IN THE SUPREME COURT OF MISSISSIPPI

KATHLEEN W. HEANEY **APPELLANT**

V. **CASE NUMBER: 2007-CA01083**

THOMAS F. HEWES, M.D.
AND WILLIAM L. SEIDENSTICKER, M.D. **APPELLEES**

REPLY BRIEF OF APPELLANT

Submitted by:

JOSEPH E. ROBERTS, JR., [redacted]
GRADY L. MCCOOL, MSB[redacted]
PITTMAN, GERMANY, ROBERTS
& WELSH, L.L.P.
410 South President Street (39201)
Post Office Box 22985
Jackson, Mississippi 39225-2985
PH: (601) 948-6200

COUNSEL FOR KATHLEEN W. HEANEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ARGUMENT

Thomas F. Hewes, M.D. and William Seidensticker, M.D. (hereinafter collectively referred to as "Defendants") assert Kathleen Heaney (hereinafter "Heaney") received a fair trial on the merits of her lawsuit despite that fact that Keith Starita, a previous patient of defendant Seidensticker was impaneled on the jury that decided the case. The Defendants claim that Mississippi law does not require every person who has had a past professional relationship with a party in the case to be automatically unqualified to serve upon the civil jury in the matter. However, this Court has opined that the relationship between a physician and patient is a unique one, and despite a potential jurors belief that he/she can be fair and impartial, in most circumstances they will be reluctant to return a verdict against the physician. Also, a circuit judge has the absolute duty to see that a fair, impartial, and competent jury is selected. *Scott v. Ball*, 595 So.2d 848, 850 (Miss. 1992). Circuit judges have at their disposal several methods to ameliorate any prejudices based upon a potential jurors past professional relationship with one of the parties. *Hudson v. Taleff*, 546 So.2d 359, 363 (Miss. 1989). The Circuit Court erred in not exercising one of these methods to ameliorate any prejudices which resulted to Heaney.

The Defendants also argue, assuming there was an error, that Heaney failed

to preserve it for appeal and/or the error was harmless. However, Heaney, during the jury selection process, requested the circuit Judge to excuse for cause those individuals that were previously patients of either of the Defendants. *(T at 105)*[1]. Lastly, there is no way to ascertain whether or not the error was harmless because there is no way to know what took place during the jury's deliberations.

A. The Circuit Court Failed to Assure that a Fair, Impartial, and Competent Jury was Selected.

During *voir dire* the potential jurors were asked if they themselves or a close family member had been treated by either defendant, Hewes or defendant, Seidensticker. *(T at 25).* Ten (10) of the first thirty-six (36) jurors answered affirmatively. *(T at 25).* Although Heaney exercised all of her peremptory challenges on former patients of the Defendants, one of Seidensticker's previous patients, Keith Starita, was impaneled on the jury that decided the case. Defendant Seidensticker performed surgery on Mr. Starita approximately fifteen years prior to the trial. *(T at 65).*

When it came time to select the jury, Heaney directed the circuit Judge to *Scott v. Ball*, 595 So.2d 848 (Miss. 1992), *Hudson v. Taleff*, 564 So.2d 358 (Miss. 1989), and *Davis v. Powell*, 781 So.2d 912 (Miss. Crt. App. 2001), for the

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1

"T" is a reference to the *Voir Dire* Trial Transcript and the number/numbers following indicate page/pages where the information may be found.

proposition that all three cases addressed situations where several members of the venire had a personal relationship or a physician/patient relationship with one of the defendants. *(T at 104).* Heaney advised the Circuit Judge that the *Scott* case recognized that a Circuit Court judge should be sensitive to that relationship because it is such a unique relationship. *(T at 104).* In *Scott*, the Court opined that "regardless of a prospective juror's complete sincerity in his belief of his ability to be fair, it is only human nature that in most cases he will be more than reluctant to return a verdict against the physician." *Scott*, 595 So.2d at 851. "The circuit judge has an absolute duty, however, to see that the jury selected to try any case is fair, impartial, and competent. *Id.* at 850.

Heaney addressed the issue that ten (10) of the first thirty-six (36) jurors on the jury panel had been patients of one of the Defendants. *(T at 104).* Heaney asked the Circuit Judge to strike those jurors who had previously been treated by one of the defendants. *(T at 106).* To which circuit Judge replied, "No sir. No, sir. I'm not going to strike the others because I'd almost have to strike the whole panel." *(T at 106).* It appears obvious from this comment that even the experienced Circuit Judge was shocked by the aberration of this many of the Defendants' former patients being in the jury pool.

As previously mentioned in the Brief of Appellant, the Court in *Hudson*

provided several methods a circuit judge can employ to ameliorate the prejudice to a plaintiff when there is a statistical aberration in the jury pool; (1) the circuit judge can provided counsel additional peremptory challenges, (2) the circuit judge can increase the size of the available venire as well as afford additional challenges, or (3) the circuit judge can sustain some of the challenges for cause. *Hudson*, 564 So.2d at 363 (Miss. 1989). Despite the fact that Heaney pointed out the *Hudson* case, as well *Scott* and *Davis*, to the Circuit Judge, none of the methods mentioned in *Hudson* were applied. This resulted in juror Starita, a previous patient of Seidensticker, being impaneled on the jury. Therefore, the Circuit Court failed to exercise its duty to insure that Heaney received a fair, impartial and competent jury to hear her claims. For this reason Heaney is entitled to a new trial.

B. Heaney Requested the Trial Judge to Strike those Jurors who had Previously been Treated by One of the Defendants, and the Issue was Properly Preserved for Appeal.

The Defendants argue that Heaney failed to preserve this issue for appeal because Heaney failed to object to the jury as sworn, failed to object to Starita being placed on the jury, and failed to request additional challenges. However, when it came time to select the jury, Heaney directed the trial court to *Scott v. Ball*, 595 So.2d 848 (Miss. 1992), *Hudson v. Taleff*, 564 So.2d 358 (Miss. 1989), and *Davis v. Powell*, 781 So.2d 912 (Miss. Crt. App. 2001), for the proposition

that all three cases addressed situations where several members of the venire had a personal relationship or a physician/patient relationship with one of the defendants. *(T at 104).* Additionally, Heaney asked the circuit Judge to strike those jurors who had previously been treated by one of the defendants. *(T at 106).* To which the circuit Judge replied, "No sir. No, sir. I'm not going to strike the others because I'd almost have to strike the whole panel." *(T at 106).* If the Court had excused all jurors who had previously been patients, or had close family members that had been patients of the Defendants, the Court would have been left with thirty-five (35) jurors on the panel from which to pick a jury.[2]

When asking the circuit Judge to strike for cause all the jurors that were previously patients of one of the Defendants, Heaney requested that "at a minimum the Court should excuse Juror Number 17, who is David Mohler, who he and his son have been treated by each of the defendants." *(T at 105).* In response to the request to strike Mohler for cause the circuit judge replied, "I'm not going to strike him for cause, Mohler. I'm going to leave him on." *(T at 106).*

The Circuit Judge then proceeded through the list of potential jurors asking Heaney and the Defendants if they accepted or rejected the juror. Heaney used her

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2

The Court did excuse other jurors for cause which would have reduced the jury panel to 35, if the Court had excused the jurors who had a previous medical relationship with the Defendants.

first peremptory challenge on James Webb, who was a previous patient of Hewes. *(T at 64 and 107).* Heaney was required to use her second peremptory challenge on Donna Winstead, who's son had been a patient of Hewes. *(T at 64 and 108).* Heaney's third peremptory challenge was used on Theresa Wilson, who also had a family member that was a previous patient of Hewes. *(T at 65 and 108).* When the circuit Judge got to Starita, Heaney replied, "Yes, sir. We would accept Mr. Starita. And just for the record, Your Honor, the reason Mr. Starita is being accepted, although he has been a previous patient of Dr. Seidensticker, is that if we did take our peremptory challenge on him, the next person we would get is David Mohler, Number 17." *(T at 108-09).* Heaney was required to use every single peremptory challenge at her disposal on potential jurors whom themselves or a close family member had been a previous patience of one of the Defendants.

During *voir dire* Heaney challenged for cause, every juror that had been a previous patient of one of the Defendants. *(T at 106).* Heaney provided the Circuit Judge with three different cases addressing the issue of statistical aberrations in jury pools and several methods to employ to ameliorate any prejudice to Heaney. The Circuit Judge by his comment, "I'm not going to strike the others because I'd almost have to strike the whole panel.", clearly recognized the aberration of the unusually high number of the Defendants' previous patients

who were on the jury pool. *(T at 106).* Heaney advised the circuit judge of his duty to see that the selected jury was fair and impartial. *Scott*, 595 So.2d at 850. The record clearly indicates that this issue has been preserved for appeal.

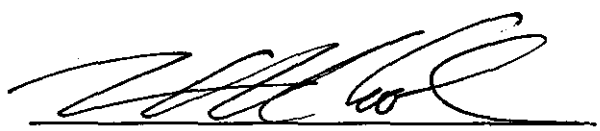
The defendants further assert that the jurors exhibited no evidence of being unqualified to serve, and the eleven to one verdict for the Defendants suggests that the failure to remove one juror for cause, Starita, cannot be said to have made a difference in the outcome of the case. Heaney directs the Court to *Scott*, wherein the Court opined that, "regardless of a prospective juror's complete sincerity in his belief of his ability to be fair, it is only human nature that in most cases he will be more than reluctant to return a verdict against the physician." *Scott*, 595 So.2d at 851. As with any jury deliberations, there is no way to ascertain what influenced the jury's decision in this matter. The fact remains that by the Circuit Judge not following the directives in *Scott* as to how to handle this type of situation, Heaney was forced to utilize her peremptory challenges on persons who should have been excused for cause and was still left with a juror, Starita, who was a patient of one of the defendants. Starita, a previous patient of Seidensticker, was allowed to serve on the jury that decided the outcome of the case. There is no

possible way to ascertain what impact Starita had on the jury's final decision.[3] Therefore, Heaney respectfully request this matter be remanded to the trial court for a new trial.

II. CONCLUSION

Based upon the foregoing, the trial Court abused its discretion with respect to the jury selection process. The challenges made for cause by Heaney, for jurors who had previous medical relationships with Hewes and/or Seidensticker, should have been granted. The record clearly indicates that this issue was properly preserved for appeal. The trial court took insufficient action to ameliorate the prejudicial effect of the statistical aberration of the jury pool, and Heaney is entitled to a new trial in this case. Therefore, Heaney respectfully request this matter be remanded to the trial court for a new trial.

Respectfully submitted,

BY: 

GRADY L. "MAC" MCCOOL, III

3

The 1957 American movie classic *12 Angry Men*, wherein one jury member works to persuade the other 11 members of the jury to acquit a suspect on trial on the basis of reasonable doubt. Although fictional, this movie is a prime example of the impact one jury member can have during deliberations and the final verdict.

GRADY L. "MAC" MCCOOL, III, [redacted]
JOSEPH E. ROBERTS, JR., [redacted]
PITTMAN, GERMANY, ROBERTS & WELSH, L.L.P.
410 South President Street (39201)
Post Office Box 22985
Jackson, Mississippi 39225-2985
Telephone: (601) 948-6200

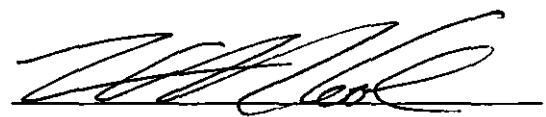
CERTIFICATE OF SERVICE

I, Grady L. "Mac" McCool, III, do hereby certify that I have this day forwarded, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

Harry R. Allen, Esq.
Doug Vaughn, Esq.
P.O. Box 4108
Gulfport, MS 39502-4108

Honorable Jerry O. Terry
421 Linda Dr.
Biloxi, MS 39531

THIS, the 27th day of February, 2008.



GRADY L. "MAC" MCCOOL, III