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

KATHLEEN W. HEANEY — APPELLANT

VERSUS — CAUSE NO.: 2007-CA-01083

THOMAS F. HEWES, M.D.
and WILLIAM L. SEIDENSTICKER, M.D. — APPELLEES

BRIEF OF APPELLEE THOMAS F. HEWES, M.D. and WILLIAM L. SEIDENSTICKER

Appeal from the Circuit Court for the First Judicial District Of Harrison County, Mississippi

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of records certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Kathleen W. Heaney, Appellant

2. Thomas F. Hewes, M.D., Appellee

3. William L. Seidensticker, M.D., Appelle

4. Counsel for Appellant: Joseph E. Roberts, Jr.
   Pittman, Germany, Roberts & Welsh, LLP

5. Counsel for Appellee, Thomas F. Hewes, M.D.: R. Douglas Vaughn and Harry R. Allen
   Allen, Cobb, Hood & Atkinson, P.A.

6. Counsel for Appellee, William L. Seidensticker, M.D.: R. Douglas Vaughn and Harry R. Allen
   Allen, Cobb, Hood & Atkinson, P.A.

7. The Honorable Jerry O. Terry, Circuit Court Judge
   Harrison County Mississippi

R. Douglas Vaughn, MSB [redacted]
Harry R. Allen, MSB [redacted]
Attorneys for Thomas F. Hewes, Appellant
and William L. Seidensticker, Appellant

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STATEMENT OF THE CASE[1]

Nature of the Case and Course of Proceedings Below

Plaintiff/Appellant Kathleen W. Heaney filed suit against Thomas F. Hewes, M.D., and William L. Seidensticker, M.D., physicians, alleging acts of medical negligence in a right hip replacement surgical procedure performed July 29, 1996, resulting in pain and suffering, along with additional medical expenses. (CP 13-14; RE 1-2). Defendants/Appellees filed their answer, denying liability on March 8, 1999. (CP-23; RE 3). Thereafter, the case went to a jury trial commencing April 2, 2007. (T-1; RE 10). The case went to the jury on April 5, 2007, and a verdict was returned in favor of Defendants/Appellees. (CP. 304-05; RE 4-5). Plaintiff/Appellant's motion for new trial was denied on May 15. 2007. (CP-312; RE 6) The notice of appeal was filed June 12, 2007. (CP. 313; RE 7).

Statement of Facts

From the jury summons that went out, a panel of 53 individuals were qualified as potential jurors. (CP 294-95; RE 8-9). It is not known how many additional jurors, if any, were served and available to be sworn. In the jury selection proceedings, the last individual selected for service juror number 28, Gary Morris, Jr., selected as second alternate. No selected juror was excused, so neither alternate juror was asked to serve during deliberations. Panelists 29 through 53 were excused, and jurors 1 through 28 were either empanelled or excused from service for cause or through peremptory challenges.

The trial judge, Honorable Jerry O. Terry, asked the jury venire panel during voir dire who among them had ever been patients of Defendant/Appellee Hewes and of the jurors eventually

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1 "T" references the Court Reporters transcript. "CP" references the Clerk's papers. "RE" references to

considered, only juror number 2, James Webb, answered. (CP 294; RE 8 T 25; RE 11) The same question was asked of Defendant/Appellee Seidensticker and of the jurors considered, jurors numbered 16, 17 and 26, Keith Starita, David Mohler and Jan White answered. (CP 294; RE 8, T 25-26; RE 11-12)

Both Defendants were retired from the practice of medicine, so no juror had any active patient/physician relationship at the time of trial. (T 26; RE 12). Judge Terry asked the following questions to the panel, and received no affirmative response from anyone: "Did any of you through your experience and your treatment by either of these doctors develop an opinion in your own minds that will affect you one way or the other as to the evidence in this case?" (T 26; RE 12) "The results of the treatment that you received or a member of your family received; did it cause you to form an opinion as to that treatment itself one way or the other that would affect you here today?" (T 27; RE 13)

Judge Terry made inquiry and learned no potential juror had ever undergone hip replacement surgery, but the mother of potential juror 17, David Mohler, had that surgery performed by Defendant Dr. Seidensticker ten years earlier by Dr. Seidensticker. (T 29; RE 14).

Upon further inquiry from Plaintiff/Appellant's counsel, the following questions were asked of the entire panel, with no affirmative responses from anyone:

"Does anyone believe doctors don't make mistakes; that they're special; that unlike the rest of us they don't make mistakes?

"Ms. Heaney has never even met Dr. Seidensticker. He was the assistant in the surgery. There were conversations with Dr. Hughes. Some of y'all – apparently a good number of y'all

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Record Excerpts of the Appellee served herewith.

know Dr. Hewes. He's been a doctor here for a while. Is there anything about that relationship that would make you favor Dr. Hewes over Mrs. Heaney? And when I say 'favor,' sometimes two people say something and you know one person, so you say, well, I'm going to believe what they say. And it would take a lot of evidence to convince you that - - a lot of evidence. Sometimes somebody says he's my guy. I really don't care what you say. I'm believing him. And we want to avoid that situation. So would anybody favor Dr. Hewes over what Mrs. Heaney may say simply because you know him or know of him or have heard something about him?"

"I need y'all to be honest with me about that. I mean, maybe if I had a doctor - - if I had a doctor, and I have a lot of doctors in Jackson, and they said something that someone else said something else, I would say I believe him just simply because I know him. Y'all all tell me that that wouldn't weigh on your mind, your relationship with Dr. Hewes; your knowledge of Dr. Hewes is not going to weigh on your verdict in this case at all?" (T 37-38; RE 25, 26)

Juror number 2, James Webb stated that he had been a patient of Dr. Hewes for one visit 15 years ago, knew Dr. Hewes from a Gulfport club and knew Dr. Seidensticker's wife and testified in answer to questions from Mr. Roberts that nothing about his knowledge of Ms. Seidensticker or of Dr. Hewes and the likelihood of seeing him socially would play any role in how he would decide the case if selected, and that he could give both sides a fair trial. (T 58-59, 64; RE 15,16, 17).

Juror 7, Donna Winstead, testified her son had been a patient of Dr. Hewes and there was nothing about that relationship that would make her favor Dr. Hewes over Mrs. Heaney. (T 64; RE 17).

Juror 12, Theresa Wilson said only that a family member had been seen by Dr. Hewes and there was nothing about that relationship that would make her favor Dr. Hewes over Mrs. Heaney.

(T 65; RE 18).

Juror 16, Keith Starita, was not excused by Plaintiff/Appellant. At the time a decision was needed for Mr. Starita, plaintiff/appellant still had one peremptory challenge remaining. (T 108; RE 19). Mr. Starita testified that he had undergone some surgery performed by Appellee Dr. Seidensticker fifteen years earlier. He said only that the surgery was not upon his hip and he testified there as nothing about that to cause him to favor Defendant Seidensticker. (T 65; RE 18). Mr. Starita was asked no further questions by counsel for Appellant.

Juror 17, David Mohler, had himself been a patient of Defendant Seidensticker for an unrelated medical condition and his mother had undergone hip replacement surgery with Dr. Seidensticker. He testified repeatedly that there was nothing about that relationship that would cause him to favor Dr. Seidensticker. (T 66; RE 20).

Juror 26, Jan White, was stricken for cause by Judge Terry for stating that in addition to having a family member treated by Defendant Seidensticker, she believed there should be a limit on the amount of damages recoverable and could not set those feelings aside. (T 99; RE 21).

The trial judge invited additional challenges for cause, and counsel for appellant asked to strike those jurors with a personal relationship or physician/patient relationship with the defendants/appellees. (T 104; RE 22). Appellants' counsel acknowledged the retirement of defendants and the lack of any continuing, present relationship, but asked that David Mohler be excused on the grounds his son and he had once been patients of each defendant, Hewes and Seidensticker. (T 105; RE 23). The trial judge denied the challenge for cause. (T 106; RE 24).

The case was tried over four days and a verdict was announced on April April 5, 2007, and a verdict was returned on a vote of 11 to 1 in favor of Defendants/Appellees. (CP. 304-05; RE 4-5).

SUMMARY OF THE ARGUMENT

Nothing in Mississippi law requires every person who has ever had any past professional relationship to be automatically unqualified to serve upon a civil jury wherein the other party to the relationship is a party. Plaintiff/appellant received a fair trial on the merits of her lawsuit and a reversal of the jury's verdict would not serve the interests of justice.

If there was any error, Appellant failed to preserve the issue for appeal and/or the error was harmless. Appellant has failed to make any record that any empanelled jurors were unfit to serve.

ARGUMENT OF LAW

A. Standard of Review

In jury selection, circuit court judges presiding over jury trials are afforded wide latitude and discretion. *Brown ex rel. Webb v. Blackwood*, 697 So.2d 763, 769 (Miss. 1997). This discretion extends to determining whether to excuse any prospective juror, including one challenged for cause. *Scott v. Ball,* 595 So.2d 848, 849 (Miss.1992); *Mississippi Winn-Dixie Supermarkets v. Hughes,* 247 Miss. 575, 156 So.2d 734, 738 (1963). The circuit judge has an absolute duty, however, to see that the jury selected to try any case is fair, impartial and competent. *Burnett v. Fulton*, 854 So.2d 1010, 1015 (Miss., 2003) (*quoting Venton v. Beckham,* 845 So.2d 676, 679 (Miss. 2003).

B. Judge Terry Correctly Applied the Law

1. Appellant's Cited Cases are Distinguishable From the Instant Case

Appellants cite the Court to three cases – none of which stand for the notion that a retired physician has a *per se* relationship with either a former patient or a patient's close family member that would make the prospective juror *de facto* incapable of serving as a fair, impartial and competent juror.

In *Davis v. Powell*, 781 So.2d 912 (Miss. App. 2000), the challenged venire members identified themselves as patients of a clinic where a defendant physician was employed, had family members who worked at the clinic and made statements that they believed the defendant physicians were truthful to the point of giving harmful truthful testimony to their detriment, and one expressed a bias against lawsuits. No such voir dire testimony was elicited in the instant case.

In *Scott v. Ball*, 595 So.2d 848, 850 (Miss. 1992), the Mississippi Supreme Court reaffirmed the requirement that a complaining party must demonstrate a clear abuse of discretion by the trial court before a failure to excuse a potential juror for cause will be second guessed. In that case, one potential juror named Hawkins was challenged for cause because the defendant physician had once treated his son, and another potential juror named Smith was challenged because the defendant physician had occasionally treated family members over a period of ten years. *Id.* at 849. The Mississippi Supreme Court found the contact with Hawkins was not enough to require removal for cause. *Id.* at 851. Under *Scott*, neither Winstead nor Wilson were required to be removed for cause, and Staritt was not challenged peremptorily, even though a challenge remained, so Appellant has waived any challenge as to him. "We need not address whether the circuit judge committed error in his refusal to excuse [challenged jurors] because Scott exercised peremptory challenges on [two] and rather than exercise a peremptory challenge on Cobb, chose to exercise it on prospective juror Powell, No. 15, who he had not challenged for cause. We have consistently held that the trial court may not be put in error for refusal to excuse jurors challenged for cause when the complaining party chooses not to exhaust his peremptory challenges." *Id.* at 851.

Finally, in *Hudson v. Taleff*, 546 So.2d 359, 361-62 (Miss. 1989), the defendant physician was an ophthalmologist in practice who either personally or through his partners or his attorney had a

relationship with 48 percent of the jury venire. The appellate court detailed the relationships with the potential jurors in that case, emphasizing the pervasiveness of those relationships throughout the venire panel, ranging from ongoing relationships and the likelihood of those potential jurors returning to see the defendant physician to relationships with the defendant's attorney and even an employee relationship between one juror's wife and the defendant physician's wife. *Id.* at 362. Additionally, the court noted that before the trial judge, appellant's counsel had not only challenged these venire members for cause, but had also requested additional peremptory challenges and a mistrial, neither of which were done in the instant cause. The Hudson court found the panel as a whole constituted a "statistical aberration" giving rise to a strong likelihood that the opportunity for undue influence over other jurors in the case was too great for the seated jury to be impartial. *Id.* at 363. Nothing in the transcript of questions and answers during voir dire in the instant case leads a rational mind to conclude there would be any such presumption of bias in the case at bar.

2. The Prospective Jurors Exhibited No Evidence of Being Unqualified

In the instant case, the circuit judge questioned each member of the venire extensively regarding any relationships with the defendants/appellees which might make the potential juror unable to serve fairly on the jury. Each of the jurors in question assured the Court, under oath, that he or she would not be influenced by past dealings and would treat both parties fairly and equally. Appellant's counsel was not limited by the court in any fashion in inquiring into the past relationships and the record reflects merely that decades earlier, there had been a patient/physician relationship, but that those relationships were of short duration and there is no record evidence that any of them endured or caused any biases in favor of Appellees at the time of trial.

In another reported decision from the Mississippi Supreme Court, a jury's verdict was upheld

on appeal when it was determined the Appellants had failed to make any record showing the empanelled jurors were unqualified to serve on the jury. *Venton v. Beckham*, 845 So.2d 676 (Miss., 2003). In *Venton*, some prospective jurors were stricken for cause while the trial judge denied challenges for cause for other venire persons similarly situated because the judge determined that there was not enough specific inquiry by counsel. *Id.* at 679. The appeal was denied and the trial court affirmed. As in *Venton*, there is nothing before this court to prove the complained of juror, Mr. Starita, was unqualified to serve. Neither was there any record developed to prove that any other empanelled jurors were unqualified or would have been stricken had Appellant been afforded additional peremptory challenges. Ultimately, there is no record before this honorable court to suggest the Plaintiff/Appellant failed to receive a trial by a fair, impartial and competent jury.

The defendants/appellants were retired from the practice of medicine at the time this cause went to trial. Both the trial court and opposing counsel were aware of this fact, as were the prospective jurors. There was no physician/patient relationship at the time of trial; nor would there be any such relationship to cloud future patient care visits. None of the cases cited by Appellant deal with the factual issues presented in this action and it cannot be assumed those decisions would require the same result when presented with this case's unique facts.

Jurors have been allowed to serve in cases where they came into court with some perceived biases but who have, upon being questioned under oath, expressed willingness to set aside their bias and determine the case on the merits. In *Hagerty v. Foster*, 838 So.2d 948, 957 (Miss. 2002), a member of the venire expressed a dislike for attorneys who advertise. Ultimately, that prospective juror was challenged for cause, and the trial judge denied the challenge. *Id.* On appeal, it was noted that the trial court had interviewed the prospective juror to determine her ability to be fair and

impartial, asking whether her opinions regarding lawyer advertising would cause her to be opposed to the Appellant's position and although the venire member expressed her dislike of lawyer advertisements on television, she also represented to the trial court that she would listen to both sides. *Id.* The Mississippi Supreme Court noted that the trial court's questions of the juror and her responses revealed no basis for excusing the prospective juror as a matter of law and overruled the appeal, stating, "Failure to grant this challenge for cause was not an abuse of discretion. Therefore, this issue is without merit." *Id.*

C. Plaintiff/Appellant has waived objections by failing to request additional peremptory challenges or by objecting to the jury as selected.

At the conclusion of the jury selection proceedings, counsel for Appellant failed to (1) request additional challenges, (2) object to the jury as sworn and (3) object to Staritt being placed on the jury. This failure to preserve the objection for appeal acts as a waiver. To preserve an issue for appeal, a contemporaneous objection must be made. *Randolph v. State*, 852 So.2d 547, 560 (Miss. 2002) (*citing Ratliff v. State*, 313 So.2d 386 (Miss. 1975)). By failing to object not only to the trial judge's failure to strike Starita for cause, but also to Starita's eventual placement on the jury, Appellant has failed to preserve this issue for appeal. *See Ortman v. Cain*, 811 So.2d 457, 461 (Miss. App. 2002) (plaintiff's failure to object to juror being placed on jury operates as waiver of objection for purposes of appeal).

In order for Plaintiff/Appellant to have preserved her objection to Juror Starita, she was required to first attempt to remove said juror from the jury via use of a peremptory challenge after her challenge for cause was denied. No such objection was made. See (T 108; RE 19). Appellant has waived this assignment of error by failing in the lower court to ask Judge Terry to excuse the

juror Starita, to allow additional peremptory challenges or to otherwise show that an additional strike would have made any difference in the final verdict which was agreed by an 11 to 1 vote. Any suggestion of influence by the empanelled juror is nothing more than sheer speculation.

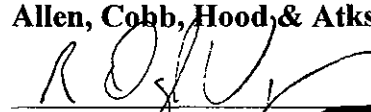
CONCLUSION

Plaintiff/Appellant received a fair trial from a jury of unbiased, qualified and competent jurors. The 11 to 1 verdict for the defendants suggests that the failure to remove one juror for cause, Starritt, cannot be said to have made a difference in the ultimate outcome of the case. There is no suggestion from the record that any other juror would have viewed the evidence differently or would have swayed the jury away from a required vote of at least 9 members for the verdict reached. As such, if there were any error, such error is harmless. Moreover, by allowing Starritt to serve on the jury while still holding a peremptory challenge, and later failing to object to the empanelled jury, Appellant waived any claim of error and failed to preserve same for purposes of this appeal. The motion for new trial was correctly overruled and this Honorable Court should affirm the verdict of the Harrison County jury and deny this appeal.

Respectfully submitted, this the 10th day of January, 2007.

Thomas F. Hewes, M.D., Appellee
William L. Seidensticker, M.D., Appellee

BY: Allen, Cobb, Hood & Atksinson, P.A.



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CERTIFICATE OF SERVICE

I, R. Douglas Vaughn, do hereby certify that I have, this day served by U.S. Mail, postage pre-paid, a true and correct copy of the above and foregoing Pleading to the following:

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CIRCUIT COURT JUDGE
Honorable Jerry O. Terry
P.O. Box 1461
Gulfport, MS 39502

SO CERTIFIED, this the 10th day of January, 2008.

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