

IN THE SUPREME COURT OF MISSISSIPPI

ABNER K. NORTHROP, JR.

APPELLANT

VERSUS

CAUSE NO: 2007-TS-00355

THOMAS P. LETARD, M.D., DAVIS R. HUTTO,
STANLEY TURNER AND MEMORIAL HOSPITAL
AT GULFPORT

APPELLEES

**APPELLEES' MEMORIAL HOSPITAL AT GULFPORT, STANLEY
TURNER AND DAVIS HUTTO'S APPELLEES' BRIEF**

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

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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 justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Abner K. Northrop, Jr., Appellant.
2. Floyd Logan, Esq., Attorney for Appellant.
3. Thomas Letard, M.D., Appellee.
4. Davis Hutto, Appellee.
5. Stanley Turner, Appellee.
6. Memorial Hospital at Gulfport, Appellee.
7. Patricia K. Simpson, Esq., Franke & Salloum PLLC, Attorney for Appellees
Memorial Hospital at Gulfport, Stanley Turner and Davis Hutto.
8. Fredrick B. Feeney, III, Esq., Franke & Salloum PLLC, Attorney for Appellees
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9. R. Douglas Vaughn, Esq., Attorney for Appellee Thomas Letard, M.D.
10. Margaret McArthur, Esq., Attorney for Appellee Thomas Letard, M.D.
11. Hon. Lisa P. Dodson, Circuit Judge.



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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT AS NORTHROP FAILED TO DEFINE THE STANDARD OF CARE WITH EXPERT TESTIMONY AND EVIDENCE
- II. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT AS EVEN IF THE STANDARD OF CARE REQUIRED VISUALIZATION OF THE IV SITE, NORTHROP FAILED TO PROVIDE ANY EVIDENCE THT THE DEFENDANTS' FAILURE TO VISUALIZE THE IV SITE DURING SURGERY CAUSED HIM INJURY

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STATEMENT OF THE CASE

Northrop's Amended Complaint was filed on March 16, 2000 in the Circuit Court of Harrison County, First Judicial District. All Defendants timely filed their Answers and discovery ensued between the parties. Depositions of all parties were taken as well as the deposition of Northrop's medical expert witness. MHG, Hutto and Turner filed a motion for summary judgment on June 13, 2005. Dr. Letard filed a Joinder to MHG, Hutto and Turner's Motion for Summary Judgment on July 19, 2005. A hearing was held on the motion on August 26, 2005. (TR. 39). Hurricane Katrina occurred three days later. The motion was reheard on January 19, 2007. (TR. 96). The trial court entered summary judgment in favor of all Defendants dismissing the case with prejudice on February 19, 2007. (R. 1077).

STATEMENT OF FACTS

The Plaintiff, Abner Northrop, underwent a radical prostatectomy and node dissection on March 2, 1999. (R.17) Dr. Ronald Brown performed the procedure at MHG. (R. 17) The Defendant, Dr. Thomas Letard, was the attending anesthesiologist and provided anesthesia services to Mr. Northrop. (R. 17) The Defendants, Davis Hutto and Stanley Turner, were the nurse

anesthetists (CRNAs) attending Mr. Northrop during his surgery. Hutto and Turner are employees of Memorial Hospital at Gulfport. (R. 517, 519)

The procedure went uneventfully until the conclusion of the case. As CRNA Turner removed the blanket and Bair Hugger from the upper body he discovered an extravasation (infiltration) of the IV in the left arm. (R. 875) Turner immediately contacted Dr. Letard. (R. 876) When he was called, Dr. Letard examined the arm and immediately requested a surgical consult of Dr. Dauterive a vascular surgeon. (R. 818, 819) Dr. Letard consulted with Dr. Brown and Dr. Dauterive regarding the arm. (R. 822) Dr. Dauterive performed a fasciotomy on Mr. Northrop and relieved the pressure on his arm. (R. 757-762) Dr. Brown testified that after Dr. Dauterive made the incision and released the pressure, the arm warmed up, pinked up and was back to normal color by the time Mr. Northrop was resting and taken to the recovery room. (R. 732) When Dr. Dauterive released Mr. Northrop from his care on two weeks later, Mr. Northrop had 100% motor function and all of his motor nerves intact. (R. 776-777) Dr. Dauterive testified Mr. Northrop had no evidence of any injury to the major nerves that supply function and sensation to his hand. (R. 777)

When questioned about what caused the extravasation, Dr. Ronald Brown testified "it was a very freak accident that happened." (R. 738) When asked for his opinion as to the cause of the extravasation, Dr. Dauterive testified that there was no evidence to him to suggest a definite mechanism as to why the IV infiltrated in this case. (R. 782-783) Dr. Dauterive had no idea and could not provide any opinion as to when the extravasation occurred. (R. 777) More importantly, the Plaintiff's expert, Dr. Felipe Urdaneta, could not explain why the extravasation occurred in this case. Dr. Urdaneta testified that he didn't know why or when the extravasation occurred. (R.1016)

Northrop sued the Defendants claiming that their negligence caused the IV to extravasate (or infiltrate) causing him injuries.

SUMMARY OF THE ARGUMENT

Northrop argues that “[t]he trial court erred in granting summary judgment as the Plaintiff’s expert, Dr. Urdanetta, has testified that the standard of care in surveillance of an IV site in an unconscious patient is constant vigilance, which consists of actually visualizing the IV site constantly, and feeling the unconscious patient’s arm.” *Appellant’s Brief*, p. 5. This is an incorrect characterization of Dr. Urdaneta’s testimony. Dr. Urdaneta specifically testified that the standard of care did not require the IV site to be visualized throughout the surgical procedure. (R. 1032, 1034, 1047, 1075) Northrop’s argument about visualizing the site is diametrically opposed to his own expert’s opinion as well as the other experts in this case. The trial court articulated that Dr. Urdaneta’s testimony was very weak on visualization of an IV site during surgery. (R. 1081) However, the trial court found that even if the standard of care could arguably constitute “constant and overall vigilance,” Northrop failed to provide any evidence that any alleged failure of the Defendants caused any injuries to him. (R. 1081) The trial court recognized that “there is no one and no document which can say how the extravasation occurred and thus no way to say that any failure of Defendants to visualize the site caused any injury or damage to Northrop.” (R. 1081-1082) The trial court was correct in its finding.

Northrop’s failure to provide expert testimony articulating the standard of care is fatal to his case. In addition, even if Northrop’s expert, Dr. Urdaneta, provided sufficient testimony regarding the standard of care, Urdaneta never testified that any failure to visualize the IV site during surgery

proximately caused any injury to Northrop. In fact, Dr. Urdaneta testified that he did not know what caused the extravasation nor could he say when it occurred during the surgery. All of the evidence in this case supports that no one knows what caused the extravasation. There is significant medical testimony that there is no requirement to visualize the IV site in this case. (R. 529-530, 829-830, 886-888, 1045, 1047) Northrop has failed to provide sufficient evidence of a *prima facie* case of medical malpractice and the trial court was correct in granting summary judgment.

ARGUMENT

Northrop failed to define the standard of care with expert testimony

The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court. *Richardson v. Methodist Hospital of Hattiesburg*, 807 So. 2d 1244, 1246 (Miss. 2002) The rule in Mississippi is that summary judgment shall be entered by a trial judge "if the pleadings, depositions, answers to interrogatories and admissions of 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." *Young v. Wendy's Intern., Inc.*, 840 So. 2d 782 (Miss. App. 2003) The presence of fact issues in the record does not per se entitle a party to avoid summary judgment; the court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense and the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact. *Johnson v. Baptist Memorial Hospital*, 843 So. 2d 102 (Miss. App. 2003) citing *Simmons v. Thompson Machinery of Mississippi Inc.*, 631 So. 2d 798, 801 (Miss. 1994) The burden on the movant is clear:

We have stated the party moving for summary judgment has the job of persuading the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, he is entitled to judgment as a matter of law. The movant carries a burden of persuasion, not a burden of proof....[T]he movant has no duty to provide an evidentiary predicate to negate the existence of a material fact as to those issues on which he does not bear the burden of proof at trial. Rather, as to issues where the movant does not bear the burden of proof at trial, he must initially only make a sufficient “informing”, “pointing out”, or “showing” that there is an absence of evidence to support the non-movant’s case.

Hartford Cas. Ins. Co. v. Haliburton Co., 826 So. 2d 1206 (Miss. 2001)

It is undisputed that MHG is a political subdivision protected by the Mississippi Tort Claims Act (MTCA), *Miss. Code Ann. § 11-46-1 et seq. (2000 as amended)*. Immunity of state and political subdivisions has been waived only to the extent provided in the MTCA. *Miss. Code Ann. § 11-46-5(1)* The remedy provided by the MTCA is the exclusive remedy for any action against a political subdivision in the State of Mississippi, including MHG, a community hospital.

It is also undisputed that unless an issue under consideration in a medical malpractice action is within the common knowledge of laymen, expert testimony is required. *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d 1346, 1355 (Miss. 1990). Case law requires that in a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care. *Id.* at 1355. An expert is necessary to determine the applicable standard of care that the hospital’s actions breached the standard of care and that such breach was the proximate cause of the plaintiff’s injuries. *Palmer at 1355; also citing Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987).

As the trial court ruled in this case, in order for a medical malpractice plaintiff to prove a *prima facie* case of negligence, the following elements must be established:

(1) The existence of a duty on the part of the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform with the standard required of the defendant; (3) the breach of such duty by the defendant was the proximate cause of the plaintiff's injuries; and (4) injury resulting to the plaintiff's person.

Brown v. Baptist Memorial Hospital Desoto, Inc., 806 So. 2d 1131, 1134 (Miss. 2002).

Not only must a plaintiff prove those elements in a medical malpractice suit, but expert testimony must be used. *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992). Expert testimony is required to identify and articulate the requisite standard of care that was not complied with and is necessary to establish that the failure to comply with the standard of care was the proximate cause of the alleged injuries. *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992); *see also Latham v. Haynes*, 495 So. 2d 453 (Miss. 1986). An expert is necessary to determine the applicable standard of care and must define what the standard of care is. *Mallet v. Carter*, 803 So. 2d 504, 508 (Miss. Ct. App. 2002). It is also necessary that the expert specifically define what actions breached the standard of care and how such breach caused the plaintiff's injuries. *Id.* In the present case, the Plaintiff has failed to provide expert testimony defining exactly what the standard of care required in this case and how the Defendants breached the standard of care.

In the present case, Northrop argues that the standard of care for the anesthesiologist and the nurse anesthetists in this case requires visualization of the IV site during surgery. (TR. 118-121, *Appellant's Brief*, p. 7-8) Northrop's assertion that the IV site had to be visually inspected is

diametrically opposed to the testimony of his own expert, Dr. Urdaneta. Dr. Urdaneta testified as follows:

Q. And you've testified that the standard of care does not specifically require the person to pull the warmer, the warming blanket up to look at the site where the IV goes into the hand; correct?

A. Correct.

(R. 1047)

Importantly, Dr. Urdaneta couldn't state how many times the IV site should be visualized during surgery. (R.1068) Dr. Urdaneta testified that it was his *personal preference* to visualize an IV site. (R. 1031-1032) He acknowledged that there is no treatise or authority which requires visualizing the IV site in this case. (R.1032, 1075) Northrop fails to cite a single authority in support of his argument that the standard of care requires visualization of the IV site in this case. Although Dr. Urdaneta testified that visualization of the IV site was not required, the Defendants provided additional medical evidence that visualization was not required. (R. 529-530, 829-830, 886-888) MHG, Hutto and Davis contend that Northrop failed to properly articulate the requisite standard of care via expert testimony. An expert is necessary to determine the applicable standard of care and such expert must define what the standard of care is. *Mallet v. Carter*, 803 So. 2d 504, 508 (Miss. Ct. App. 2002). It is also necessary that the expert specifically define what actions breached the standard of care and how such breach caused the plaintiff's injuries. *Id.* Although Northrop contends that the IV site should have been visualized during the surgery, his expert could not testify as to how often the site should have been visualized during the surgery. (R. 1068) There is significant medical testimony that there is no requirement to visualize the IV site in this case. (R.

529-530, 829-830, 886-888, 1045, 1047) As this Court ruled in *Brown v. Baptist Memorial Hospital Desoto, Inc.*, 806 So. 2d 1131, 1134 (Miss. 2002), in a medical malpractice action, a plaintiff must establish by expert testimony the standard of acceptable professional practice. *Id. at 1134* In *Brown*, this Court emphasized that the expert in a medical malpractice action must identify the act or failure to act which was the proximate cause of any injury to the plaintiff. *Id.* In *Brown*, an infant was diagnosed as suffering from Erb's palsy immediately after birth. *Id. at 1132* The injury is one of the complications of birth. *Id.* Experts from both sides could not state what had caused the injury or when it occurred. *Id.* This Court rules that the plaintiff failed to provide sufficient expert testimony to support her claims that an act or failure to act on the part of the defendants proximately caused any injury to the infant. *Id. at 1135* This case is identical in premise to the *Brown* decision. None of the medical experts can testify as to what caused the extravasation or when it happened and extravasation is a known complication of any IV. Applying the analysis in *Brown*, the trial court was correct in granting summary judgment.

Northrop seeks to hold the Defendants liable for failing to do an act which was not required by the standard of care. Simply put, he wants to hold them responsible for something they were not required to do in the first place. The failure to articulate the standard of care through expert testimony in this case is fatal to Northrop's claims. *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992)

If the standard of care required visualization of the IV site, Northrop failed to provide any evidence that the Defendants' failure to visualize the IV site during surgery caused him injury

For the sake of argument, even if visualizing the IV site was required by the standard of care, Northrop has utterly failed to provide any evidence that the Defendants failure to visualize the IV site caused the extravasation in this case. The trial court found that “[t]here is nothing to show that the injury or result would have been any different with visualization during the surgery than that which occurred without the visualization of the IV site.” (R. 1084) This case is similar to the case of *Young v. University of Mississippi Medical Center*, 914 So.2d 1272 (Miss. App. 2005).

In *Young*, Lewanda Young was admitted to UMC to undergo a bilateral breast reduction surgery. *Id.* at 1273. Young complained of cramps in her legs the evening following the surgery. *Id.* at 1274. She was examined by a nurse that evening and her physician the following day. *Id.* at 1274. She was released from the hospital and died at home two days later. *Id.* She died as the result of a pulmonary embolism. *Id.* Young’s daughter filed suit against University of Mississippi medical Center alleging that the failure of the nurses to place anti-embolic stockings on Young caused her fatal pulmonary embolism. *Young v. University of Mississippi Medical Center*, 914 So.2d 1272 (Miss. App. 2005) The Plaintiffs alleged that UMC violated the standard of care by failing to put anti-embolism stockings on Young during her surgery and the failure to put those stockings on her caused Young to suffer a pulmonary embolism which was fatal.

The trial court found that the standard of care required the use of anti-embolic stockings during Young’s surgery. *Id.* at 1274 The trial court further found that Young had proved that the anti-embolic stockings were not used during the surgery and that UMC breached that standard of care. *Id.* However, the trial court found that the Plaintiff failed to prove by a preponderance of the evidence that UMC’s breach of the standard of care proximately caused Young’s death. *Id.*

Specifically, the trial court found that Young failed to show that the fatal embolus formed during or post surgery and that the evidence permitted on speculation or guess work as to the proximate cause of death. *Id.* In upholding the trial court's verdict in favor of UMC, the Court held that Young failed to prove that the fatal pulmonary embolus was caused by UMC's failure to use anti-embolism stockings. Specifically, the Court ruled that no medical expert testified that it was more probable than not that UMC's failure to use the stockings caused the fatal pulmonary embolus. *Id. at 1277*

The premise of the ruling in *Young* is identical in this case. Northrop failed to provide evidence through expert testimony that failing to visualize the IV site during the surgery caused the extravasation. In the present case, there is no medical testimony as what caused the extravasation.

Dr. Urdaneta, Northrop's expert, testified as follows:

Q. Do you know why the extravasation occurred in this case?

A. No. I don't.

Q. Do you know when it occurred?

A. No.

Q. Can you put any parameters around the time when it could have occurred?

A. It could have occurred from the get-go, from the time they actually started hanging fluids through that IV. It could have happened at the beginning, but it could have happened at any point.

Q. It could have happened 5 minutes before they took the curtains down?

A. Theoretically, yes

(R. 1016)

Northrop argues that “[s]ince the standard of care requires vigilance to discover the extravasation, plaintiff is not required to prove the cause of the extravasation, he need only prove that the Defendants’ failure to visually check and feel the patient’s arm caused his injuries.” *Appellant’s Brief*, p. 8 Northrop goes on to argue that “[s]imply put, the extravasation caused the injury to Plaintiff’s left arm, and the anesthesia team, the Defendants, failed to exercise reasonable care to discover it for over three hours during which they were in control of and responsible for the administration of anesthesia and IV fluids to Northrop.” *Appellant’s Brief*, p. 9-10 Again, this contention is refuted by Northrop’s own expert. Dr. Urdaneta testified that he *does not know* what caused the extravasation or when it occurred.

Q. All right. Dr. Urdaneta, would you agree that the fact that an extravasation occurred in Mr. Northrop by itself is not proof of negligence?

A. The extravasation, per se, is not proof of negligence, that is correct.

Q. An extravasation can happen suddenly?

A. Yes.

Q. Without warning?

A. Without warning.

(R. 1021 - 1022)

Dr. Urdaneta further testified that from his review of the records, you could not tell an extravasation was occurring. He testified as follows:

Q. All right. Now let me ask you: From your review of these records, what about Mr. Northrop’s course of this procedure would have alerted a reasonably careful anesthesiologist to the presence of an extravasation?

- A. The only – reviewing the records, from the vital signs there’s no way you can tell that an extravasation is occurring.

(R. 1026)

At no point could Dr. Urdaneta identify when the CRNAs should have noticed the extravasation in this case.

- Q. Can you show me where in the record the CRNAs should have noticed an extravasation occurred? Can you point to me, show me in the record where?

- A. We already discussed and we already said like about four times already, there’s no way for me to tell, no way for anyone to tell when the extravasation occurred. I cannot point to you at that point. The only thing I can tell you is that they recognized it is when they took the Bair Hugger off and they took the drapes off the patient. That’s the only thing I can tell you.

(R. 1063)

Northrop argues that “[h]ad the anesthesia team visually checked the IV site, the injury to Northrop’s arm from the extravasation could have been prevented or at least minimized.” *Appellant’s Brief*, p. 9 Although he argues that the extravasation should have been “discovered” earlier in the procedure than it was, Northrop’s expert cannot confirm when it should have been discovered and testified that he could not determine from the medical records when the extravasation should have been discovered. Again, Northrop’s expert refutes his own legal arguments. There is no medical testimony in this case wherein an expert testified that if the Defendants had visualized the site during the surgery the extravasation would have been prevented or at least minimized. The failure to provide this evidence should be fatal to Northrop’s case.

Accepting Northrop’s argument at face value would allow a finding of liability simply because the extravasation happened. According to Northrop’s expert, just because the extravasation

happened does not mean there was negligence. (R. 1021-1022) In fact, extravasations can occur suddenly and without warning. (R. 529, 1021-1022) The evidence provided by Northrop consists only of speculation and conjecture. No one has testified as to when or how often the IV site should have been visualized in order to prevent or minimize the extravasation in this case. No one has testified as to when the extravasation occurred although there is some expert testimony that it most likely occurred right before the drape was removed. (R. 529-530)

The Plaintiff's failure to provide expert opinion evidencing causation is fatal to his case. *Drummond v. Buckley*, 627 So. 2d 264 (Miss. 1993) There is no medical testimony regarding what caused the extravasation. In addition to his expert not being able to determine the cause of the extravasation, Dr. Brown, the urologist performing the surgery, testified that the extravasation was a freak accident. (R. 738) Dr. Dautrive, the vascular surgeon who performed the faciotomy on Northrop's arm, testified that he could not tell what caused the extravasation. (R. 762, 777) Dr. Dautrive indicated that it was impossible to tell when the extravasation happened. (R. 757) Dr. James Berry, an expert anesthesiologist, testified in his affidavit that Turner and Hutto did not breach any standard of care and that there was no indication or reason to suspect that an extravasation had occurred prior to the undraping of the patient. (R. 529-532) It cannot be overlooked that Dr. Urdaneta, Northrop's expert, did not testify that the failure of Defendants to visualize the IV site caused the extravasation. None of the medical testimony in this case supports the assertion that if the IV site had been visualized during the surgery the extravasation wouldn't have happened. Northrop is required to provide expert medical evidence to support his argument in this case. His own expert's testimony diametrically opposes his legal contentions.

CONCLUSION

Although Northrop alleges MHG, Turner and Hutto were negligent in this case, he has failed to show any negligent act or omission on the part of these Defendants. This medical malpractice action requires expert testimony to define the standard of care, identify breaches of that standard and prove causation of injury. The Complaint, on its face, involves issues of improper performance during a surgical procedure. The applicable standard of care in performing anesthesia services during a radical prostatectomy and node dissection is not within the common knowledge of lay persons. Expert medical testimony is required to define and articulate the standard of care. Expert testimony is required to specifically identify the actions and/or omissions which breach that standard of care.

Although Northrop contends that visualization of the IV site is required by the standard of care, his own expert refutes such a contention. In fact, all of the medical evidence provided in this case opines that visualization of the IV site is not required. Northrop has failed to offer any sworn testimony which identifies the applicable standard of care with respect to Defendants MHG, Turner and Hutto or any evidence which supports his allegations that they breached the standard of care in their care and treatment of Northrop.

Even if Northrop provided sufficient evidence articulating that the standard of care required visualization of the IV site during the surgery, he has also failed to provide any evidence that Northrop's alleged injuries were proximately caused by the Defendants' failure to visualize the IV site during surgery. No evidence, testimony or document, as to the cause of the extravasation has been provided by Northrop. No evidence, testimony or document, has been provided as to when the


extravasation occurred. There is evidence that the extravasation most likely occurred right before the drapes were removed but none of the medical experts can opine within a reasonable medical certainty as to the time the extravasation occurred. In the absence of such expert testimony and evidence, the Plaintiff cannot establish a *prima facie* case of negligence against these Defendants. Since the Plaintiff cannot establish a *prima facie* case of negligence against these Defendants, no genuine issue of material fact exists in this case. Summary judgment was appropriate in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served via US mail, postage prepaid, a copy of the above Brief for Appellees Memorial Hospital at Gulfport, Stanley Turner and Davis Hutto to the following:

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So certified this the 11 day of October 2007.



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STANLEY TURNER AND MEMORIAL HOSPITAL
AT GULFPORT

APPELLEES

CERTIFICATE OF SERVICE

I do hereby certify that I have this day forwarded via US mail, postage prepaid, one (1) original and three (3) copies of the above Brief for Appellees Memorial Hospital at Gulfport, Stanley Turner, and Davis Hutto to the Clerk of the Supreme Court.

So certified this the 14 day of October 2007.



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