expert evidence to support Neely's case), Neely produced an affidavit from an expert. [R. 236.] However, because the affidavit was not served prior to the hearing in accordance with Rule 56(c), the trial court declined to consider it. [R. 245-46.] On November 21, 2006, the trial court granted NMMC's and NMHS' motion for summary judgment on the ground that Neely had failed to timely produce expert evidence in response to the defense's dispositive motion and entered final judgment for the defendants. [R. 242-46.] Neely filed a motion for reconsideration, which the trial court denied on April 23, 2007. [R. 285.]

Statement of Facts

On November 2, 2001, James E. Neely was admitted to NMMC as an inpatient for treatment of a urologic condition. On two occasions, Mr. Neely, who was a smoker, left his hospital room and was later discovered in another part of the hospital where he had ostensibly gone to smoke. On each occasion, Mr. Neely was returned to his room and instructed to remain on the unit. (Appellants' brief, pp. 6-7; 8-9.) On the evening of November 4, 2001, Mr. Neely was again absent from his room when a consulting physician came to his room at approximately 8:15 p.m. for an evaluation. Hospital nursing and security personnel began searching for Mr. Neely. At approximately 11:15 p.m., Mr. Neely was discovered in a walkway area outside the hospital with a head injury which apparently caused his death. [R. 170.] It is presumed that Mr. Neely left his hospital room in order to smoke, went out of the building through an

emergency/fire exit, climbed stairs to the hospital's roof, and accidentally fell to his death. Neely's theory of liability is that Mr. Neely's death was the result of the negligent failure of hospital employees to provide proper health care services. [R. 10-11.]

SUMMARY OF THE ARGUMENT

The plaintiff in a medical negligence case must, in all but rare cases involving issues within the common knowledge of laymen, present testimony from a competent medical expert stating an opinion as to the applicable standard of care, the defendant's breach of that standard, and proximate causation of injury. To avoid summary judgment, the plaintiff in such cases must produce such evidence at the summary judgment stage, prior to the hearing on the motion. Prior cases have considered whether the defendant in such procedural circumstances must offer expert medical opinion negating negligence before the plaintiff's duty to produce expert evidence arises, and have held that the defendant has no such obligation. These rulings are consistent with and supported by other cases addressing the burdens of persuasion and production at the summary judgment stage in other types of cases. The cases make it clear that a defendant moving for summary judgment has no burden of production, but only a burden of persuasion, that is, the responsibility to point out to the trial court that the evidence of record (or lack thereof) shows that there is no genuine issue of material fact and that the defendant is entitled to judgment as a matter of law. The authorities relied on by Neely do not support his argument, because the cases are factually dissimilar from this case, or the statements or holdings therein cited by Neely are

misconstrued or misapplied. Because Neely had the burden of producing competent medical evidence in a timely fashion in response to the defense's dispositive motion and failed to meet that burden, the trial court's decision to grant summary judgment in favor of NMMC and NMHS was correct and should be affirmed.

ARGUMENT

NMMC AND NMHS WERE NOT REQUIRED TO SUBMIT AN AFFIDAVIT FROM A MEDICAL EXPERT NEGATING NEGLIGENCE IN ORDER TO PLACE THE BURDEN ON NEELY TO COME FORWARD WITH PRODUCTION OF AN AFFIDAVIT FROM A COMPETENT MEDICAL EXPERT IN ORDER TO AVOID SUMMARY JUDGMENT.

A. Standard of Review

Appellate courts review a trial court's granting of a motion for summary judgment *de novo*, applying the same standards applicable in the trial court. The courts look at all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. *Lee v. Golden Triangle Planning & Development District*, 797 So. 2d 845, 847 ¶5 (Miss. 2001); *Jacox v. Circus Circus Mississippi*, 908 So. 2d 181, 183 ¶4 (Miss. App. 2005).

B. Standard for Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c); *see also Anglado v. Leaf River Forest Products, Inc.*, 716 So. 2d 543, 547 (Miss. 1998). Where a party responding to a motion for summary judgment fails to produce evidence sufficient to establish the existence of an essential element of his cause of action, summary judgment is mandated. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996); *Galloway v. Travelers Insurance Co.*, 515 So. 2d 678, 683 (Miss. 1987); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

C. Argument

At the outset, it should be noted what is not at issue in this appeal. Neely does not dispute that, to establish a prima facie case of medical negligence against a hospital or physician under Mississippi law, a plaintiff must present competent expert testimony as to the applicable standard of care, breach thereof, and proximate causation. *See Travis v. Stewart*, 680 So. 2d 214, 218-19 (Miss. 1996); *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d 1346, 1355 (Miss. 1990); *Hammond v. Grissom*, 470 So. 2d 1049, 1053 (Miss. 1985). Neely concedes that, given a "properly supported" motion for summary judgment, he would have the burden to submit an expert affidavit in order to avoid summary judgment. Neely does not dispute that he was required to submit any necessary expert affidavit prior to the date of the hearing on the defense's dispositive motion. Finally, Neely has not asserted that the trial court abused its discretion in ruling on the motion at issue without considering his untimely expert affidavit submitted after the hearing on the motion. The sole issue presented on appeal is whether NMMC and NMHS properly "supported" their motion for summary judgment so as to place the burden of production concerning competent expert evidence on Neely.[1]

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[1] In the "statement of issues" in Neely's brief, Neely appears also to raise the issue of whether he was excused from timely submitting an expert affidavit because he had, prior to the hearing, filed an unsworn designation identifying an expert and disclosing her expected testimony, and the issue of whether he was excused because NMMC and NMHS did not seek to depose the expert prior to the hearing on the subject motion. However, since Neely did not argue those issues or cite any authority with respect to them in his brief, those issues are abandoned and waived. *Randolph v. State*, 852 So. 2d 547, 558 ¶¶29, 30 (Miss. 2002); *Bannister v. State*, 731 So. 2d 583, 588 ¶¶20, 21 (Miss. 1999); *Varvaris v. Perreault*, 813 So. 2d 750, 752-53 ¶6 (Miss. App. 2001). Even if properly raised in his brief, these arguments fail as a matter of well settled Mississippi law. *See Griffin v. Pinson*, 952 So. 2d 963, 967 (Miss. App. 2006); *Langley v. Miles*, 956 So. 2d 970, 976 (Miss. App. 2006).

Neely acknowledges that he did not produce competent evidence from a medical expert to support his claims of medical negligence prior to the hearing on the motion for summary judgment. He argues, however, that he was relieved of this burden because NMMC and NMHS did not support the motion for summary judgment with an affidavit demonstrating compliance with the applicable standard of care. For the reasons set forth below, Neely's position is without merit.

It is well settled under Mississippi law that a party opposing a motion for summary judgment must set forth specific facts demonstrating that genuine issues of material fact exist for trial in order to avoid summary judgment. *Fruchter v. Lynch Oil, Co.*, 522 So. 2d. 195, 198-99 (Miss. 1988). In a medical negligence case, such "specific facts" that must be set forth by the plaintiff include the sworn testimony of a medical expert as to the applicable standard of care and the defendant's breach of that standard. *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d 1346, 1355 (Miss. 1990); *Langley v. Miles*, 956 So. 2d 970, 976 (Miss. App. 2006). Neely argues, however, that this duty of production does not arise until the moving defendant first submits sworn expert evidence *negating* negligence on the part of the defendant.

Neely's argument is inconsistent with the plain language of Rule 56 of the Mississippi Rules of Civil Procedure. The rule provides, in pertinent part:

> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move *with or without supporting affidavits* for a summary judgment in his favor as to all or any part thereof.

Miss. R. Civ. P. 56(b) (emphasis added). Thus, under the plain language of the rule, there is no requirement for a defendant to support a motion for summary judgment

with an affidavit negating an essential element of the plaintiff's case as to which the plaintiff bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Hartford Casualty Insurance Co. v. Halliburton Co.*, 826 So. 2d 1206, 1215 ¶¶30-32 (Miss. 2001).

In addition, Mississippi case law that is directly on point plainly and expressly refutes Neely's argument. In *Paepke v. North Mississippi Medical Center, Inc.*, 744 So. 2d 809 (Miss. App. 1999), the court of appeals considered and rejected the precise same argument advanced here by Neely. In *Paepke*, the plaintiff contended that he was not obligated to produce expert medical evidence in opposition to a motion for summary judgment that was not affirmatively supported by sworn expert testimony. *Id.* at 812 ¶13. The court rejected that argument, holding that

> Mr. Paepke also contends that the trial court erred in requiring that he present expert medical testimony which established the standard of care when the appellees presented no medical testimony to support their motion for summary judgment. This Court finds that the trial court did not err in requiring that Mr. Paepke present expert medical testimony in the absence of any expert medical testimony from the appellees. "The party moving for summary judgment bears the burden of persuading the trial court that no genuine issue of material fact exists, and that they are, based on the existing facts, entitled to judgment as a matter of law. The movant and non-movant bear the burdens of production corresponding to the burdens of proof they would bear at trial. Thus, the movant only bears the burden of production where they would bear the burden of proof at trial. Correspondingly, the non-movant, provided [he] would bear the burden of proof at trial on the issue in question, is responsible for 'producing supporting evidence of significant and probative value' in opposition to the motion for summary judgment."

Id. ¶14 (internal quotations omitted) (citing *Daniels v. GNB, Inc.*, 629 So. 2d 595, 600 (Miss. 1993)). This holding was reaffirmed and followed in *Langley v. Miles*, 956 So. 2d 970 (Miss. App. 2006), in which the plaintiff also made the precise argument advanced by Neely in this case. There, as here, the plaintiff contended that "because no supporting affidavits were attached to the defendants' motion for summary judgment, the defendants failed to meet their burden of persuasion and [the plaintiff] had no obligation to produce any sworn medical evidence." *Id.* at 976 ¶18. The court of appeals flatly rejected that argument, holding that

> the defendants met [the burden of persuasion] by pointing out from the existing facts that, because Langley lacked expert medical evidence, there was no genuine issue of material fact and the defendants were entitled to a judgment as a matter of law. Langley had the burden of proof of medical negligence at trial and, to withstand summary judgment, Langley needed to produce . . . a sworn affidavit of an expert witness attesting to the standard of care and that the defendants' treatment of Langley breached the standard of care.

Id. ¶19. Thus, NMMC and NMHS in the instant case met their summary judgment burden of persuasion simply by pointing out to the trial court the absence of any affidavit from a medical expert from Neely opining that NMMC and NMHS had breached the standard of care.

Similarly, in *Griffin v. Pinson*, 952 So. 2d 963, 967 ¶11 (Miss. App. 2006), the court affirmed the granting of summary judgment for the defendant in a medical negligence case because the plaintiff failed to submit an expert's affidavit in opposition to the motion for summary judgment. In that case, there is no indication that the defendant offered any expert affidavits in support of the motion. *Id.*

The foregoing cases establish that, contrary to Neely's contention, the defendant in a medical negligence case, like the defendant in any other case, has no burden to provide affidavits or other sworn evidence negating the existence of negligence in order to obtain summary judgment. Rather, in all cases, the burden of producing evidence in support of or in opposition to a motion for summary judgment falls upon the party bearing the burden of proof at trial on the issue in question, and the party moving for summary judgment has no duty to provide an evidentiary predicate negating the existence of a material fact regarding issues on which the non-movant bears the burden of proof at trial. *Hartford Casualty*, 826 So. 2d at 1215 ¶¶30-32; *Fruchter*, 522 So. 2d at 198; *Galloway v. Travelers Insurance Co.*, 515 So. 2d 678, 683 (Miss. 1987); *Millican v. Turner*, 503 So. 2d. 289, 292 n. 3 (Miss. 1987). In such cases, the movant must only initially inform the court of the absence of evidence in support of a non-movant's case. *Celotex Corp.*, 477 U.S. at 323, 325. The movant's burden is one of persuasion—to persuade the trial court that the evidence of record (or lack thereof) does not demonstrate a genuine issue of material fact and that the movant is thus entitled to judgment as a matter of law. *Hartford Casualty*, 826 So. 2d at 1215; *Pargo v. Electric Furnace Co.*, 498 So. 2d 833, 835-36 (Miss. 1986).

The cases cited by Neely are not to the contrary, and do not support Neely's position that NMMC and NMHS were required to offer a medical expert's affidavit opining the absence of negligence in order to place the burden on Neely to produce a medical expert's affidavit opining the existence of negligence. Neely cites *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985) and *Brown v. Credit Center, Inc.*, 444 So. 2d 358

(Miss. 1983), both of which plainly state, as quoted by Neely, that a summary judgment movant has only a burden of persuasion rather than a burden of production. Neely also cites *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346 (Miss. 1990), which also clearly (and emphatically) states that the movant's burden respecting an issue upon which the non-movant bears the burden of proof at trial is one of persuasion, not production. *Id.* at 1355. Somehow, however, that clearly stated burden of persuasion becomes transmogrified in Neely's brief into a "burden of initial production" that is not enunciated by any of the cases cited by Neely, nor any case from a Mississippi appellate court.

Contrary to Neely's brief, *Dawkins and Co. v. L & L Planting Co.*, 602 So. 2d 838 (Miss. 1992), does not support Neely's position. That case described the movant's burden as only "to show there is no genuine issue of material fact," one of the ways that the burden of persuasion is described. *Id.* at 842; *see Hartford Casualty*, 826 So. 2d at 1215 ¶30 (duty variously described as "informing," "pointing out," or "showing"); *Langley*, 956 So. 2d at 976 (defendants met burden of persuasion by "pointing out" absence of evidence creating genuine issue of fact). In *Dawkins*, which involved a contract claim, the trial court granted summary judgment to the defendant based on the statute of frauds. The supreme court held that summary judgment was improper because the plaintiff, which had the burden of proving that it had an enforceable contract with the defendant, presented sufficient evidence that the defendant was a merchant so that the "merchant's exception" to the statute of frauds was applicable. There is no statement or implication in the court's opinion that summary judgment was improperly granted

because of some failure on the part of the defendant to make some preliminary evidentiary showing. Rather, simply put, the defendant failed to persuade the court, based on the evidence that had been presented in the trial court record, that there was no issue of fact as to whether the "merchant's exception" applied.

Neely also cites *Smith v. Malouf*, 597 So. 2d 1299 (Miss. 1992), in which the appellate court reversed the trial court's grant of summary judgment for the defendant on the basis that, because the defendant "offered no probative evidence in support of his motion for summary judgment, the risk of persuasion never shifted" to the nonmovant. However, *Smith* is inapposite to the instant case, since the defendant in *Smith* moved for summary judgment based on an affirmative defense—the plaintiff's lack of standing to sue—as to which the defendant possessed the ultimate burden of proof at trial. Since the movant in *Smith* had the burden of proof at trial, he also had the burden of production at the summary judgment stage, and thus his failure to offer evidence in support of the affirmative defense was fatal to his summary judgment motion. That case, contrary to Neely's contention, did not set forth a general burden of production for summary judgment movants, but simply followed the well-established rule that the burden of production at the summary judgment stage corresponds to the burden of proof at trial. The *Smith* decision offers no support for Neely's ill-fated argument that a movant who does not bear the burden of proof at trial nevertheless has a burden to produce evidence negating the nonmovant's case to advance a summary judgment motion.

Neely's reliance on *Smith v. H.C. Bailey Companies*, 477 So. 2d 224 (Miss. 1985) is also misplaced. While it is generally true, as Neely's quotation from that case[2] states, that "where a party moving for summary judgment supports his motion with sworn matter . . . the opponent bears a burden of presenting affidavits . . . to create a genuine issue of fact," it does not follow that where a movant does not present sworn matter in support of the motion, the opponent does not have a burden of production. The *H.C. Bailey Companies* court was not addressing the question of whether the lack of an evidentiary proffer by a movant would relieve the nonmovant from its obligation to come forward with evidence; as suggested by the quoted language, the movants had offered affidavits in support of their motions. The issue before the court in *H.C. Bailey Companies* was whether the trial court had given the nonmovant adequate time to come up with evidence to oppose the motion where the nonmovant had failed to file a Rule 56(f) affidavit.[3] *Id.* at 232-33. Particularly since the court not was considering the issue raised by Neely here, the language in question cannot plausibly be construed as implying that a nonmovant's duty to present an affidavit arises *only* when the defendant has first presented sworn evidence.

The statement in the *H.C. Bailey Companies* opinion that a movant must establish the propriety of summary judgment by the strengths of its own showing rather than the

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[2] The two passages in Neely's brief quoted from *H.C. Bailey Companies* are actually from two federal court decisions that were quoted by the supreme court.

[3] The court in *Smith v. Community Federal Savings & Loan Association*, 77 F.R.D. 668 (N. D. Miss. 1977), from which the court in *H.C. Bailey Companies* quoted, was considering a similar issue related to Rule 56(f).

defects in the nonmovant's production comes from *Jackson v. State of Mississippi*, 644 F.2d 1142, 1144 (5th Cir. 1981), in which the court merely emphasized that the failure of a nonmovant to come forward with an affidavit complying with Rule 56(e) in opposition to a summary judgment motion does not automatically entitle the movant to summary judgment and that the trial court must still be persuaded that, based on the evidence of record, the movant is entitled to judgment as a matter of law. In *Jackson*, the court held that the defendants' uncontroverted affidavits, accepted as true, did not establish that they were entitled to judgment as a matter of law, and thus the failure of the plaintiff to furnish a competent affidavit controverting the defendants' affidavits did not require the entry of summary judgment for the defendants. *Id.* at 1144, 1146. There is no suggestion, either by the court in *Jackson* or by the court in *H.C. Bailey Companies* quoting *Jackson*, that the principle stated was intended to modify the parties' respective burdens with regard to summary judgment as expressed in numerous cases such as those cited herein by NMMC and NMHS. For these reasons, the quoted language has no application to the issue before the court in this matter.[4]

Neely also errs in his reliance on *Dailey v. Methodist Medical Center*, 790 So. 2d 903 (Miss. App. 2001). In that case, the failure of the plaintiff to submit an affidavit from a medical expert establishing the standard of care was not the reason the trial court granted summary judgment. The trial court found that the plaintiff, through hospital records and the testimony of nurses, had established the defendants' negligence in

[4] Multiple appellate decisions in Mississippi stand for the proposition that failure of a plaintiff in a medical negligence case to produce an expert affidavit in response to a medical defendant's motion for summary judgment dictates that the defendant is entitled to a judgment as a matter of law. *See Palmer*, 564 So. 2d at 1355-63; *Travis*, 680 So. 2d at 218-19.

giving the patient the wrong medication.[5] However, the trial court nevertheless granted summary judgment in favor of the medical defendants on the ground that the plaintiff had failed to offer testimony from a medical doctor that the defendants' negligence in giving the wrong drug had proximately caused an identifiable injury to the patient. The plaintiff offered expert testimony from a toxicologist on the issue, but the trial court held that the toxicologist's opinion was not competent to establish proximate cause and damages, and that only a physician's opinion would suffice. *Id.* at 916 ¶17. The court of appeals reversed the summary judgment, holding that the testimony of the toxicologist was competent to sustain the plaintiff's burden to create a genuine issue of fact as to proximate cause and damages. *Id.* at 917 ¶21.

The *Dailey* court noted, as Neely points out, that the trial court had relied in part on the erroneous belief that the defendants had offered affidavits of physicians in support of the motion, when in fact the defendants had only offered a disclosure of the expected testimony of those physicians. However, nothing in the court's opinion states, or even hints, that the failure of the defendants to submit affidavits in support of their motion excused the plaintiff from producing expert testimony to prove causation and damages. The court did not hold that the plaintiff was not obligated to produce any expert testimony, but rather that the plaintiff's expert testimony, as produced, did not have to come from a medical doctor. The reason a physician's testimony was not necessary had nothing to do with the fact that the defendants had offered no affidavits

[5] The court of appeals noted that it was within the common knowledge of laymen that giving a labor-inducing drug to a male cancer patient constituted medical negligence. *Id.* at 917 ¶21.

in support of their dispositive motion, but rather was because the expert testimony the plaintiff did produce – that of toxicologist – was competent and sufficient to establish a triable fact question as to proximate cause and damages. *Id.*

Thus, Neely's assertion that the court in *Dailey* reversed summary judgment because the moving defendants had failed to submit any competent summary judgment evidence is plainly incorrect. In fact, the court reversed summary judgment because the plaintiff (unlike Neely in this case) submitted competent summary judgment evidence, which the trial court had erroneously held to be incompetent. Nothing in *Dailey* suggests that, if the defendants had actually submitted affidavits from the physicians, such would have rendered the plaintiff's expert opinion incompetent and allowed summary judgment to be entered. To the contrary, it is obvious that affidavits from the defendants' experts on the one hand that the drug did not cause injury, and the sworn affidavit testimony of the plaintiff's toxicologist, on the on the other, that the drug did cause injury, would have resulted in a genuine issue of fact defeating the defendants' motion for summary judgment. Therefore, Neely's characterization of *Dailey* is mistaken, and the case does not support his position herein. But even if Neely was correct in his interpretation of *Dailey*, any such holding was overruled by the court's subsequent decision in *Langley*, which is flatly contrary to Neely's position.

In *Fruchter v. Lynch Oil Co.*, 522 So. 2d. 195, 198 (Miss. 1988), the supreme court stated that references in earlier cases to a movant generally having some burden of production were inaccurate, and the court emphasized that the movant has a burden of production *only* where he bears the burden of proof on the issue (as with an affirmative

defense). Neely has cited no case overruling *Fruchter* or rejecting its analysis, or holding that a different rule applies in medical negligence cases. The case law simply does not establish the existence of any "burden of initial production" that would require a defendant to offer sworn evidence negating an essential element of the plaintiff's cause of action.

Neely's phrase "burden of initial production" used throughout his brief apparently was derived from the *Mississippi Civil Procedure* treatise cited in his brief, which does suggest that the movant has a burden of "production." However, as noted above, the supreme court in *Fruchter* stated that any such description of the movant's burden was erroneous. In other words, the treatise's explication is contradicted by case law and is, therefore, incorrect. In accordance with its characterization of a movant's burden, the treatise also asserts, as quoted by Neely, that the movant must "present *some* evidence showing that proof of one or more elements of the claim is absent or insufficient." However, even if the very contradiction inherent in that statement (how could one present evidence that there is no evidence?) were not enough to make it evident that the statement is not to be taken literally, it is apparent from the context that the author of the treatise was not speaking of a literal proffer of evidentiary material, because the treatise goes on to say that the movant could satisfy the obligation to "present some evidence" by, for example "*pointing out* the nonmoving party's responses to interrogatories or by *demonstrating* a lack of documentary evidence"—in other words, by simply directing the court's attention to the absence of evidence supporting the nonmovant's claim. J. Jackson, ed., *Mississippi Civil Procedure* § 11:19 at 11-32—11-33

(emphasis added). In any event, since the treatise acknowledges that the movant need not negate the elements of the nonmovant's case, *id.* at 11-32, then the purported duty to "present *some* evidence" could not extend as far as Neely asserts, which is to require that NMMC and NMHS offer expert affidavit evidence asserting the absence of negligence. If there is a responsibility on the part of a defendant to present "evidence" of the insufficiency of the plaintiff's evidence, that responsibility could not include presenting affidavits negating negligence, because such affidavits would not establish, and would not be necessary to establish, the absence of evidence from the plaintiff. In this case, there is nothing more NMMC and NMHS could have done to establish the absence of the essential expert testimony supporting Neely's case other than, as they did, to state to the trial court that no such evidence had been adduced, leaving it to Neely either to show that the statement was incorrect or to proceed to produce such testimony through affidavit or deposition. In any event, NMMC and NMHS did not, as Neely suggests, "simply assert in a conclusory manner that the nonmoving party has no evidence to support its case"; NMMC and NMHS pointed out specifically the way in which Neely's evidence was deficient.

Even if there were not such a great weight of authority plainly holding that a defendant has no burden of production in procedural circumstances such as these, the fallacy of Neely's position can easily be seen simply by applying the principle that the standard for summary judgment is the same standard as that for directed verdict, only at an earlier procedural stage, *Breland v. Gulfside Casino Partnership*, 736 So. 2d 446, 448 ¶15 (Miss. App. 1999), and then transposing the evidentiary record at the summary

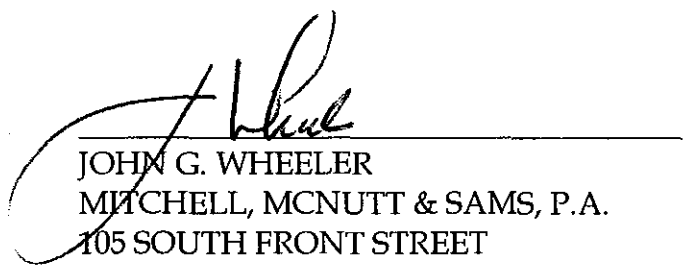
judgment stage to a trial scenario. It is elemental that Neely, in his case in chief at trial, would be required to present evidence sufficient to create a jury issue as to each element of his cause of action. This, of course, would include expert testimony. If Neely failed to put on such expert testimony, NMMC and NMHS would unquestionably be entitled to a directed verdict at the close of Neely's case. All NMMC and NMHS would have to do at that point would be to point out to the trial court the deficiency in Neely's evidence. NMMC and NMHS would have no obligation to open their case in chief and put on expert testimony negating negligence before making a motion for a directed verdict. Since NMMC and NMHS would not be required to present expert testimony in order to obtain a directed verdict, they could have no such duty in order to obtain summary judgment.

In sum, neither the case law, nor the commentary on the case law, cited by Neely supports the existence of any obligation on the part of NMMC and NMHS to offer sworn evidence negating an essential element of Neely's cause of action. Therefore, Neely's position is without merit, and the trial court was correct in granting summary judgment in favor of NMMC and NMHS.

CONCLUSION

Neely's brief is correct in one respect: this is a simple case. The law required Neely, in order to avoid summary judgment, to timely present sworn testimony from a medical expert to establish the elements of his claim. Neely failed to do so. NMMC and NMHS moved for summary judgment and pointed out to the trial court that the record was devoid of any expert medical evidence addressing the essential elements of Neely's

cause of action. In doing so, NMMC and NMHS satisfied their sole burden with respect to the evidentiary predicate for summary judgment—the responsibility to "show" or "point out" that Neely's necessary evidence was lacking and that thus there was no genuine issue of material fact and NMMC and NMHS were entitled to judgment as a matter of law. In short, NMMC and NMHS satisfied their "burden of persuasion." Neely has cited no authorities holding that NMMC and NMHS were required to offer expert testimony refuting Neely's allegations of negligence in order to trigger Neely's obligation to support his claim with sworn expert evidence. As the cases cited by NMMC and NMHS clearly state, there is no such duty on the part of a medical negligence defendant or any other defendant. Consequently, the trial court was correct in granting summary judgment in favor of NMMC and NMHS, and the judgment of the trial court should be affirmed.



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ADDENDUM OF STATUTES AND OTHER AUTHORITIES

J. Jackson, ed., *Mississippi Civil Procedure* § 11:19 pp. 11-32, 11-33

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tion, the plaintiff bears the burden of proving duty, breach of duty, proximate cause and damages. Similarly, if a defendant raises accord and satisfaction as an affirmative defense, the defendant carries the burden of proving the elements of the defense at trial.

When the moving party bears the burden of proof on the claim or defense at trial, that party must satisfy not only the initial burden of production on the Rule 56(c) standard (no genuine issue of material fact) but also satisfy the burden of persuasion on the claim or defense by demonstrating that it would be entitled to a directed verdict at trial.[9] In other words, the moving party must establish the elements of its claim or defense with evidence of such sufficiency that reasonable jurors could not differ on the outcome. This showing by the moving party shifts the burden of production to the nonmoving party to demonstrate that a material fact is subject to a genuine dispute.

If the nonmoving party has the burden of proof at trial on the claim or defense, the moving party satisfies its burden of production in one of two ways. First, the moving party can submit affirmative proof that negates an essential element of the opponent's claim or defense by demonstrating that no reasonable jury could return a verdict for the nonmoving party. Second, the moving party can show that the nonmoving party lacks evidence to establish an essential element of its claim or defense.[10] More often than not, the moving party uses the second method to satisfy its initial burden of production.

If the moving party does not bear the burden of proof on the claim or defense at trial, it need only "present *some* evidence showing that proof of one or more of the elements of [the claim or defense] is absent or insufficient."[11] Although the moving party need not negate the elements of its opponent's case, the moving party must show an absence of facts and cannot simply assert in a conclusory manner that the nonmoving party has no evidence to support its case.[12] A proper showing can usually be achieved by deposing the nonmoving party and its

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[9]Fruchter v. Lynch Oil Co., 522 So. 2d 195 (Miss. 1988); ("We have referred to the movant's burden as one of production and of persuasion, not of proof."). *See* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 4 Fed. R. Serv. 3d 1024 (1986) (Brennan, J., dissenting). Justice Brennan's view of Rule 56 is consistent with the majority's analysis; he merely elaborated on the parties' burdens under Rule 56.

[10]Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 4 Fed. R. Serv. 3d 1024 (1986) (Brennan, J., dissenting).

[11]Palmer v. Biloxi Regional Medical Center, Inc., 564 So. 2d 1346 (Miss. 1990).

[12]Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 4 Fed. R. Serv. 3d 1024 (1986) (White, J., concurring). Quay v. Archie L. Crawford and

witnesses, pointing out the nonmoving party's responses to interrogatories or requests for admissions or by demonstrating a lack of documentary evidence.

If the nonmoving party bears the burden of proof at trial on a claim or defense but "fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law."[13] For example, in a negligence action, the plaintiff has the burden of proving at trial the four elements of negligence. If, in opposing a motion for summary judgment, the plaintiff cannot make a sufficient showing on any one of the four elements, the plaintiff cannot prevail on the claim. The defendant, as the moving party, would be "entitled to judgment as a matter of law" because the plaintiff could not prove its case.[14]

Rule 56 does not mandate a formal response to a motion for summary judgment. The need to respond arises under Rule 56(e) only if the motion "is made and supported as provided in this rule." The nonmoving party, however, remains silent at its peril.[15] A nonmoving party will rarely, if ever, face a motion that does not require some type of response. If the motion is patently meritless, the effort to point out the existence of a genuine issue of material fact should be minimal.

If the moving party carries its burden and presents a valid summary judgment motion, the nonmoving party must produce "supportive evidence of *significant* and *probative* value" that shows the presence of a genuine issue of material fact.[16] The evidence must be significant; a "mere scintilla" of evidence is insufficient.[17] The nonmoving party's evidence must be competent; in other words, it must be

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Shippers Exp., Inc., 788 So. 2d 76 (Miss. Ct. App. 2001) (holding that summary judgment evidence cannot consist of self-serving statements).

[13]Ivy v. Merchant, 666 So. 2d 445 (Miss. 1995); Galloway v. Travelers Ins. Co., 515 So. 2d 678 (Miss. 1987). *See* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 4 Fed. R. Serv. 3d 1024 (1986).

[14]*See* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 4 Fed. R. Serv. 3d 1024 (1986).

[15]*E.g.*, O'Cain v. Harvey Freeman and Sons, Inc. of Mississippi, 603 So. 2d 824 (Miss. 1991). But see Whitehead v. Johnson, 797 So. 2d 317 (Miss. Ct. App. 2001) (holding that the court erred in shifting the burden to the nonmoving party by basing its decision to grant summary judgment on the nonmoving party's failure to produce evidence or argument challenging the release at issue in the case as ambiguous).

[16]Palmer v. Biloxi Regional Medical Center, Inc., 564 So. 2d 1346 (Miss. 1990). *See* Ellis v. Powe, 645 So. 2d 947 (Miss. 1994).

[17]Murphree v. Federal Ins. Co., 707 So. 2d 523 (Miss. 1997); Strantz v. Pinion, 652 So. 2d 738 (Miss. 1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

CERTIFICATE OF SERVICE

I certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellees on the attorneys for appellants, by placing said copy in the United States Mail, postage prepaid, addressed to them at their usual addresses as follows:

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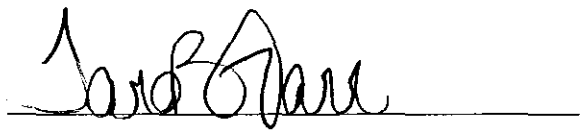
JOHN G. WHEELER

CERTIFICATE OF FILING

The undersigned, an employee of Mitchell, McNutt & Sams, P.A., certifies that on February 13, 2008, he/she deposited in Federal Express overnight delivery, addressed to the clerk of the Mississippi Supreme Court, the original and three copies of the Brief of Appellees.



CORRECTED CERTIFICATE OF SERVICE

I certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellees on the attorneys for appellants, by placing said copy in the United States Mail, postage prepaid, addressed to them at their usual addresses as follows:

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