

**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**

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

Submitted by:

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**CERTIFICATE OF INTERESTED PERSONS**

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

Kathleen W. Heaney  
Plaintiff/Appellant

Thomas F. Hewes, M.D.  
and William L. Seidensticker, M.D.  
Defendants/Appellees

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## **STATEMENT REGARDING ORAL ARGUMENT**

Counsel for Kathleen W. Heaney respectfully requests that this Court grant oral argument on the issues raised herein.

Oral argument would give the Court the opportunity to question the parties as to specific points of law and facts which it considers to be of primary importance. The parties would be able to expand on the necessary facts which are critical to the determination in this case.

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
STATEMENT REGARDING ORAL ARGUMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
I. STATEMENT OF THE ISSUE	1
II. STATEMENT OF THE CASE	1
A. Course of the Proceedings and Disposition of the Court Below	1
B. Statement of the Facts	2
III. SUMMARY OF THE ARGUMENT	3
IV. ARGUMENT	4
V. CONCLUSION	7
VI. CERTIFICATE OF SERVICE	8

## **I. STATEMENT OF THE ISSUE**

The trial court erred in not granting Plaintiff's challenges for cause for those jurors who had either themselves or a close family member previously been patients of the Defendant doctors or their clinic.

## **II. STATEMENT OF THE CASE**

### ***A. Course of the Proceedings and Disposition of the Court Below:***

This matter was tried before the Honorable Jerry O. Terry in the Circuit Court of the First Judicial District of Harrison County Mississippi in Gulfport on April 2, 2007. The jury returned a verdict in favor of the Defendants, Thomas F. Hewes, M.D., (hereinafter "Hewes") and William L. Seidensticker, M.D., (hereinafter "Seidensticker") on April 5, 2007. On April 16, 2007, Plaintiff, Kathleen W. Heaney (hereinafter "Heaney") filed her Motion for New Trial. (*R at 289-303*). Final Judgment was entered in favor Hewes and Seidensticker on April 25, 2007. (*R at 304-305*). On May 4, 2007, Heaney filed her First Supplemental Motion for New Trial. (*R at 306-311*). The Circuit Court entered and Order denying Heaney's Motion for New Trail on May 15, 2007. (*R at 312*). Heaney timely filed her Notice of Appeal on June 12, 2007. (*R at 313*).

**B. Statement of the Facts:**

On July 28, 1996, Heaney was admitted to Memorial Hospital of Gulfport for a right hip replacement. The right hip replacement was performed by Hewes and Seidensticker on July 29, 1996. Heaney suffered multiple dislocations of the hip after her surgery and in November of 1998, discovered that the hip replacement was not properly performed and the prosthetic hip was not properly aligned. On December 11, 1998, Heaney filed her complaint against Hewes, Seidensticker and Memorial Hospital of Gulfport. (*R at 13-15*).

The trial was commenced on April 2, 2007, in the Circuit Court of the First Judicial District of Harrison County, Gulfport Mississippi and a jury was convened in this action on the same day. Three hundred (300) potential jurors were summoned for the jury pool and fifty-three (53) were qualified for the jury pool. (*R at 294-303*). During *voir dire*, it was determined that at least ten (10) of the first thirty-six (36) jurors had themselves or had a close family member that was a patient of Hewes and/or Seidenstricker. (*T at 64-70*)<sup>12</sup>. During selection of the jury Heaney challenged

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1

"T" is a reference to the Trail Transcript and the numbers following indicate the page numbers where the information may be found.

2

James Webb, Donna Winstead, Theresa Wilson, Keith Starita, David Mohler, Jan White, Kelley Mayfield, Mary Ann Blount, Niki Burwell and Christy Peterson all indicated during *voir dire* that they themselves or a close family member were patients of Hewes and/or Seidensticker.

for cause each and every juror who had previously been a patient of Hewes and/or Seidensticker, or had a close family member who had been a patient of Hewes and/or Seidensticker. (*T at 104-106*). The Circuit Court denied these challenges for cause.

Heaney used all four of her peremptory challenges on the individuals who had previously been patients or had close family members who had been patients of Hewes and/or Seidensticker. (*T at 107-112*). Once the jury was impaneled, there remained one patient of Seidensticker, Keith Starita, on the jury which decided this case. (*T at 65 and 112*).

### **III. SUMMARY OF THE ARGUMENT**

Heaney's juror challenges for cause of venire persons who had previously been patients or had close family members who had been patients of Hewes and/or Seidensticker should have been granted by the trial court. The court's denial of these challenges for cause resulted Heaney having to utilize all of her peremptory challenges on previous patients of the defendants. Despite Heaney using all of her challenges she was still left with a juror on the panel who had a previous medical relationship with the defendants.

The trial court could have employed one of several methods to ameliorate the prejudice to Heaney. The trial court could have afforded counsel additional peremptory challenges, the court could have increased the size of the available venire,



as well as, affording additional challenges, or the court could have sustained at least some of the challenges for cause. However, the trial court elected not to employ any of these measures. Because the trial court took insufficient action to ameliorate the prejudicial effect of the statistical aberration of the jury pool, Heaney is entitled to a new trial in this case.

#### **IV. ARGUMENT**

The trial court should have granted Heaney's juror challenges for cause of venire persons who had previously been patients, or had close family members who had been patients of Hewes and/or Seidensticker. When the potential jurors were asked during *voir dire* if they themselves or a close family member had been treated by Hewes or Seidensticker ten (10) of the first thirty-six (36) jurors answered affirmatively. Although Heaney exercised all four (4) of her peremptory challenges on jurors who had previously been patients of Hewes and/or Seidensticker. One of the Defendant's previous patients, Keith Starita, was still impaneled on the jury that decided the case.

In the case of *Hudson v. Taleff*, 546 So.2d 359, (Miss. 1989), a case against a local doctor in Lauderdale County, during *voir dire* it was determined that of the twenty-five (25) jurors, twelve had connections with the defendant, his medical practice, or his attorneys. In *Hudson*, the Plaintiff used all of its peremptory

challenges, but was still left with two jurors who had a connection with the Defendant's medical practice. *Id.* In *Hudson*, the Court determined that given the statistical aberration in the jury pool, the judge should have done several things to ameliorate the prejudice to the Plaintiff; (1) he could have afforded counsel additional peremptory challenge, (2) he could have increased the size of the available venire as well as affording additional challenges, or (3) he could have sustained at least some of the challenges for cause. *Id.* at 363. Based upon the foregoing, the Court in *Hudson* determined that the Plaintiffs did not obtain a fair trial because of the jury composition and remanded the case for new trial.

In *Powell v. Davis*, 781 So. 2d 912, (Miss. Ct. App. 2000). the Court was considering a medical mal-practice case which had been filed in Wayne County. There was a venire consisting of fifty-three jurors. Of that number, thirty had been previous patients of the clinic in which the Defendant doctor was a partner. In *Davis*, five of the jurors who indicated that they were patients of the clinic, served on the juror. *Id.* The Court in *Davis* citing *Hudson v. Taleff*, 546 So.2d 359, (Miss. 1989), ruled that it was compelled to reverse the case. *Id.* The Court in *Davis* stated, "each of these cases teaches unequivocally that the trial judge

should take all necessary corrective measures to insure an unbiased jury.....” *Id.* at 917.

The Court in both of the cited cases recognized that statistical aberrations often occur due to a large number of persons of the venire being associated in some way with the medical clinic or the physician involved and that the Court should take measures to insure that both parties have an unbiased jury. Also, see *Scott v. Ball*, 595 So. 2d 848 (Miss. 1992). Heaney’s counsel brought the above cases to the Trial Court’s attention during jury selection. However, the trial court elected not to employ any of the measures set out in these cases in an effort to ameliorate the potential prejudice to Heaney.

In the present case, if the Circuit Court had excused all jurors who had previously been patients, or had close family members that had been patients of the Defendants, Hewes and Seidensticker, the court would have been left with thirty-five (35) jurors on the panel from which to pick a jury. The Court instead elected not to excuse these jurors who had a previous medical relationship with Hewes and/or Seidensticker. Heaney was, therefore, left to utilize all of her peremptory challenges on previous patients of the Defendants and was still left

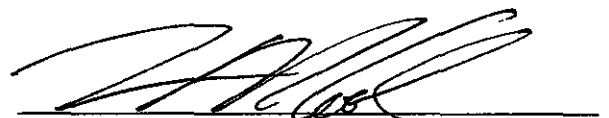
with a juror on the panel who had a previous medical relationship with the Defendants.

### V. CONCLUSION

Based upon the foregoing, the trial Court abused its discretion with respect to the jury selection process. The challenges made for cause by the Plaintiff, for jurors who had a previous medical relationship with Hewes and/or Seidensticker, should have been granted. Because the trial court took insufficient action to ameliorate the prejudicial effect of the statistical aberration of the jury pool, 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:



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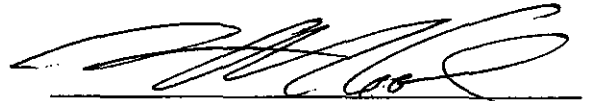
**CERTIFICATE OF SERVICE**

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 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 8<sup>th</sup> day of November, 2007.

  
GRADY L. "MAC" MCCOOL, III