

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2008-CA-00328**

EMMITT PAIGE, SR.

PLAINTIFF-APPELLANT

V

MISSISSIPPI BAPTIST MEDICAL CENTER, INC.

DEFENDANT-APPELLEE

---

**CORRECTED BRIEF OF APPELLEE**

---

Appealed From The Circuit Court of The First Judicial District  
of Hinds County, Mississippi Cause No: 251-05-193CIV

---

D. COLLIER GRAHAM, JR., ESQ. [REDACTED]  
WISE CARTER CHILD & CARAWAY  
401 EAST CAPITOL STREET, SUITE 600  
POST OFFICE BOX 651  
JACKSON, MS 39205-0651  
TELEPHONE: (601) 968-5549  
TELECOPIER: (601) 944-7738

ATTORNEYS FOR DEFENDANT-APPELLEE

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00328

EMMITT PAIGE, SR.

PLAINTIFF-APPELLANT

V

MISSISSIPPI BAPTIST MEDICAL CENTER, INC.

DEFENDANT-APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

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

1. Emmitt Paige, Sr., Individually and on Behalf of all Wrongful Death Beneficiaries of Cheryl Paige, Deceased - Plaintiff/Appellant
2. Candace Paige, Wrongful Death Beneficiary of Cheryl Paige, Deceased
3. Emmitt Paige, Jr., Wrongful Death Beneficiary of Cheryl Paige, Deceased
4. Herbert Lee, Leonard McClellan, Chowke Lumumba, 2311 West Capitol Street, Jackson, Ms 39209 - counsel for plaintiff/appellant
5. Mississippi Baptist Medical Center, Inc. - Defendant/Appellee
6. D. Collier Graham, Jr., Wise Carter Child & Caraway, P.O. Box 651, Jackson, MS 39205-0651 - Counsel for Defendant/Appellee
7. William Harris, M.D. - Co-defendant in underlying Hinds County Circuit Court action
8. Rebecca Wiggs, Counsel for co-defendant, William Harris, M.D.
9. Honorable Bobby DeLaughter - Hinds County Circuit Court Judge

  
D. COLLIER GRAHAM, JR., ATTORNEY OF  
RECORD FOR DEFENDANT/APPELLEE

## TABLE OF CONTENTS

Certificate of Interested Persons .....	i
Table of Contents .....	ii
Table of Authorities .....	iii, iv
Statement of Issue .....	1
Statement of the Case .....	1-9
A. Course of Proceedings and Disposition in the Court Below .....	1-9
Underlying Undisputed Material Facts .....	9-15
A. Mrs. Paige's Personal Physician Selected Dr. Harris to Provide Care & Treatment for Her and Dr. Harris' Status as a Highly Qualified Cardiovascular Surgeon Practicing Independent of MBMC .....	9-11
B. Pre-Surgery Tests, Information and Informed Consent Properly Obtained by Dr. Harris .....	11-12
C. The AVR Surgery .....	12-13
D. Post-Op Recovery in the CVSRU .....	13-14
E. Dr. Harris Orders Mrs. Paige Back to the Operating Room .....	15
Summary of the Argument .....	15-19
Argument .....	19-42
Introduction .....	19-20
1. Plaintiff's Challenge of Circuit Court's Discovery Ruling .....	20-23
2. The Exclusion of Dr. Calvin Ramsey as an Expert Witness .....	23-29
3. The Exclusion of Expert Testimony From Charles Bridges on Matters that were Untimely Disclosed .....	29-32
4. Summary Judgment in Favor of MBMC on all Claims Raised by Plaintiff's Complaint was Proper .....	32-42
Conclusion .....	42-43
Certificate of Service .....	44

## TABLE OF AUTHORITIES

	Page
<u>Bickham v. Grant</u> , 861 So.2d 299, 300 (Miss. 2003) .....	33
<u>Bowie v. Monfort Jones Memorial Hospital</u> , 861 So.2d 1037, 1041-43, (Miss. 2003) .....	30
<u>Brown v. Baptist Memorial Hospital DeSoto, Inc.</u> , 806 So.2d 1131, 1134 (Miss. 2002) .....	33
<u>Bullock v. Lott</u> , 964 So.2d 1119, 1129-1134 (Miss. 2007) .....	42
<u>Busby v. Mazzeo</u> , 929 So.2d 369, 372-73 (Miss. App. 2006) .....	34
<u>Cf. Spinosu v. Weinstein</u> , 168 A.D.2d 32, 40 (N.Y. App. Div. 1991) .....	37
<u>Cheeks v. Bio-Medical Applications, Inc.</u> , 908 So.2d 117, 120 (Miss. 2005) .....	25, 28, 29
<u>Cole v. Wiggins</u> , 487 So.2d 203, 205 (Miss. 1986) .....	37
<u>Collins v. Joshi</u> , 611 So.2d 898, 903 (Miss. 1992) .....	23
<u>Coral Drilling Inc. v. Bishop</u> , 260 So.2d 463 (Miss. 1972) .....	39
<u>Cossitt v. Alfa Ins. Co.</u> , 726 So.2d 132, 135 (Miss. 1998) .....	22
<u>Deiorio v. Pensacola Health Trust</u> , 990 So.2d 804 (Miss. App. 2008) .....	31, 34
<u>Dodson v. Singing River Hosp. Sys.</u> , 839 So.2d 530, 534 (Miss. 2003) .....	23
<u>Ekornes-Duncan v. Rankin Medical Center</u> , 808 So.2d 955 (Miss. 2002) .....	22, 31, 36
<u>Ford Motor Company v. Tennin</u> , 960 So.2d 379-393 (Miss. 2007) .....	21, 22
<u>Griffin v. Pinson</u> , 952 So.2d 963, 966-67 (Miss. App. 2007) .....	34
<u>Hall v. Warden</u> , 796 So.2d 271, 281 (Miss. App. 2001) .....	37
<u>Hardy v. Brantley</u> , 471 So.2d 358, 369 (Miss. 1985) .....	32
<u>Harnish v. Children's Hosp. Med. Ctr.</u> , 439 N.E.2d 240, 245 (Mass. 1982) .....	37
<u>Hartel v. Pruett</u> , ____ So.2d ____, 2008 WL 4879223 (Miss., Nov. 13, 2008) .....	31
<u>Hathcock v. Southern Farm Bureau Cas. Inc.</u> , 912 So.2d 847 (Miss. 2005) .....	23
<u>Hewes v. Langston</u> , 853 So.2d 1237, 1250 (Miss. 2003) .....	21
<u>Holland v. Mayfield</u> , 826 So.2d 664, 663 (Miss. 1999) .....	20
<u>Hubbard v. Wansley</u> , 954 So.2d 951, 957-958 (Miss. 2007) .....	25, 28
<u>Jamison v. Kilgore</u> , 903 So.2d 45, 47 (Miss. 2005) .....	37

<u>Kent v. Baptist Memorial Hospital-North Miss. Inc.</u> , 853 So.2d 873 (Miss. App. 2003) . . . . .	33
<u>Miss. United Methodist Conference v. Brown</u> , 911 So.2d 478, 481-82 (Miss. 2000) . . . . .	21
<u>Morton v. City of Shelby</u> , 984 So.2d 323, 329 (Miss. App. 2007) . . . . .	20
<u>Nichols v. Tubb</u> , 609 So.2d 377 (Miss. 1992) . . . . .	22
<u>Oakwood Homes Corp. v. Randall</u> , 824 So.2d 1292, 1293-94 (Miss. 2002) . . . . .	20
<u>Poole ex rel. Poole v. Avara</u> , 908 So.2d 716 (Miss. 2005) . . . . .	24
<u>Pratt v. Sessums</u> , 989 So.2d 308, 309-10 (Miss. 2008) . . . . .	20
<u>Roberts v. Colson</u> , 729 So.2d 1242 (Miss. 1999) . . . . .	32
<u>Shelton v. Kindred</u> , 279 So.2d 642, 644 (Miss. 1973) . . . . .	20
<u>Smith v. Gilmore Memorial Hospital</u> , 952 So.2d 177, 190 (Miss. 2007) . . . . .	33
<u>Trapp v. Cayson</u> , 471 So.2d 375 (Miss. 1985) . . . . .	33
<u>Troupe v. McAvley</u> , 955 So.2d 848, 856-858 (Miss. 2007) . . . . .	25, 28, 29
<u>United American Ins. Co. v. Merrill</u> , 978 So.2d 613 (Miss. 2007) . . . . .	24
<u>University of Miss. Med. Ctr. v. Pounders</u> , 970 So.2d 141 (Miss. 2007) . . . . .	28, 29
<u>University Medical Center v. Martin</u> , ____ So.2d ____, 2008 WL 4879165 (decided November 13, 2008) . . . . .	29
<u>Walker v. Skiwski</u> , 529 So.2d 184, 186 (Miss. 1988) . . . . .	34
<u>Whittington v. Mason</u> , 905 So.2d 1261, 1264-66 (Miss. 2005) . . . . .	37

## **OTHER AUTHORITIES**

	Page
Rule 10(b)(4), <u>Mississippi Rules of Appellate Procedure</u> . . . . .	1, 20
Rule 54(b), <u>Mississippi Rules of Civil Procedure</u> . . . . .	9
Rule 56(d), <u>Mississippi Rules of Civil Procedure</u> . . . . .	7
Rule 56(e), <u>Mississippi Rules of Civil Procedure</u> . . . . .	34, 39
Rule 56(f), <u>Mississippi Rules of Civil Procedure</u> . . . . .	7, 17, 21, 22, 30
Rule 702, <u>Mississippi Rules of Evidence</u> . . . . .	5, 6, 17, 23, 39
Rule 4.04(a), <u>Uniform Rules of Circuit and County Courts</u> . . . . .	8, 18, 30, 31, 32, 39

## **STATEMENT OF ISSUE**

Defendant/Appellee, Mississippi Baptist Medical Center, Inc. (MBMC) objects to the Plaintiff/Appellant raising on appeal the issue of whether the circuit court abused its discretion in limiting discovery as to MBMC's corporate by-laws, medical staff bylaws and organization chart, as such proposed issue was not properly raised or preserved for appellate review. Moreover, such proposed issue was not raised by Plaintiff/Appellant pursuant to Rule 10(b)(4), Mississippi Rules of Appellate Procedure in designating the Record on Appeal (R.1347-1348), and Plaintiff/Appellant failed to include in the record the documents reviewed by the circuit court that were the subject of the discovery ruling. Therefore, MBMC respectfully moves the court to disregard the first issue raised by Plaintiff/Appellant herein.

Otherwise, MBMC re-states the issues properly raised as follows:

1. Whether the circuit court abused its sound discretion in excluding expert testimony from Calvin Ramsey, M.D. on the subject matter of the standard of care applicable to surgical and recovery nurses and hospital personnel in the context of a cardiovascular surgery patient where plaintiff failed to demonstrate that Dr. Ramsey had any expertise in that field.
2. Whether the circuit court abused its discretion in excluding expert testimony from Dr. Charles Bridges that was untimely disclosed by plaintiff.
3. Whether entry of summary judgment in favor of MBMC was appropriate on the record of undisputed material facts presented to the circuit court.

### **4. STATEMENT OF THE CASE**

The statement of the case included in Brief of Appellant is inaccurate and incomplete. Therefore, MBMC sets forth below the course of proceedings and the facts relevant to the issues presented for review.

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

The instant case involves the claim of medical malpractice against MBMC for the alleged wrongful death of plaintiff's decedent, Cheryl Paige, closely following Aortic Valve Replacement (AVR) cardiovascular surgery performed by Dr. William Harris at MBMC on or about February 16,

2004. The plaintiff filed a complaint against Dr. Harris and MBMC on or about March 4, 2005, and alleged that Dr. Harris inadvertently lacerated Mrs. Paige's liver during cardiovascular surgery to replace her diseased aortic heart valve; that this liver injury was not timely diagnosed and treated; and that as a consequence Mrs. Paige bled to death approximately two hours following the end of the AVR surgery (See Complaint ¶¶ 1, 5 & 7; R. 13-20).

The specific claims against MBMC were that (1) it was vicariously liable for the alleged malpractice of Dr. Harris (See Complaint ¶3; R.13-20); (2) it was liable for the alleged negligence of the hospital's cardiovascular surgical nurses; cardiovascular perfusionist and cardiovascular surgery recovery nurses in their care and treatment of Mrs. Paige (See Complaint ¶¶4 & 8; R. 13-20); and (3) it was liable for alleged negligence in allowing Dr. Harris to have staff privileges to practice cardiovascular and thoracic surgery at MBMC (See Complaint ¶¶3, 4, & 8; R. 13-20). After issue was joined an initial scheduling order was entered on or about November 10, 2005 which set a trial date of December 11, 2006, set the deadline for plaintiff to designate expert witnesses by March 15, 2006, set the deadline for defendants to designate expert witnesses by April 15, 2006 and cut-off discovery on June 30, 2006 (R. 25-26). By order dated April 10, 2006, the deadline for plaintiff to make expert witness disclosures was extended to April 15, 2006 (R. 30). On April 17, 2006 the plaintiff made expert witness disclosures. Plaintiff identified Dr. Calvin Ramsey, an internal medicine primary care physician from Lexington, Mississippi who was expected to testify that Mrs. Paige died "because of gross negligence and recklessness on the part of Dr. William Harris and others, including the medical staff at Baptist Hospital, the nurses, the surgical technicians and the Anesthesiologist"; that Dr. Harris was "negligent in causing lacerations to Mrs. Paige's liver and hepatic portal vein during the AVR surgery"; that Dr. Harris, "the Anesthesiologist" and "(MBMC's) staff Surgical Technicians, Surgical Assistants and Nurses assigned to care for Mrs. Paige were all negligent for failure to realize that Mrs. Paige was in serious trouble because of the tremendous drop in her blood pressure, particularly during the heart bypass, during the cardiac surgery and immediately following the surgery". Plaintiff's disclosure noted that Dr. Ramsey's opinions were based on his review of the medical records and "his knowledge, training, education and experience as a practicing internist" (emphasis added). (R.34-35).

Plaintiff also identified as an expert witness Jo Ann Latham, a Nurse Practitioner, who was expected to testify that a "substantial drop in blood pressure should have been a 'red flag' that Mrs. Paige was in serious trouble" and that the nursing staff attending Mrs. Paige following surgery failed to properly monitor Mrs. Paige and summon the appropriate assistance in a timely manner. (R. 35-36). Plaintiff's April 17, 2006 expert disclosure also identified Dr. Charles Bridges as an expert in cardiovascular surgery. However, the disclosure for Dr. Bridges significantly does not include any opinions that any MBMC nurses or other hospital personnel violated the standard of care applicable to them in their care and treatment of Mrs. Paige (R. 33-34).

Thereafter, by the agreement of the parties the plaintiff was allowed until June 23, 2006 to notify the defendants whether he intended to make any supplemental expert witness disclosures. (R. 214-215). Pursuant to the agreement when plaintiff chose not to make any further expert disclosures, MBMC's expert disclosures were due on July 18, 2006. On that date MBMC timely made its expert witness disclosures identifying among others Mary Berlin, R.N./Certified Cardiovascular Perfusionist at the University of Mississippi Medical Center and David McGiffin, M.D., Professor and Chairman of the Cardiovascular and Thoracic Surgery Department at the University of Alabama at Birmingham Medical Center. MBMC's expert designation provided detailed disclosures of each expert's extensive background, knowledge, training and experience in their respective fields of cardiovascular surgery and nursing care/cardiovascular perfusion during cardiovascular surgery and recovery immediately after surgery. The designation also provided detailed disclosures of the experts' respective opinions that the MBMC surgical and recovery nurses, as well as the cardiovascular perfusionist and other surgery technicians, in every respect met and/or exceeded the standard of care applicable to them in their care and treatment of Mrs. Paige. Additionally, as to the plaintiff's unsubstantiated allegation in the complaint that Dr. Harris was not competent to perform AVR surgery and that MBMC was negligent in granting his surgical privileges, the designation disclosed that was Dr. McGiffin's personal familiarity with Dr. Harris being extremely well qualified to perform cardiovascular surgery because Dr. McGiffin was involved in Dr. Harris' training in that field, and indeed, Dr. McGiffin had recommended to MBMC that Dr. Harris be granted cardiovascular surgery privileges. (R. 85-145).



By agreement of the parties the circuit court entered an amended scheduling order on November 8, 2006 re-setting the case for trial on December 3, 2007 and extending the deadline for discovery to March 15, 2007. (R. 171-172). At plaintiff's request the circuit court entered an order on April 10, 2007 further extending the discovery deadline through July 30, 2007. However, the trial date of December 3, 2007 remained unchanged. (R. 218). During the extended discovery period that stretched over two years time MBMC made available for deposition every one of its employees who were directly involved in the care and treatment of Mrs. Paige. The plaintiff deposed all the nurses and the cardiovascular perfusionist<sup>1</sup> who were involved in the caring for Mrs. Paige during cardiovascular surgery and in the cardiovascular surgery recovery unit. (R. 207). Plaintiff took the deposition of Dr. Harris, Dr. Barry Aden (the private practice anesthesiologist who Dr. Harris selected to participate in the AVR surgery) (R. 415, 414) and Dr. Michael Koury, a private practice general surgeon who Dr. Harris selected to assist him during a second surgery to try and save Mrs. Paige's life. (R. 207) MBMC responded to two sets of interrogatories, four sets of requests for production, two sets of requests for admissions and four subpoenas seeking documents. (Id.) MBMC provided complete substantive responses to every discovery request that sought information relevant to the claims actually raised in the complaint.<sup>2</sup> MBMC objected to producing its corporate by-laws, medical staff by-laws and organizational chart as not being relevant to any issue raised by the complaint. Plaintiff sought to compel production of these documents, and brought its motion to compel on for hearing on August 10, 2007. (R. 173-203, 204-217; R. Vol. 11, p. 1-71). At the hearing the court ruled from the Bench that by August 17, 2007 MBMC should produce for in camera inspection by the court MBMC's corporate and medical staff by-laws, as well as an organizational chart to allow the court to determine

---

1

A cardiovascular perfusionist is an employee of MBMC who is responsible for operating the heart-lung bypass machine during cardiovascular surgery such as the AVR surgery performed on Mrs. Paige by Dr. Harris (R. 537-539).

2

That is, whether Dr. Harris was negligent in his performance of the subject aortic valve replacement or in his post-operative care of Mrs. Paige; whether Dr. Harris was an employee of or under contract to MBMC; whether any nurse or other MBMC personnel were negligent in caring for Mrs. Paige; and whether MBMC was negligent in hiring Dr. Harris or supervising his surgical practice. (See Complaint; R. 13-20).

whether such documents contain any information relevant to any issue raised by the complaint. (R. Vol. 11, p. 50-54).<sup>3</sup> MBMC timely complied with the court's order. After reviewing the documents the circuit court entered a supplemental order finding that specified sections of the Corporate By-laws, Medical Staff By-laws, and organizational chart be produced. (R. 221-223). MBMC timely complied with the court's order.<sup>4</sup>

At the August 10, 2007 hearing, the circuit court granted plaintiff one final extension of the discovery deadline - until September 7, 2007 - for the express purpose of providing final expert witness supplemental disclosures. (R. Vol. 11, p. 68-69). Plaintiff took advantage of this opportunity to provide a supplemental disclosure of Dr. Bridges' expected expert testimony. However, the September 7, 2007 supplemental disclosure for Dr. Bridges, like the original April 17, 2006 disclosure for him, does not mention any opinion that any MBMC nurse or other hospital personnel failed to meet the standard of care applicable to them in their care and treatment of Mrs. Paige. Rather, the September 7, 2007 supplemental expert disclosure for Dr. Bridges is exclusively directed at Dr. Harris, and sets out Dr. Bridges' opinion that Dr. Harris violated the standard of care by allegedly lacerating Mrs. Paige's liver during the AVR surgery when he inserted a French Drain, and by Dr. Harris' failure thereafter to timely diagnose and treat the allegedly resulting intra-abdominal hemorrhage. (R. 953-959, R. 1000-1007, R. 1034).

From plaintiff's discovery disclosures it was readily apparent that Dr. Ramsey was not remotely qualified under Rule 702, Mississippi Rules of Evidence to give expert opinion testimony as to the standard of care applicable to the cardiovascular surgeon, cardiovascular surgical nurses, cardiovascular perfusionist and cardiovascular surgery recovery nurses whose care and treatment were at issue in this case. (R. 34-35, 73-79). Dr. Ramsey is an internist, whose practice has always been

---

3

The court entered a written order on August 28, 2007 which incorporated its oral ruling from the Bench. (R. 219-220). The written order omits reference to the organizational chart, but that document was submitted by MBMC as well to the court for in camera inspection. (R. 221-223).

4

The un-redacted documents submitted by MBMC for in camera inspection are on file with the circuit court. (R. 223). However, plaintiff has not included in the record on appeal either the portions of the documents produced to plaintiff, or the un-redacted documents on file with the circuit court.

limited to providing non-surgical primary care to patients. He has absolutely no training in surgery generally, much less cardiovascular surgery. He has never participated in the performance of cardiovascular surgery, nor has he ever participated in the post-operative recovery care of a cardiovascular surgery patient. He has never supervised cardiovascular surgery nurses or perfusionists, nor has he supervised cardiovascular surgery recovery nurses. Therefore, the defendants moved to exclude expert testimony from Dr. Ramsey based on his lack of qualifications. (R. 224-236; R. 72-90).

As part of its “gate keeping” responsibility under Rule 702, Mississippi Rules of Evidence, the circuit court held a hearing on September 28, 2007 to determine whether Dr. Ramsey had any actual expertise in the healthcare fields at issue sufficient to permit him to provide expert opinion testimony on the standard of care issues. (R. 72-90). At this hearing the plaintiff was given the opportunity to present the court with evidence that Dr. Ramsey had expert knowledge as to the standard of care applicable to cardiovascular surgeons, cardiovascular surgery nurses, cardiovascular perfusionist and cardiovascular surgery recovery nurses, notwithstanding that Dr. Ramsey’s training and experience were limited to the non-surgical specialty of internal medicine. The plaintiff wholly failed to present the court with any indication whatsoever that Dr. Ramsey had any basis of knowledge of the standard of care applicable to Dr. Harris or the MBMC hospital personnel who provided care to Mrs. Paige; and therefore, the circuit court rightly exercised its sound discretion by excluding Dr. Ramsey as an expert witness (R. Vol. 11, 72-90, 261-262).

Following the final close of all discovery, and as the December 3, 2007 trial date approached, MBMC moved on October 15, 2007 for entry of summary judgment in its favor on all claims asserted by plaintiff (R. 292-696). This motion was supported by the affidavit testimony of Mary Berlin, R.N./Cardiovascular perfusionist and Dr. David McGiffin, cardiovascular surgeon, which tracked the expected expert testimony MBMC had disclosed in detail over one year previously (R. 85-145). MBMC’s summary judgment motion was also supported by the relevant medical treatment records concerning Mrs. Paige, as well as the deposition testimony of Dr. Harris, Dr. Aden and the MBMC

nurses and perfusionist who participated in Mr. Paige's care.<sup>5</sup> Contrary to plaintiff's argument on appeal, MBMC's summary judgment motion was not supported by any expert witness whose qualifications plaintiff challenged.<sup>6</sup>

In response to MBMC's motion for summary judgment, the plaintiff did not complain that he did not have an adequate opportunity to conduct discovery, nor did he seek additional time to obtain and submit admissible evidentiary materials pursuant to Rule 56(f). Neither did plaintiff submit any affidavit or other admissible evidentiary materials from any expert witness who had been timely disclosed as to the claims against MBMC.<sup>7</sup> Rather, plaintiff sought to oppose summary judgment by submitting on October 30, 2007 his own affidavit which was not based on personal knowledge, did not contain qualified expert testimony that any MBMC personnel violated the applicable standard of care and did not create any issue of material fact as to any of the claims alleged against MBMC. (R. 823-870). Additionally, on November 1, 2007 the plaintiff submitted an untimely "supplemental" report of Dr. Charles Bridges, also dated November 1, 2007.<sup>8</sup> As the November 1, 2007 "supplemental

---

5

William Chester Waller is the cardiovascular perfusionist who was involved in Mrs. Paige's AVR surgery; Dwayne Stephenson, R.N. and Spencer Bradshaw, R.N. are the cardiovascular surgery recovery nurses who assisted Dr. Harris and Dr. Aden in the immediate post-surgical recovery care of Mrs. Paige.

6

Brief of Appellant, p. 6. As the record citation in plaintiff's appeal brief bears out (R. 1317) in response to plaintiff's motion (not designated by plaintiff to be included in the appeal record) the court reserved until trial a ruling on whether Dr. Reginal Martin, a surgeon, Dr. Michael Hughson, a pathologist who performed an autopsy on Mrs. Paige, and Dr. Barry Aden, the anesthesiologist who participated in Mrs. Paige's surgeries, were qualified to give expert testimony in their respective fields. These three witnesses were designated by Dr. Harris, not MBMC. Thus, the court did not apply any different standard as to the experts presented by MBMC, (whose qualifications were not challenged by plaintiff), and Dr. Ramsey whose qualifications were challenged by defendants and found lacking by the circuit court.

7

Curiously, plaintiff had timely identified Jo Ann Latham, R.N. as a potential expert witness against MBMC; however, plaintiff did not submit an affidavit from Ms. Latham in support of any claim that any MBMC nurses or hospital personnel failed to comply with the applicable standard of care in treating Mrs. Paige. Likewise, while the court had ruled that Dr. Ramsey was not qualified to give expert testimony as to the standard of care applicable to cardiovascular surgery and recovery nurses and cardiovascular perfusionists the plaintiff did not proffer any affidavit from Dr. Ramsey or other evidentiary materials required by Rule 56(e), Mississippi Rules of Civil Procedure in opposition to MBMC's motion for summary judgment. (R. 823-870).

8

Other than the plaintiff's own affidavit (R. 823-870), plaintiff did not include in the record on appeal his opposition to MBMC's motion for summary judgment which incorporated the November 1, 2007 "supplemental" report from Dr. Bridges. However, that document is attached as an exhibit to MBMC's motion in limine to exclude the untimely opinions of Dr. Bridges. (R. 1033-1052).

report” was the first time plaintiff had made any disclosure that Dr. Bridges might offer expert testimony against MBMC, long after the expiration of the final deadline for expert witness supplementation and only thirty-two (32) days prior to the start of trial, MBMC moved to exclude the untimely opinions of Dr. Bridges. (R. 1033-1052).

By order dated November 29, 2007, the circuit court ruled that the November 1, 2007 “supplemental” report from Dr. Bridges contained untimely disclosed new opinions that violated both the court’s scheduling order and Rule 4.04(A), Uniform Rules of Circuit and County Courts, and was unfairly prejudicial to MBMC.<sup>9</sup> Therefore, the circuit court granted MBMC’s motion to exclude the untimely disclosed opinions from Dr. Bridges.<sup>10</sup> (R. 1106).

The circuit court then proceeded to rule on MBMC’s motion for summary judgment. On the plaintiff’s claim that MBMC was vicariously liable for the treatment provided by Dr. Harris, the court found that there was no material issue of fact or legal basis to support the claim. The undisputed material facts established that Dr. Harris was neither the employee or agent of MBMC in his treatment of Mrs. Paige. She was referred to Dr. Harris by her own personal physician, and Dr. Harris in turn selected the anesthesiologist who participated in the care. Likewise, the circuit court found that plaintiff had not submitted any admissible evidence to create an issue of a fact on the claim that any MBMC nurse perfusionist or other hospital personnel provided negligently sub-standard care to Mrs. Paige. The circuit court found that there was no material issue of fact on plaintiff’s claim that MBMC was negligent in granting cardiovascular surgery staff privileges to Dr. Harris; and that, therefore, MBMC was entitled judgment as a matter of law on that claim as well. Thus, the circuit court granted MBMC’s motion for summary judgment on all the claims alleged against MBMC in the complaint.

---

9

The circuit court additionally noted that the plaintiff did not seek a continuance of the December 3, 2007 trial setting as a potential alternative method of mitigating the unfair prejudice of the untimely expert witness disclosure.

10

As Dr. Bridges was timely disclosed as an expert witness against co-defendant, Dr. Harris, the circuit court’s order excluding his untimely disclosed new opinions against MBMC did not adversely affect his ability to testify at trial against Dr. Harris.

(R. 1107-1108). Final judgment was entered in favor of MBMC pursuant to Rule 54(b).<sup>11</sup> (R. 1114).

Plaintiff moved the circuit court to reconsider the ruling granting MBMC summary judgment. (R. 1062-1100, R. 1115-1150, and R. 1233-1242), which the court denied by order dated January 9, 2008. (R. 1334).<sup>12</sup> Additionally, after final judgment had been entered in favor of MBMC, plaintiff asked the court to reconsider its earlier ruling excluding expert testimony from Dr. Ramsey based on his lack of qualifications in the relevant field of cardiovascular surgery and recovery hospital care. (R. 1298-1317).<sup>13</sup> The court likewise denied this motion to reconsider. (R. 1335).

Thereafter, plaintiff timely noticed the instant appeal (R. 1338) raising as issues the circuit court's ruling excluding expert testimony from Dr. Ramsey based on his lack of qualifications, the ruling excluding the untimely supplemental opinions of Dr. Bridges, and the ruling granting summary judgment in favor of MBMC. (R. 1347-1348). Plaintiff did not attempt to raise any issue concerning the circuit court's ruling on plaintiff's motion to compel discovery from MBMC until the Brief of Appellant was filed; and plaintiff failed to include in the Record on Appeal the documents which were the subject of the discovery dispute.

#### **UNDERLYING UNDISPUTED MATERIAL FACTS<sup>14</sup>**

##### **A. Mrs. Paige's Personal Physician Selected Dr. Harris To Provide Care & Treatment For Her and Dr. Harris' Status as a Highly Qualified Cardiovascular Surgeon Practicing Independent of MBMC.**

On or about February 24, 2000, Mrs. Paige was diagnosed with a heart murmur by her personal

---

<sup>11</sup>

The plaintiff's claims against Dr. Harris proceeded to trial which resulted in a jury verdict and monetary judgment for the plaintiff. That jury verdict and judgment against Dr. Harris is the subject of a separate pending appeal before this court; although as of the date of filing the instant brief the appeal has not yet been assigned a docket number.

<sup>12</sup>

MBMC opposed each of plaintiff's serial submissions seeking reconsideration of the summary judgment ruling. (R. 1152-1232 & R. 1323-1333).

<sup>13</sup>

MBMC's opposition to plaintiff's motion to reconsider the ruling that Dr. Ramsey was not qualified to testify as an expert witness in this case is found at R. 1323-1333.

<sup>14</sup>

The statement of underlying undisputed material fact is drawn from MBMC's motion for summary judgment and supporting exhibits. (R. 292-696). Specific record citations will be made throughout the factual statement.

gynecologist, Dr. Joel Payne (Dr. Payne). Thereafter, Mrs. Paige was referred by Dr. Payne to Thomas Thompson, M.D. (Dr. Thompson), a cardiologist, for follow-up. Dr. Thompson treated and monitored Mrs. Paige's condition for a period of time, and as her condition deteriorated, he referred her to Dr. Harris for evaluation and AVR surgery. [See medical records of Dr. Payne, attached to Motion for Summary Judgment as Exhibit "A" (R. 298); medical records of MBMC, p. MBMC 0027-0028 (R. 315-316); Deposition of Dr. Harris pp. 19-20 (R. 345-346), 87 (R.354), 112 (R.338), 336 (R.407), 343-44 (R.411-412)].

On January 30, 2004, Dr. Harris saw Mrs. Paige upon the request of Dr. Thompson. (R.315, 345-346). Following this presentation, Dr. Harris agreed with the need for AVR surgery. After Dr. Harris discussed the procedure with Mrs. Paige including, among other things, the risks and benefits of AVR, Mrs. Paige gave her informed consent to proceed with the operation. (Deposition of Dr. Harris at 105 (R.360); Medical Records, pp. MBMC0005 (R.299), and MBMC0027-28 (R.315-316). Dr. Harris selected Dr. Barry Aden (Dr. Aden), through his anesthesiology group, Jackson Anesthesia Associates, to assist in the surgery by providing anesthesia care. (Deposition of Dr. Harris at 345-46 (R.413-414). Ultimately, the AVR surgery was scheduled for February 16, 2004. Dr. Harris was not employed by or under contract with MBMC when he treated Mrs. Paige. (Deposition of Dr. Harris at 327 & 342 (R.402 & R.410). Rather, Dr. Harris is an independent physician in private practice. Dr. Harris is a partner with Cardiovascular Surgery Clinic. (R.410) While Dr. Harris has staff privileges to practice cardiovascular and thoracic surgery at MBMC, he is not paid by MBMC, and he was not the agent of MBMC in his care and treatment of Mrs. Paige. Dr. Harris and/or Cardiovascular Surgery Clinic billed patients directly, with no involvement from MBMC. (Deposition of Dr. Harris at 328 (R.403), 331-32 (R.404-405), 342 (R.410).

Dr. Harris is a well trained, highly qualified and skilled cardiovascular and thoracic surgeon, and he was entirely competent to perform AVR surgery and follow-up care on Mrs. Paige. At the time of Mrs. Paige's surgery, on February 16, 2004, Dr. Harris was Board Certified in Cardiovascular and Thoracic Surgery; he had completed post medical school graduate residency and fellowship programs in cardiovascular and thoracic surgery at the University of Alabama Birmingham (UAB) from 1997

to 1999; he had been on the full time teaching faculty in the Department of Cardiovascular and Thoracic Surgery at UAB from 1999 to 2000; he had been on the full time teaching faculty in the Department of Cardiovascular and Thoracic Surgery at the University of Mississippi Medical Center from 2000 to 2001; he had been in private practice of cardiovascular and thoracic surgery as a partner in the Cardiovascular Surgical Clinic in Jackson, Mississippi beginning in 2001, and he had staff privileges to practice cardiovascular and thoracic surgery (including AVR), at St. Dominic Hospital, Central Mississippi Medical Center, and MBMC continuously since 2001. He has never had his staff privileges restricted at any hospital. It was entirely reasonable for Dr. Harris to have been granted staff privileges to practice cardiovascular and thoracic surgery at MBMC at the time of Mrs. Paige's surgery (See Affidavit of Dr. David McGiffin (R.581-590); Deposition of Dr. Harris, pp. 11-14 (R.341-344), 148 (R.379), 195 (R.383), 314 (R.401), 354-355 (R.422-423)).

**B. Pre-Surgery Tests, Information And Informed Consent Properly Obtained By Dr. Harris.**

Prior to AVR surgery, MBMC nurses obtained the pre-operative lab test and chest x-ray ordered by Mrs. Paige's surgeon, Dr. Harris on January 30, 2004. Dr. Harris' written orders in the pre-operative record instructed the nurses that repeating pre-operative lab test and a chest x-ray on the day of surgery was unnecessary because such tests and x-rays had been done within the past thirty (30) days, and he was satisfied with the results. (See MBMC records, pp. MBMC-0009-0011 (R.302-304); Dr. Harris' deposition, pp. 113-120 (R.366-373); See also Affidavits of Dr. McGiffin (R.581-590) and Ms. Mary Berlin, R.N./Cardiovascular Perfusionist (R.641-647). Additionally, the results of these lab tests and the chest x-ray were known to Dr. Harris, and it was his exclusive responsibility to order repeat studies, if he determined such were necessary (Deposition of Dr. Harris, pp. 75-76 (R.352-353); and 113-120 (R.366-373); McGiffin and Berlin affidavits (R.581-590 & R.641-647). In a pre-operative nursing assessment of Mrs. Paige, her history of Hodgkin's Lymphoma with radiation treatment was noted (MBMC records, p. MBMC-0079 (R.329). In their respective pre-operative evaluations of Mrs. Paige, both Dr. Harris and Dr. Aden were well aware of her history of Hodgkin's Lymphoma with radiation treatment, hypothyroidism, and that she had a pleural effusion on her pre-



operative chest x-ray (See MBMC record, pp. MBMC0017-29 (R.306-317), and MBMC0032 (R.317); Deposition of Dr. Harris, pp. 56-57 (R.347-348), 264 (R. 396); Deposition of Dr. Aden, p. 265 (R.527)). No alleged deficiency in pre-operative nursing assessment or history could have possibly caused or contributed to any injury to or the death of Mrs. Paige. (See Affidavits of McGiffin (R. 581-590) and Berlin (R.641-647)). Prior to surgery, Dr. Harris also obtained Mrs. Paige's informed consent for the AVR procedure. Deposition of Dr. Harris at 105-06 (R.360-361), 142 (R.378). Dr. Harris was exclusively responsible for obtaining informed consent from Mrs. Paige for the AVR surgery and any associated treatment or procedures (Affidavits of McGiffin (R.581-590) and Berlin (R.641-647)).

**C. The AVR Surgery.**

On February 16, 2004, Mrs. Paige underwent AVR surgery. Plaintiff alleges in his complaint that Dr. Harris somehow inadvertently lacerated Mrs. Paige's liver during AVR surgery causing her to hemorrhage uncontrollably (R.13-17). Plaintiff further alleges that a drop in Mrs. Paige's blood pressure and decreases in her blood values (hemoglobin, hematocrit and platelets) during surgery should have alerted Dr. Harris that Mrs. Paige was bleeding uncontrollably. Plaintiff claims without substantiation that MBMC personnel negligently failed to monitor Mrs. Paige's vital signs (including blood pressure) and blood values during surgery and timely report these to Mrs. Paige's physicians, Dr. Harris and Dr. Aden. (R.35-36). However, plaintiff's allegations against the MBMC personnel are simply not supported by the undisputed facts of record. During the course of the operation, Dr. Harris was continuously aware of Mrs. Paige's vital signs not only by being timely alerted by hospital personnel, but also through personally viewing the continuous vital signs on a monitor screen visible to him during surgery. (Dr. Harris Deposition at 248-49 (R.387-388). Additionally, Dr. Harris was timely informed of Mrs. Paige's blood values during surgery. (See Dr. Harris's deposition at 346-49 (R.414-417); MBMC record MBMC0045 (R.328)). It was the exclusive responsibility of Mrs. Paige's physicians, and not the nurses, or perfusionist to determine the clinical significance, if any, of any changes in Mrs. Paige's vital signs, blood values, or other aspects of her condition; and to determine what, if any, treatment was appropriate (Affidavits of McGiffin (R.581-590), Berlin (R.641-647)). The

decreases in Mrs. Paige's blood values during surgery (hemoglobin, hematocrit and platelet count) were timely reported to Dr. Harris. He determined the blood values to be normal and expected for a patient such as Mrs. Paige who was receiving anti-coagulation medications in connection with being on a cardiovascular bypass perfusion pump, and were not indicative of unexpected or uncontrolled bleedings. (MBMC record p. MBMC0045 (R.328); See Deposition of Dr. Harris, pp. 347-348 (R.415-416), Deposition of Dr. Aden, pp. 241-44 (R.517-520), Deposition of Chet Waller, pp. 44-45 (R.542-543), 68-71 (R.544-547), 82-83 (R.548-549); and Affidavits of McGiffin (R.581-590) and Berlin (R.641-647)). Mrs. Paige did have an episode of hypotension (decrease in systolic blood pressure) just after Dr. Harris directed that she come off the cardiovascular bypass perfusion pump and the corresponding anticoagulation was reversed with a medication called Protomine. This decrease in blood pressure was immediately known to Dr. Harris and Dr. Aden. (MBMC record pp. MBMC0039-0041 (R.323-325); See Deposition of Dr. Harris, pp. 252-53 (R.389-390) and 348 (R.416), and Dr. Aden, p. 96 (R.454)). Such an episode of hypotension in a patient coming off the bypass perfusion pump and having anticoagulation therapy reversed is not unusual (See Deposition of Harris, p. 349 (R.349), Deposition of Dr. Aden, pp. 101-103 (R.455-457), and 122-124 (R.474-476) and Deposition of Waller, pp. 44-45 (R.542-543), 68-71 (R.544-547), 82-83 (R.548-549) and Affidavits of McGiffin (R.581-590), Berlin (R.641-647)), and was treated by Dr. Aden administering medications to increase and stabilize her blood pressure in the normal range. (Deposition of Dr. Harris, pp. 252-256 (R.389-393); and Deposition of Dr. Aden, pp. 106-110 (R.459-463)). Mrs. Paige's vital signs remained stable for the next forty-five (45) minutes she remained in the operating room. Thereafter, she was transported from the operating room to the adjacent Cardiovascular Surgery Recovery Unit ("CVSRU" sometimes also referred to as the "ICU") in stable condition accompanied by Dr. Aden and followed closely by Dr. Harris. (See MBMC record pp. MBMC0040, & MBMC0095 (R.324 & 337), Deposition of Dr. Aden pp. 153-55 (R.489-491), 159 (R.495), 171 (R.498), 182 (R.501), Deposition of Dr. Harris, pp. 243 (R.386), 255 (R.392); and Affidavits of McGiffin (R.581-590), Berlin (R.641-647)).

**D. Post-op Recovery In The CVSRU.**

Plaintiff also alleges without substantiation that MBMC nurses were negligent in not

appropriately monitoring Mrs. Paige's condition after surgery and timely reporting problems with her condition to her treating physicians. Again, the undisputed facts of record wholly undermine plaintiff's claim against the MBMC nurses. Upon arrival in the CVSRU, Mrs. Paige was immediately appropriately assessed by nurses Dwayne Stevenson, R.N. and Spencer Bradshaw, R.N. in the presence of Dr. Aden. At that time, approximately 12:36 p.m., her vital signs were normal and stable (See medical records p. MBMC-0095 (R.337); Deposition of Stevenson pp. 10-13 (R.552-555), 29-30 (R.565-566), 86-87 (R.569-570), Deposition of Bradshaw pp. 27-33 (R.572-578), Deposition of Dr. Harris, pp. 255 (R.393), 257 (R.394), 350 (R.418), and Deposition of Dr. Aden, pp.154-159 (R.490-495), 171-172 (R.498-499), 182 (R.501), 196-200 (R.502-506)). Approximately four (4) minutes later her vital signs began to be unstable. Nurses Stevenson and Bradshaw immediately recognized this change in Mrs. Paige's condition and made it known to Dr. Aden (who was immediately in attendance at the bedside) and Dr. Harris (who was only a few feet away from the bedside and responded immediately) (MBMC record p. MBMC0095 (R.337), Deposition of Dr. Harris pp. 259 (R.395), 350-354 (R.418-422), Deposition of Dr. Aden pp. 154-155 (R.490-491), 159 (R.495), 165-166 (R.496-497), 171-172 (R.498-499), 182 (R.501), 196 (R.502), 210 (R.507), 213 (R.508); and Deposition of Mr. Stevenson pp. 10 (R.552), 13-19 (R.555-561), 25 (R.564), 29-30 (R.656-566), 43 (R.567), 77 (R.568), 86-87 (R.569-570)). Thereafter, Dr. Harris and Dr. Aden remained in continuous attendance and directed all efforts to stabilize Mrs. Paige's condition, determine the underlying cause of her problem and treat it. Nurse Stevenson, Nurse Bradshaw and other ancillary hospital personnel timely and appropriately followed the orders and instructions of Dr. Harris and Dr. Aden. There was no unreasonable delay by any nurse or hospital personnel in responding to any physician order for diagnostic tests, equipment, or other resources. (MBMC records pp. MBMC0095 (R.337), MBMC0089 (R.335), MBMC0086 (R.332), MBMC0088 (R.334), MBMC0090 (R.336); Deposition of Dr. Harris pp. 216-217 (R.384-385), 257-259 (R.394-396), 292-296 (R.398-400), 352-354 (R.420-422), Deposition of Dr. Aden pp. 159 (R.495), 165-66 (R.496-497), Deposition of Mr. Stevenson pp. 43 (R.567), 77 (R.568), and Affidavits of Dr. McGiffin (R.581-590) and Dr. Berlin (R.641-647)).

**E. Dr. Harris Orders Mrs. Paige Back To The Operating Room.**

After extensive efforts to stabilize Mrs. Paige in CVSRU, Dr. Harris determined to return Mrs. Paige to the operating room for exploratory surgery at about 1:30 p.m. (13:30) (MBMC records pp. MBMC0007-0008 (R.300-301), MBMC 0035-0036 (R.321-322) and Deposition of Dr. Aden, pp. 165 (R.165), and 273 (R.533)). Mrs. Paige was timely and appropriately transported back to the operating room from the CVSRU. (Deposition of Dr. Harris pp. 353 (R.421)). During the exploratory surgery, Mrs. Paige was timely and appropriately monitored, and all physicians orders were timely and appropriately carried out. (MBMC record pp. MBMC0035-0036 (R.321-322), MBMC0044 (R.327); Deposition of Dr. Harris pp. 352-354 (R.420-422), and Affidavits of McGiffin (R.581-590), and Berlin (R.641-647)). Despite all the efforts to save Mrs. Paige's life she ultimately died during the exploratory surgery (MBMC record pp. MBMC0007-0008 (R.300-301)).

**SUMMARY OF THE ARGUMENT**

There is absolutely no merit to any of the contentions raised by plaintiff/appellant on appeal; and thus, the judgment entered in favor of defendant/appellee, Mississippi Baptist Medical Center, Inc. (MBMC) should be affirmed. The Circuit Court of Hinds County exercised sound discretion in making its rulings regarding the conduct of discovery and the admissibility of evidence in this case. The plaintiff was given a full and fair opportunity over a more than two year period to substantiate the claims he alleged in his complaint against MBMC. However, the undisputed material facts presented to the circuit court established that MBMC was entitled to judgment as a matter of law. Therefore, summary judgment in favor of MBMC was appropriately entered on all three of the claims alleged in the complaint.

In his complaint for the alleged wrongful death of Cheryl Paige closely following Aortic Valve Replacement (AVR) cardiovascular surgery by co-defendant, Dr. William Harris at MBMC plaintiff claimed that Dr. Harris somehow managed to inadvertently lacerate Mrs. Paige's liver during the surgery which resulted in uncontrolled hemorrhage that ultimately caused her to bleed to death. Plaintiff sought to impose liability upon MBMC on three basis; (1) vicarious liability for the alleged substandard care of Dr. Harris in causing the uncontrolled bleeding, and in not timely diagnosing and

treating it prior to her death; (2) liability for alleged substandard care of the hospital personnel (surgical nurses, cardiovascular perfusionist, and cardiovascular surgery recovery nurses), who assisted Dr. Harris during and immediately following surgery, in not properly monitoring Mrs. Paige's vital signs; and (3) liability for alleged negligence in granting medical staff privileges to Dr. Harris to perform cardiovascular surgery at MBMC when he allegedly was not competent to do so.

Plaintiff's argument on appeal that the circuit court abused its discretion in restricting discovery is utterly without merit.<sup>15</sup> The only specific discovery ruling complained of by plaintiff on appeal concerns his motion to compel production of the MBMC's Corporate By-laws, Medical Staff By-laws and organizational chart. This court ordered MBMC to produce the full text of these documents in camera to determine whether anything contained therein was possibly relevant to any issue raised by the complaint. After reviewing the document the court found that some portions may be relevant and ordered production of those specific portions. While it is not clear whether plaintiff's complaint on appeal is that the circuit court abused its discretion in not ordering production of the entirety of the bylaws and organizational chart, or that the timing of the ruling prejudiced plaintiff's ability to adequately respond to MBMC's summary judgment motion. However, what is clear is that neither argument has any merit. In the first instance, plaintiff did not include in the record on appeal the documents on file with the circuit court that were the subject of dispute. Therefore, there is no substantive basis for plaintiff to cogently argue that the circuit court abused its discretion in making a relevancy determination. From a procedural standpoint the circuit court properly reviewed the subjects of the discovery dispute on an item-by-item basis and promptly issued a definitive ruling. The circuit court cannot be faulted for not ruling any earlier on plaintiff's motion when it was plaintiff's responsibility to pursue a ruling. Furthermore, plaintiff cannot credibly claim that he was prejudiced by the timing of the discovery ruling when he did not seek a delay in consideration of summary

---

15

As noted above, MBMC objects to plaintiff's attempts to belatedly raise as an issue on appeal the circuit court's ruling on his motion to compel as such was not properly raised or preserved in the court below; and moreover, plaintiff did not include in the appeal records the very documents which were the subject of the discovery ruling he now seeks to challenge as erroneously prejudicial to the outcome of the case. Therefore, MBMC urges the court to ignore this issue.

judgment pursuant to Rule 56(f).

The circuit court likewise properly exercised its sound discretion in performing its “gatekeeping” role under Rule 702, Mississippi Rules of Evidence to determine that plaintiff’s proposed expert witness, Dr. Calvin Ramsey, was not sufficiently knowledgeable of the standard of care applicable to cardiovascular surgeons, cardiovascular surgery nurses, cardiovascular perfusionists or cardiovascular surgery recovery nurses to be qualified to give expert testimony in this case. Although the circuit court noted that Dr. Ramsey was a non-surgical internist rather than a cardiovascular surgeon, the decision to exclude Dr. Ramsey as an expert on the standard of care applicable to the cardiovascular surgery and cardiovascular surgery recovery hospital personnel in this case was not stridently limited to an examination of the classification or title of Dr. Ramsey’s specialty practice. The circuit court held an evidentiary hearing on defendants’ motion to exclude Dr. Ramsey as an expert to permit plaintiff the opportunity to shoulder his burden to demonstrate that Dr. Ramsey did indeed possess the requisite knowledge of the standard of care applicable to the subject healthcare providers, notwithstanding his non-surgical specialty. The plaintiff could not demonstrate any expertise on the part of Dr. Ramsey in the subject field because it was plainly apparent that he had none. The entirety of Dr. Ramsey’s education, training and practice experience was limited to the non-surgical primary care of patients. The plaintiff could not demonstrate to the court that Dr. Ramsey had ever participated in any surgery, much less cardiovascular surgery; or that he had ever observed or had the responsibility for supervising any surgical nurses, perfusionist or surgery recovery nurses. Thus, it was entirely appropriate for the circuit court to refuse to accept Dr. Ramsey as an expert in the field of hospital care during cardiovascular surgery and surgical recovery.

The circuit court likewise properly exercised its sound discretion in excluding the proposed “supplemental” expert testimony of Dr. Charles Bridges in response to MBMC’s motion for summary judgment. The proposed testimony from Dr. Bridges against MBMC was disclosed by plaintiff for the first time only thirty-two (32) days before the long established trial date, long after the final extended deadline set by the court for expert witness supplemental disclosures, and in gross violation of Rule

4.04A, Uniform Rules of Circuit and County Court Practice.<sup>16</sup> In response to MBMC's motion to exclude the untimely disclosed proposed expert testimony by Dr. Bridges, the plaintiff neither asserted a legitimate excuse for the untimely disclosure, nor asked the court for a continuance of the trial setting. Thus, there was no abuse of discretion by the court in excluding the proposed expert testimony by Dr. Bridges against MBMC.<sup>17</sup>

Entry of summary judgment in favor of MBMC on all three (3) of the claim's alleged against it in the complaint was entirely correct based on the undisputed material facts presented to the circuit court. The record is unequivocal in establishing conclusively that Dr. Harris was neither the employee or agent of MBMC when he treated Mrs. Paige, and thus, MBMC can have no vicarious liability for any alleged malpractice by Dr. Harris. In his care for Mrs. Paige, Dr. Harris was in private practice as a partner with the Cardiovascular Surgery Clinic (R.410). He was neither employed by nor under contract with MBMC (R. 402 & 410). Moreover, Mrs. Paige came under the care of Dr. Harris because she was referred to him by her personal physician, not because she relied on MBMC to select a cardiovascular surgeon for her. Dr. Harris merely had staff privileges to perform surgery at MBMC, the same status he had at two (2) other local hospitals - St. Dominic and Central Mississippi Medical Center.<sup>18</sup> (R.423). Secondly, the undisputed material facts establish that there was absolutely no

---

<sup>16</sup>

The initial trial date had already been continued once, and the approaching trial date transgressed by plaintiff's untimely attempted supplemental expert disclosure had been set for more than twelve (12) months. (R. 171-172).

<sup>17</sup>

Additionally, even had the court not excluded Dr. Bridge's proposed testimony against MBMC as untimely, entry of summary judgment in favor of MBMC would still be proper because such proposed testimony did not create a material issue of fact on any of the three (3) claims alleged against MBMC. The proposed testimony of Dr. Bridges does not even attempt to address the factual issue of whether Dr. Harris was an employee or agent of MBMC; while the proposed testimony addresses the alleged substandard care of Dr. Harris it does not actually articulate a violation of a standard of care applicable to the nurses and perfusionist employed by MBMC; and no where does the proposed testimony of Dr. Bridges support the allegations that Dr. Harris was not competent to perform cardiovascular surgery and that MBMC was negligent in granting him staff privileges. (R. 1033-1052; R. 1152-1155).

<sup>18</sup>

Additionally, although plaintiff did not allege a claim in his complaint that Dr. Aden, the anesthesiologist who participated in the AVR surgery was negligent, and that MBMC was vicariously liable for his treatment; it is noteworthy that MBMC can likewise have no such liability in the premises as Dr. Aden was not its employee or agent. He was in private practice with Jackson Anesthesia Associates (JAA)group, and Dr. Harris - not MBMC- selected Dr. Aden to assist with the surgery by request through JAA.

substandard care provided by any of the nurses or the perfusionist. Without dispute, Mrs. Paige was in the continuous presence of Dr. Harris and/or Dr. Aden from the time the AVR surgery began through her ultimate death during a second exploratory surgery. This includes the brief time she was cared for in the Cardiovascular Surgery Recovery Unit when she began to be unstable and efforts were undertaken by Dr. Harris and Dr. Aden to diagnose the cause of her problems and save her life. During the entirety of their care of Mrs. Paige hospital personnel were strictly in a supportive role of assisting the physicians in their direct care of Mrs. Paige. The standard of care applicable to the involved hospital personnel required that they monitor the patient's vital signs, report changes to the attending physicians, and timely follow the instructions given by these physicians. The record undisputably establishes that the hospital personnel complied with this standard of care. Throughout the AVR surgery and recovery Dr. Harris and Dr. Aden were continuously made aware of the patient's condition. It was the exclusive responsibility of the physicians, and not the nurses or the perfusionist, to determine the significance of any change in the patient's condition, and diagnose the cause of any condition or to initiate any treatment. (R. 581-590, R. 641-647). Finally, there is absolutely no material issue of fact in the record to support any claims that Dr. Harris was not competent to perform cardiovascular surgery or that MBMC was negligent in granting him medical staff privileges. Indeed, the record establishes that Dr. Harris is a well trained highly qualified cardiovascular surgeon and that MBMC properly granted him staff privileges. (R. 581-590). Therefore, as the undisputed material facts presented to the circuit court establish MBMC's entitlement to judgment as a matter of law the ruling of the circuit court in MBMC's favor should be affirmed.

### **ARGUMENT**

### **INTRODUCTION**

The principal issue raised by plaintiff on appeal is whether summary judgment was appropriately entered in favor of defendant MBMC. Subsidiary to that ultimate issue are plaintiff's arguments that the circuit court abused its discretion in a discovery ruling on the production of documents, and in evidentiary rulings concerning the admission of proposed expert testimony. Review of the procedural and substantive facts in the record, as well as the applicable law, clearly reveals that



the plaintiff was given a full and fair opportunity to support his claims against MBMC; and that on the undisputed material facts properly submitted to the circuit court MBMC was indeed entitled to entry of judgment in its favor as a matter of law on each of the three (3) claims of liability plaintiff raised in his complaint. Thus, the final judgment in favor of MBMC should be affirmed on appeal.

### **1. Plaintiff's Challenge of Circuit Court's Discovery Ruling**

In his first assignment of error plaintiff makes a rather muddled argument that the circuit court abused its discretion in its ruling on plaintiff's motion to compel production of "MBMC's Corporate By-laws, Medical Staff By-laws and organizational chart". (Brief of Appellant, pp. 8-10). It is not clear whether plaintiff is challenging the scope of the court's ruling (i.e. that the court should have ordered production of additional documents);<sup>19</sup> or merely complaining about the timing of the ruling in relationship to the ruling on MBMC's motion for summary judgment (i.e. that plaintiff was somehow left ill-prepared to respond to MBMC's summary judgment motion). What is clear is that the circuit court was well within the exercise of its sound discretion in its management of discovery in this case. Holland v. Mayfield, 826 So.2d 664, 663 (Miss. 1999) ("The control of discovery is a matter committed to the sound discretion of the trial judge."); Morton v. City of Shelby, 984 So.2d 323, 329 (Miss. App. 2007) (abuse of discretion standard applies to discovery ruling preliminary to a ruling on a summary judgment motion).

Plaintiff would mislead this court into the view that MBMC refused to engage in any meaningful discovery, hid records and ambushed him with untimely expert disclosures such that he

---

19

As noted above, MBMC objects to plaintiff raising this issue on appeal as it was not included in the statement of the issues plaintiff made pursuant to Rule 10(b)(4), Mississippi Rules of Appellate Procedure (R. 1347-1348); and moreover, plaintiff did not include in the record either the portions of the disputed documents the court ordered produced, or the unredacted documents reviewed by the court in camera (which remain on file in the circuit court) and found not subject to production in full on the basis of lacking relevancy. This court can hardly say that the circuit court's determination on the relevancy, and hence discoverability, of certain documents was an abuse of discretion when the complaining party has not placed the documents before the court for review. Therefore, this court should ignore this issue on appeal. Pratt v. Sessums, 989 So.2d 308, 309-10 (Miss. 2008) (appellant's duty to "see to it that the record contained all data essential to an understanding and presentation of matters relied upon for reversal on appeal"; judgment of trial court must be affirmed when record insufficient for analysis of whether trial court abused discretion); Oakwood Homes Corp. v. Randall, 824 So.2d 1292, 1293-94 (Miss. 2002) (where appellant fails to place the necessary record pertaining to an assignment of error in the appeal record the court is unable to consider issue); Shelton v. Kindred, 279 So.2d 642, 644 (Miss. 1973) ("It must be presumed that the rulings of the trial court was correct, and such presumption will prevail, unless the actual record supports a contrary view").

was deprived of the fair opportunity to oppose MBMC's motion for summary judgment. However, a review of the procedural record of the course of proceedings in the court below exposes the folly of plaintiff's claim. MBMC freely and timely provided access to all relevant factual discovery in this case. Every medical record or other document relating to the care and treatment of Mrs. Paige was produced early in the case by MBMC. Every person employed by MBMC involved in the care of Mrs. Paige was made available for deposition by plaintiff. (R. 204-217). Plaintiff had the opportunity to depose both co-defendant Dr. Harris and a corporate representative of MBMC to confirm that Dr. Harris was neither employed by or under contract with MBMC, and to fully explore Dr. Harris' credentials to perform cardiovascular surgery competently.<sup>20</sup>

MBMC did make legitimate relevancy objections to discovery that was far afield of the claims raised by plaintiff's complaint. On plaintiff's motion to compel the circuit court engaged in the very exercise of discretionary analysis endorsed by this court - it took the discovery request and each objection raised item-by-item, and against the framework of the issues raised by the complaint determined whether the material requested was relevant. Ford Motor Company v. Tennin, 960 So.2d 379 (Miss. 2007), Hewes v. Langston, 853 So.2d 1237, 1250 (Miss. 2003); and Miss. United Methodist Conference v. Brown, 911 So.2d 478, 481-82 (Miss. 2000). The court reviewed the complaint and initially ordered MBMC to produce for in camera inspection the entirety of MBMC's corporate by-laws, medical staff by-laws and organizational chart:

---

20

While plaintiff's challenge to the circuit court's discovery ruling is specifically directed to the production of selected portions of MBMC's corporate by-laws, medical staff by-laws, and organizational chart deemed relevant by the circuit court following in camera review, plaintiff makes a passing erroneous claim that MBMC did not comply with the court's order to produce the results of assessments of Dr. Harris to have staff privileges or the results of any investigation into the death of Mrs. Paige. (R. 219). As correctly reported to the circuit court, MBMC did indeed produce the documents confirming Dr. Harris' appointment and reappointments to the medical staff which were the only documents it had responsive to the discovery request. (R. Vol. 11, pp. 36, 49-50, 57 & 70-71). Additionally, as far as any peer review investigation into Mrs. Paige's death, as also correctly reported to the circuit court, the only documents reviewed were the medical records which were produced, and there were no written results of a peer review investigation to produce. (R. Vol. 11, pp. 33, 35, 50). Of course, again none of these discovery responses or documents were included in the record by plaintiff because such were not the subject of an issue on appeal. Were there any substance to plaintiff's claim that MBMC failed to comply with the court's discovery order he should have sought enforcement pursuant to Rule 37. Ford Motor Company v. Tennin, 960 So.2d 379-393 (Miss. 2007). Tellingly, no such motion was made by plaintiff. Additionally, plaintiff did not seek a continuance pursuant to Rule 56(f), Mississippi Rules of Civil Procedure of the court's consideration of MBMC's summary judgment motion on the claim that MBMC had failed to comply.

to determine whether or not there are any provisions of those documents that are relevant to the hiring, supervision and review of doctors to whom staff privileges are granted by the hospital and whether or not there are any provisions that relate to patient care

(R. 50-52). Following in camera review of the documents the circuit court took a very liberal view of relevancy, and ordered MBMC to produce specified portions of the documents that even arguably touched on the above subjects (R. 221-223). It is undisputed that MBMC timely complied with this order. Any complaint by plaintiff on appeal that this order came too late to avoid him being “ambushed” by MBMC’s summary judgment motion is indeed hollow.<sup>21</sup> In the first instance, if the by-laws and organizational chart were so centrally relevant to plaintiff’s claims, then it was his obligation to not only file a motion to compel, but to obtain a ruling on the discovery motion. Ford Motor Company at 393; Cossitt v. Alfa Ins. Co., 726 So.2d 132, 135 (Miss. 1998). Plaintiff has no legitimate complaint that the timing of the circuit court’s discovery ruling caused him undue prejudice when it was he who waited until the waning days of over two years of protracted discovery to properly seek a ruling on his motion to compel. More significantly, the plaintiff never sought to delay the court’s consideration of MBMC’s motion for summary judgment pursuant to Rule 56(f) on the basis that he needed additional time to conduct additional discovery or prepare an evidentiary submission utilizing the produced portions of the by-laws and organizational chart. The plaintiff now argues that he was prevented the opportunity to retain the services of a “hospital administrator expert” to review the produced by-laws and organizational chart and presumably opine on the issues of whether Dr. Harris was competent to perform cardiovascular surgery and whether MBMC acted reasonably in granting staff privileges to him. However, he never raised this supposed need for more time in the trial court,

---

21

Plaintiff’s argument that he was “ambushed” by MBMC’s discovery disclosures and his reliance on Ekonnes-Duncan v. Rankin Medical Center, 808 So.2d 955 (Miss. 2002) and Nichols v. Tubb, 609 So.2d 377 (Miss. 1992) (Brief of Appellant pp. 8-9) is strange indeed considering that essentially the verbatim expert witness affidavits of Dr. McGiffin and Nurse/Perfusionist Berlin relied on by MBMC were disclosed to plaintiff over a year prior to the filing of MBMC’s motion for summary judgment (Compare R. 85-92 with R. 582-589 & R. 641-644).

and thus, his complaint should fall on deaf ears now.<sup>22</sup>

Plaintiff's argument that the discovery rulings show a pattern of bias on the part of Circuit Judge Bobby Delaughter favoring MBMC is as recklessly irresponsible as it is unsupported by the factual record and the legal authorities relied upon by plaintiff. There is not the slightest hint in the record of any extra-judicial relationship between Judge Delaughter and MBMC or its counsel. Plaintiff never made any suggestion whatsoever in the circuit court that Judge Delaughter should have recused himself from presiding over this case. Yet, plaintiff relies on the decision of Hathcock v. Southern Farm Bureau Cas. Inc., 912 So.2d 847 (Miss. 2005); Dodson v. Singing River Hosp. Sys., 839 So.2d 530, 534 (Miss. 2003); and Collins v. Joshi, 611 So.2d 898, 903 (Miss. 1992), all of which address the issue of whether a circuit court judge should have recused himself due to an actual or perceived conflict of interest. Contrary to plaintiff's baseless argument, the record reflects that Judge Delaughter treated all of the parties with the impartiality that the law expects. Indeed, Judge Delaughter granted every one of plaintiff's multiple requests for extensions of the discovery and expert witness designation deadlines. (R. 30, 171, 218, Vol. 11, pp. 57-71). It is beyond ridiculous for plaintiff to suggest that Judge Delaughter was biased in favor of MBMC by granting its motion for summary judgment without giving plaintiff an adequate opportunity to conduct discovery when plaintiff never even ask Judge Delaughter pursuant to Rule 56(f) to allow additional discovery or time to prepare his response to the summary judgment motion.

## **2. The Exclusion of Dr. Calvin Ramsey as an Expert Witness**

Pursuant to Rule 702, Mississippi Rules of Evidence, the circuit court has the responsibility to inquire into the qualifications of witnesses proffered as experts and determine if the witnesses are truly expert "within a purported field of knowledge" Comment Rule 702. Thus, the trial court exercises its discretion as a "gatekeeper" to determine whether the tendered witness has actual expertise that is

---

22

On the subject of Dr. Harris' competency to practice cardiovascular surgery plaintiff had access to Dr. Harris' credentials for more than one year prior to the close of discovery (See. e.g. R. 85-92), and he had the opportunity to depose both Dr. Harris and a corporate representative of MBMC on the subject. It is beyond absurd to argue that plaintiff did not have an ample opportunity to support a claim that Dr. Harris was not competent to practice cardiovascular surgery; if indeed there was any merit to such a claim.

“relevant and reliable”. Id. A witness who maybe well qualified as an expert in one field is not necessarily qualified in other fields. Thus, the trial court’s discretionary determination is necessarily individualized based on the particular field of specialized knowledge at issue, and whether the proffered expert has the background, education, training and experience in the particular field to be accepted as an expert. It is the burden of the proponent of a proffered expert witness to satisfactorily demonstrate that the witness is an expert in the relevant particular field at issue such that his or her testimony is reliable. The trial court’s discretionary decision on the admissibility of expert testimony is given great deference on review and should not be reversed unless the decision “was arbitrary and clearly erroneous, amounting to an abuse of discretion”. United American Ins. Co. v. Merrill, 978 So.2d 613 (Miss. 2007); Poole ex rel. Poole v. Avara, 908 So.2d 716 (Miss. 2005).

In the instant case the plaintiff alleged in his complaint that Dr. Harris provided substandard care in allegedly lacerating Mrs. Paige’s liver during cardiovascular surgery and in allegedly failing to timely diagnose and treat an intra-abdominal hemorrhage that allegedly resulted from a liver laceration. Correspondingly, plaintiff’s complaint alleged that MBMC’s cardiovascular surgery nurses, cardiovascular perfusionist and cardiovascular surgery recovery nurses provided substandard care in their supportive roles of assisting the cardiovascular surgeon and anesthesiologist during surgery and immediate post-operative recovery.<sup>23</sup> In order to prevail on these claims the law requires that the

---

23

Plaintiff also argues belatedly that Dr. Ramsey should have been allowed to testify on a “phantom” claim that the anesthesiologist involved in the surgery, Dr. Aden, was negligent in his use of a transesophageal echocardiogram (TEE) probe and that MBMC was negligent in allowing Dr. Aden to use a TEE probe without proper credentials. This is a “phantom” claim because plaintiff never raised a claim in his complaint either that Dr. Aden was guilty of malpractice, or that MBMC was liable for any allegedly substandard care by Dr. Aden which caused any injury to Mrs. Paige (See complaint R. 13-20); and moreover, plaintiff never sought to amend his complaint to raise any such claim. It is noteworthy that the record citation in the plaintiff/appellant’s brief to Dr. Ramsey’s expert report the trial court allegedly should have considered in ruling on the admissibility of Dr. Ramsey’s testimony is not the one before the court at the time it ruled on defendant’s motion to exclude (Supp. R. pp. 1021), but rather an unsworn supplemental report from Dr. Ramsey submitted by plaintiff on motion to reconsider more than three months after the court’s ruling excluding Dr. Ramsey as an expert and after the court had granted MBMC’s motion for summary judgment (R. 1298-1317). Such an untimely filing is a poor basis of claiming error on either the evidentiary ruling or the entry of summary judgment. Regardless of whether a claim regarding an anesthesiologist’s attempted placement of a TEE probe was “phantom” or real, Dr. Ramsey showed no more actual expert knowledge in that field, or the subsidiary field of credentialing physicians in the use of TEE probes, than he did in the field of the standard of care applicable to nurses and perfusionist while assisting cardiovascular surgeons and anesthesiologist during cardiovascular surgery and recovery. There is nothing in plaintiff’s response to the motion to exclude testimony from Dr. Ramsey. (R. Vol. 11, pp. 74-88; R. Vol. 1, pp. 24-35, 73-76) that indicates that Dr. Ramsey had ever been trained in the use of a TEE, that he had ever performed a TEE on any patient, or even placed a TEE probe in a preliminary position, or that he had any specialized knowledge of the interplay of the separate skills and responsibilities between

plaintiff establish through the testimony of an expert qualified in the field that the standard of care applicable to each of these health care professionals in the context of condition presented by Mrs. Paige was indeed violated in such a way to proximately cause or contribute to Mrs. Paige's death. Cheeks v. Bio-Medical Applications, Inc., 908 So.2d 117, 120 (Miss. 2005). Therefore, with regard to the claims against MBMC personnel the relevant field of specialized knowledge which a truly qualified expert must possess is cardiovascular surgery and recovery nursing and perfusionist care.<sup>24</sup>

Through expert witness disclosures plaintiff proffered Dr. Calvin Ramsey as a proposed expert in the field of cardiovascular surgery, and more particularly in the field of the standard of care applicable to a cardiovascular surgeon, cardiovascular surgery nurses, cardiovascular perfusionist and cardiovascular surgery recovery nurses. (R. 34-35, 73-79). From these disclosures it was readily apparent that Dr. Ramsey was not remotely qualified to give relevant and reliable expert testimony on the subject of whether each of these health care professionals acted in accordance with the standard of care applicable to them during cardiovascular surgery and recovery. Dr. Ramsey is a non-surgical internal medicine primary care physician from Lexington, Mississippi. Beyond the mere classification of Dr. Ramsey's specialty it is clear that he has no basis of knowledge of what the standard of care requires of surgeons, nurses, or perfusionist during the AVR surgery or during immediate post-operative recovery from such cardiovascular surgery. Hubbard v. Wansley, 954 So.2d 951, 957-958 (Miss. 2007); Troupe v. McAvley, 955 So.2d 848, 856-858 (Miss. 2007). There is absolutely no indication whatsoever in the record that Dr. Ramsey had any training or experience in the performance of cardiovascular surgery or in recovering such patient's immediately after AVR surgery, or that he has ever participated in or even observed such specialized care. He has not participated in the training

---

anesthesiologist, who only preliminarily insert a TEE probe around a patient's airway tube, maintained by the anesthesiologist during surgery, and the cardiologist who is then called in to the operating room to ultimately position the TEE probe and perform the TEE (which is for the purpose of obtaining a sonographic image of the heart from inside the chest. (T. 254-259)).

24

Plaintiff alleges that Dr. Harris was not competent to perform cardiovascular surgery and that MBMC was negligent in granting him medical staff privileges to practice that specialty at MBMC. Of course, testimony from an expert with specialized knowledge of the competency of cardiovascular surgeons would be likewise required to sustain those claims.

or supervision of cardiovascular surgical or recovery nurses or perfusionists, and thus, he had no basis of knowledge of what the standard of care requires of such personnel in that setting. Moreover, he has no basis of knowledge of what may be variations of normal vital signs and lab values during and immediately following cardiac bypass surgery; or what effect specialized medications administered during cardiovascular surgery may be expected to have on a patient; or what the expected interactions are between the cardiovascular surgeon, anesthesiologist, surgical nurses, perfusionist and recovery nurses during cardiovascular surgery and immediate post-operative recovery.

In response to the defendants' motion to exclude expert testimony from Dr. Ramsey (Supp. R. pp. 1-21, R. 224-236 and R. Vol 11, pp. 74-82 and 85)<sup>25</sup> the court held on evidentiary hearing to allow plaintiff the opportunity to shoulder his burden to demonstrate that Dr. Ramsey had sufficient expertise in the relevant fields notwithstanding that he did not practice cardiovascular surgery (R. Vol. 11, pp. 72-88). During that hearing the plaintiff did not attempt to demonstrate that Dr. Ramsey had any actual knowledge of the standard of care applicable to the surgeon, nurses or perfusionist caring for a patient during cardiovascular surgery or recovery.

By Mr. McClelland (plaintiff's counsel):  
First of all, Dr. Ramsey is not being offered as an expert  
in the area of surgery . . .

(R. Vol. 11, p. 83)

Rather, plaintiff argued that the standard of care testimony he proposed to offer from Dr. Ramsey applicable to the surgical and surgical recovery personnel who "assisted Dr. Harris" was actually outside the field of surgery (R. Vol. 11, pp. 85-88). However, the plaintiff could not articulate how the proposed field of expertise differed from the treatment of surgical patients, or how Dr. Ramsey might have such specialized knowledge of the standard of care applicable to these nurses and perfusionist. The circuit court had little trouble recognizing that plaintiff sought to make a distinction without a difference. Dr. Ramsey was proposed to offer testimony about the standard of care applicable to

---

25

Co-defendant Dr. Harris originally filed the motion to exclude expert testimony from Dr. Ramsey and MBMC subsequently joined the motion. (R. Vol 11, p.85).

“members of the surgical team,” and he plainly had no basis to know what the standard of care required of nurses or a perfusionist assisting a cardiovascular surgeon during surgery and recovery.

On appeal the plaintiff argues that Dr. Ramsey was rejected as an expert witness merely because he is not a cardiovascular surgeon, and that the circuit court abused its discretion by “failing to even consider those portions of Dr. Ramsey’s report that were unrelated to cardiovascular surgery”. Those assertions are flatly wrong on both counts. In the first instance, the circuit court did not exclude Dr. Ramsey simply because he did not carry the title of “cardiovascular surgeon” (R. Vol. 11, pp. 79-80); rather, Dr. Ramsey was excluded because he had no familiarity with the standard of care applicable to the surgeon, nurses and perfusionist in the context of cardiovascular surgery and complications that developed from surgery in the cardiovascular surgery recovery unit. Secondly, none of the opinion testimony from Dr. Ramsey proposed by plaintiff included any field but the care and treatment provided during cardiovascular surgery and recovery. Even the issue relating to the use of a transesophageal echocardiogram (TEE) probe by the anesthesiologist (which was never raised by plaintiff in an amended complaint) involves care during cardiovascular surgery by a member of the surgical team.

As the circuit court noted in both the ruling from the bench (R. Vol. 11, p. 88) and its corresponding written order granting defendants’ motion to exclude Dr. Ramsey as an expert witness, the entirety of the treatment provided by MBMC’s personnel was in the context of cardiovascular surgery; and plaintiff “failed to demonstrate that Dr. Ramsey has sufficient familiarity with the standards of cardiovascular surgery to allow him to provide the jury with reliable expert testimony in a matter arising out of complications following aortic valve replacement surgery”. (R. 261).<sup>26</sup>

Dr. Ramsey may very well have sufficient expertise in the field of internal medicine to provide opinion testimony as to the standard of care applicable to physicians, or perhaps even nurses, in the

---

26

In the oral ruling from the bench following the evidentiary hearing where plaintiff outlined the scope of the proposed testimony from Dr. Ramsey (R. Vol. 11, pp. 83-87) the court noted: “Everything concerns the negligence of the surgical team. This is outside the apparent scope of Dr. Ramsey’s field of expertise. The burden is on the plaintiff to demonstrate that the expert is familiar with the standards of care of the various members of the surgical team in this case. That’s not been done. So your motion is granted”.



context of non-surgical primary care. However, as was clear to the circuit court, he clearly is not qualified to give reliable expert testimony on the standard of care applicable to any health care provider during cardiovascular surgery or recovery in the context of complications following AVR surgery.

The circumstance addressed by this court in Cheeks is strikingly similar to the instant case. There, the plaintiff proposed to offer expert testimony from a primary care physician on the subject of the standard of care applicable to nurses and physicians in the specialized context of dialysis. Like Dr. Ramsey in the instant case, the proffered expert in Cheeks was a primary care physician who had absolutely no experience treating patients in the specialized field, had never participated in the subject procedure and had never operated any of the equipment involved. The trial court exercised its sound discretion in granting the defendant's motion to exclude expert testimony from the primary care physician. The plaintiff was left without the support of an expert witness, and thus, summary judgment for the defendant health care providers followed. This court affirmed.

Likewise, this court's decisions in Hubbard and Troupe support the circuit court's discretionary ruling in excluding Dr. Ramsey as an expert in the particular field at issue. In Hubbard this court noted:

The law empowers a trial judge to determine whether a proffered expert is qualified to testify and does not restrict exercise of this power to the trial stage only. That is, a judge has as much power to resolve doubts on qualifications of proffered experts during the summary judgment stage as he has during the trial stage.

Id. at 956.

In affirming the trial court's exercise of discretion in excluding a neurosurgeon from testifying as to the standard of care applicable to an internal medicine physician in treating a patient with a condition neurosurgeons otherwise treat this court noted that plaintiff had failed to offer any evidence that the neurosurgeon had any familiarity with the standard of care applicable to the defendant as a primary care physician in treating the condition. Id. at 958. Similarly, in Troupe, the exclusion of a neurosurgeon as an expert was affirmed, not simply because the neurosurgeon did not practice the same specialty as the defendant physician, but because the plaintiff could not demonstrate that the proffered expert had the background, training or experience to have a familiarity with the standard of care applicable to treatment in a different line of practice. Id. at 857-858. As in Cheek, the evidentiary

ruling excluding expert testimony resulted in summary judgment being granted the defendants.

The decisions of this court in University of Miss. Med. Ctr. v. Pounders, 970 So.2d 141 (Miss. 2007) and University Medical Center v. Martin, \_\_\_\_ So.2d \_\_\_\_, 2008 WL 4879165 (decided November 13, 2008) are readily distinguishable, and do not support plaintiff's argument that it was error to exclude Dr. Ramsey as a standard of care expert in the instant case. In both Pounders and Martin this court noted that:

[a] trial judge's decision as to whether a witness is qualified to testify as an expert is given the widest possible discretion. (Emphasis added) Pounders at 146, Martin at ¶8. (emphasis added)

In both cases the court affirmed the trial court's discretionary decision to admit expert testimony from the witness. Moreover, in both cases the proffered experts demonstrated a basis of familiarity with the specialized knowledge that was at issue. In Pounders, the expert was found to have sufficient background, training and experience to testify on the issue of causation. In Martin, a primary care physician was accepted by the trial court as an expert in the field of emergency medicine and allowed to testify as to the standard of care applicable to health care providers in that setting. The distinction between the expert witness allowed to testify in Martin and Dr. Ramsey is that while the expert witness there was not then engaged in the practice of emergency medicine, he had thirty-four (34) years of experience in emergency medicine and he continued to treat patients for emergency conditions in his primary care clinic. Thus, he was found to have a basis for knowledge of the standard of care applicable to the physicians and nurses involved in the emergency room setting. Conversely, Dr. Ramsey had absolutely no experience treating patients such as Mrs. Paige.

**3. The Exclusion of Expert Testimony From Charles Bridges on Matters that were Untimely Disclosed**

The circuit court was well within the exercise of its sound discretion in excluding expert testimony from Dr. Charles Bridges that was the subject of an untimely supplemental disclosure by plaintiff. Dr. Bridges is a cardiovascular surgeon who was timely designated by plaintiff to testify only as to the standard of applicable Dr. Dr. Harris. Throughout over two years of discovery and several extensions of the deadline for making substantive expert witness disclosures there was never any

indication that Dr. Bridges would be offered to testify that any of the MBMC personnel violated the standard of care applicable to them. As the December 3, 2007 trial date approached the court granted plaintiff's request to extend the deadline to make final supplemental expert disclosures by September 7, 2007. (R. Vol. 11, p. 68). While plaintiff availed himself of the opportunity to make supplemental disclosures as to Dr. Bridges' expected testimony against Dr. Harris there was still nothing in the September 7, 2007 supplemental disclosures for Dr. Bridges directed at MBMC personnel (R. 1034, R. 953-959). MBMC then timely moved for entry of summary judgment in its favor as to all claims raised by plaintiff in his complaint and supported the motion with evidentiary materials and sworn affidavits from Dr. David McGiffin, a cardiovascular surgeon and Mary Berlin, R.N./Cardiovascular Perfusionist (both of whose detailed expert testimony was disclosed more than one year previously, R. 85-145) (R. 292-696). On November 1, 2007 only thirty-two (32) days from trial the plaintiff submitted a "supplemental" report from Dr. Bridges in opposition to MBMC's motion for summary judgment. MBMC moved to exclude the supplemental opinions of Dr. Bridges because such were not only grossly untimely under the court's September 7, 2007 final deadline for expert disclosures, the supplementation also violated Rule 4.04A, Uniform Rules of Circuit and County Court Practice which mandates that all expert disclosures must be made at least sixty (60) days before trial "(a)bsent special circumstances". (R. 1033-1052). Plaintiff neither claimed any special circumstances or excuse for the untimely supplementation, nor requested that the court grant a continuance of either summary judgment consideration pursuant to Rule 56(f) or the December 3, 2007 trial setting.

Excluding the untimely supplemental opinions of Dr. Bridges was in accord with the discretion permitted the circuit court. Bowie v. Monfort Jones Memorial Hospital, 861 So.2d 1037, 1041-43, (Miss. 2003). The plaintiff knew from the day he filed his complaint that to sustain his claims against MBMC hospital personnel that he would be required to present the testimony of a qualified expert with actual knowledge of the standard of care applicable to these nurses and perfusionist. He had over two years time to timely disclose a qualified expert against MBMC. The December 3, 2007 trial setting had been in place for more than a year and was actually the second time the case had been set for trial. Dr. Bridges had been identified by plaintiff as an expert against Dr. Harris for more than a year. There was

no legitimate reason for the plaintiff to have waited until thirty-two (32) days prior to trial to attempt to “ambush” MBMC with new expert opinions directed against it. Indeed, it would have been unfairly prejudicial to MBMC to have permitted such an untimely supplementation. Ekornes-Duncan v. Rankin Med. Ctr., 808 S.2d 955 (Miss. 2002); Hartel v. Pruett, \_\_\_\_ So.2d \_\_\_\_, 2008 WL 4879223 (Miss., Nov. 13, 2008) (trial court’s evidentiary ruling excluding untimely expert witness supplementation not an abuse of discretion) Deiorio v. Pensacola Health Trust, 990 So.2d 804 (Miss. App. 2008) (exclusion of expert witness designated forty-two days prior to trial in violation of URCCC 4.04(A) not an abuse of discretion; resulting summary judgment in favor of defendant affirmed).

On appeal plaintiff argues that it was an abuse of discretion to have excluded the proposed expert testimony from Dr. Bridges against MBMC because: (a) Dr. Bridges’ supplemental opinions were allegedly based on review of additional records, (b) the circuit court allegedly applied an inconsistent standard in excluding Dr. Bridges’ supplemental testimony and not excluding untimely expert disclosures by MBMC; and (c) the circuit court should have considered a less harsh remedy than exclusion. Unfortunately for plaintiff none of these arguments carries any weight. In the first place, plaintiff has never identified what “additional records” Dr. Bridges supposedly reviewed to arrive at his supplemental opinions that were not long available for Dr. Bridges to review. All of the subject medical records in the case were produced to plaintiff prior to the April 17, 2006 original designation of Dr. Bridges as an expert against Dr. Harris. Thus, there was no legitimate reason that plaintiff could not have given Dr. Bridges all of the medical records to review on the front end.<sup>27</sup> Secondly, the plaintiff is flatly wrong in asserting that he made a request to exclude untimely expert designation by MBMC which was denied by the circuit court. Tellingly, he provides no record citation for this assertion. What the record does bear out is that expert witness affidavits of Dr. McGiffin and Nurse/Perfusionist Berlin on which the circuit court relied in granting summary judgment are substantially the same as the detailed expert disclosures made by MBMC over a year earlier (R. 85-92,

---

<sup>27</sup>

Plaintiff can not possibly mean to claim that the “additional records” reviewed by Dr. Bridges that supposedly triggered his untimely supplemental report were the portions of MBMC’s corporate and medical staff by-laws or its organizational chart as Dr. Bridges makes absolutely no reference to these documents in this November 1, 2007 supplemental report (R. 1049-1051).

R. 581-590 and R. 641-645). Finally, it is passing strange for the plaintiff to now complain that the circuit court should have employed a less drastic remedy than exclusion when plaintiff never asked the circuit court to consider any alternative remedy, such as a continuance of the December 3, 2007 trial setting. Indeed, the plaintiff made no response whatsoever to MBMC's motion to exclude the untimely opinions of Dr. Bridges. At the time, plaintiff was quite anxious to keep the long set trial date. Unfortunately for him the circuit court was not going to permit his last minute attempt to ambush MBMC with untimely expert witness supplementation.

Plaintiff's reliance on Roberts v. Colson, 729 So.2d 1242 (Miss. 1999) is misplaced as the procedural circumstances there are not the same as those in the instant case. In Roberts the untimely supplemental expert disclosures were still more than six months before the scheduled trial date. Thus, the potential prejudice to the defendant was not great and could have been cured with revised scheduling without adversely affecting the trial setting. Most significantly, the untimely supplementation in Roberts did not violate URCCC 4.04(A) as was done in the instant case.

**4. Summary Judgment in Favor of MBMC on all Claims Raised by Plaintiff's Complaint was Proper**

As previously noted, plaintiff raised three types of claims against MBMC in his complaint: (1) that Dr. Harris was allegedly the employee or agent of MBMC, and it is therefore vicariously liable for his alleged malpractice; (2) that MBMC is liable for the alleged failure of its nurses and perfusionist to comply with the standard of care applicable to them; and (3) that Dr. Harris was not competent to perform cardiovascular surgery and MBMC was negligent in granting him medical staff privileges. The circuit court recognized that under the undisputed material facts presented to it MBMC was entitled to judgment as a matter of law on all three claims (R. 1107-1108). This was a correct result and should be affirmed by this court.

The undisputed material facts plainly establish that Dr. Harris was not the employee or agent of MBMC when he treated Mrs. Paige. He was a cardiovascular surgeon in a private practice partnership who had surgical privileges at three local hospitals, including MBMC. Mrs. Paige was referred to Dr. Harris by her own cardiologist, not MBMC. Thus, under well established precedent

MBMC could have no vicarious liability for any alleged acts or omissions by Dr. Harris that may have caused the death of Mrs. Paige. Hardy v. Brantley, 471 So.2d 358, 369 (Miss. 1985) (hospital not vicariously liable where patient selects the physician who then admits the patient to the hospital); Trapp v. Cayson, 471 So.2d 375 (Miss. 1985) (no vicarious liability of a hospital where patient's own physician makes referral to another physician who has staff privileges at a hospital), Bickham v. Grant, 861 So.2d 299, 300 (Miss. 2003) (hospital has no vicarious liability for staff physician not employed by or under contract with the hospital); Kent v. Baptist Memorial Hospital-North Miss. Inc., 853 So.2d 873 (Miss. App. 2003) (hospital not vicariously liable for treatment by a staff physician where patient's own physician had selected the referral physician).

It would not appear that plaintiff challenges on appeal MBMC's entitlement to summary judgment on the claim of vicarious liability for the treatment by Dr. Harris. See Brief of Appellant, pp. 16-22. Plaintiff does not assert any material factual issue to support his claim, and neither does he cite any legal authorities on this point. Therefore, summary judgment should be affirmed on this separate claim.

In order to prevail on his claim based on the care and treatment provided by MBMC's nurses and perfusionist it was incumbent on plaintiff to present sworn testimony from a qualified expert witness that the nurses and/or perfusionist deviated from the standard of acceptable professional practice in a way that proximately caused or contributed to Mrs. Paige's death. Brown v. Baptist Memorial Hospital DeSoto, Inc., 806 So.2d 1131, 1134 (Miss. 2002). See also Smith v. Gilmore Memorial Hospital, 952 So.2d 177, 190 (Miss. 2007) (expert testimony required to establish the standard of care applicable to a surgical nurse; summary judgment for hospital employer of nurse appropriate in absence of such expert testimony). As noted above, the circuit court properly exercised its wide discretion in finding that Dr. Ramsey was not qualified to offer expert testimony as to the standard of care applicable to MBMC's cardiovascular surgery and cardiovascular surgery recovery nurses and cardiovascular perfusionist. Still, in response to MBMC's motion for summary judgment plaintiff never proffered any sworn testimony from Dr. Ramsey stating any of his unqualified opinions that MBMC's personnel provided substandard care. Rather, after the circuit court granted MBMC's

summary judgment motion plaintiff submitted an unsworn “preliminary report” from Dr. Ramsey in support of plaintiff’s motion to reconsider. (R. 1233, 1261-1268). This “preliminary report” would not have been sufficient under Rule 56(e) to create an issue of fact on the claim against the hospital even had Dr. Ramsey been a qualified expert and the material had been timely submitted before summary judgment was granted. Walker v. Skiwski, 529 So.2d 184, 186 (Miss. 1988); Griffin v. Pinson, 952 So.2d 963, 966-67 (Miss. App. 2007); and Busby v. Mazzeo, 929 So.2d 369, 372-73 (Miss. App. 2006) (Rule 56(e) requires that summary judgment materials be sworn; unsworn expert witness disclosures and unsworn letter or report from proposed expert not admissible to defeat summary judgment on standard of care issue). Thus, if this court were to reach the anomalous decision that Dr. Ramsey was somehow qualified to provide expert testimony against MBMC’s personnel, plaintiff still failed to properly preserve a claim that Dr. Ramsey would have actually provided sworn testimony sufficient to defeat summary judgment.

As also noted above, the circuit court properly exercised its considerable discretion in excluding the untimely disclosed proposed testimony of Dr. Bridges found in his November 1, 2007 “supplemental report”. Still, even if the circuit court had not excluded the proposed testimony from Dr. Bridges as untimely, MBMC would still be entitled to summary judgment on the nurse/perfusionist claim as Dr. Bridges did not sufficiently create a material issue of fact as to standard of care violations by the nurses or perfusionist. Deiorio. Dr. Bridges’ supplemental expert opinions as to the alleged failure to meet the applicable standard of care remained limited to physician care, and not nursing or perfusionist care. Dr. Bridges’ November 1, 2007 supplemental expert opinion does not assert that he is familiar with the standard of care applicable to nurses or perfusionist; nor does Dr. Bridges offer expert opinion that any particular nurse or perfusionist violated the standard of care. At most, the November 1, 2007 supplemental expert disclosure states Dr. Bridges’ opinion that Dr. Harris injured Mrs. Paige’s liver when he inserted a Blake drain during the AVR surgery which caused Mrs. Paige to bleed; that this bleeding was “masked by the use of pressor agents” ordered by Dr. Harris, so that what was really “wrong” with Mrs. Paige “was not recognized by Dr. Harris, Dr. Aden and other members of the surgical, nursing and anesthesia teams”. Dr. Bridges does not give an opinion that the

nurses or some other particular ancillary hospital personnel violated the standard of care by not making a medical diagnosis of what was allegedly actually “wrong” with Mrs. Paige. Rather, he gives the opinion that:

“The failure to make the diagnosis of hemorrhage more rapidly and the failure to check a hemoglobin value in the ICU immediately by way of an arterial blood gas fell below the standard of care. Furthermore, the failure to administer the appropriate quantity of blood (5 to 7 units rather than one unit) and the delay in administering blood due to the failure to make the correct diagnosis all fell below the standard of care to a reasonable degree of medical certainty. Injuring her liver in the first place also clearly fell below the standard of care. All multiple failures by Drs. Harris and Aden led to Mrs. Paige’s death.” (Emphasis added)

Dr. Bridges offers no actual opinion that the nurses or hospital personnel violated the standard of care applicable to them in the alleged failure to diagnose or order tests or treatment, no doubt because such non-physicians cannot by law perform such functions that are exclusively reserved to physicians. While Dr. Bridges may note that, like the physicians present, the nurses did not “recognize” an alleged intra-operative hemorrhage, he certainly does not offer the opinion that it was their duty under the standard of care applicable to non-physicians to make a medical diagnosis or order treatment. Moreover, he does not offer any opinion that any of the nurses failed to timely and appropriately monitor Mrs. Paige’s vital signs and blood values and timely report such to Mrs. Paige’s physicians, or that there was any failure to timely follow the physician’s orders. Finally, in contrast to the opinions expressed against Dr. Harris and Dr. Aden, Dr. Bridges does not offer any opinion that any alleged failure on the part of any nurse or hospital personnel to comply with the applicable standard of care caused any injury to or the death of Mrs. Paige. (R. 1049-1051).

Plaintiff had timely identified as a potential expert witness, Jo Ann Latham, a nurse practitioner with some indication of a background in cardiovascular nursing care. (R. 35-36). However, plaintiff chose not to oppose MBMC’s summary judgment motion with a sworn affidavit from Ms. Latham. It can only be assumed that she was not actually prepared to state under oath that any of the MBMC personnel provided substandard care. That is certainly understandable in light of the undisputed testimony of Dr. Harris, Dr. Aden, Mr. Waller, Mr. Stephenson, and Mr. Bradshaw that the expected function of these nurses and perfusionist was to assist the physician’s present; that it was not the



expected responsibility of these non-physicians to determine the significance of any vital signs or lab values, or to make any diagnosis, or to initiate any treatment without the order of a physician present; and that the nurses and the perfusionist did in fact timely inform Dr. Harris and Dr. Aden of all changes in Mrs. Paige's vital signs and lab values, and otherwise timely and appropriately carried out the instructions of the attending physicians present. Based on these undisputed material facts the circuit court was correct in granting summary judgment to MBMC on the nurse/perfusionist claim. That decision should be affirmed herein. Ekornes-Duncan at 958-59 (Even had plaintiff's standard of care expert not been excluded from testifying due to untimely disclosure, defendant hospital was entitled to summary judgment because it was undisputed that the plaintiff's treating physicians were in charge of the patient care and were looking for the very condition the plaintiff claimed that the nurses should have diagnosed).

The circuit court was likewise correct in granting summary judgment to MBMC on the claim that it was negligent in granting medical staff privileges to Dr. Harris to practice cardiovascular surgery at MBMC. The plaintiff did not even attempt to submit any materials in response to MBMC's summary judgment on this point. The undisputed material facts establish that Dr. Harris is an extremely well trained highly qualified cardiovascular surgeon and that MBMC had absolutely no reason not to accept the recommendation of Dr. David McGiffin, the Chairman of the Cardiovascular and Thoracic Surgery Department at the University of Alabama Birmingham, who was personally involved in training and practicing with Dr. Harris. Neither Dr. Ramsey nor Dr. Bridges were prepared to create a material issue of fact on this claim even had they been allowed to testify against MBMC (R. 34-35 & R. 1049-1051).

Beyond the granting of summary judgment on the three claims that were actually raised by plaintiff's complaint and properly before the circuit court for dispositive ruling, plaintiff claims that this court should reverse the final judgment in favor of MBMC based on two additional claims that were not properly raised in the trial court: (a) the alleged failure by MBMC to obtain informed consent from Mrs. Paige for the AVR surgery performed by Dr. Harris; and (b) the alleged negligence of MBMC in allowing Dr. Aden to insert a transesophageal echocardiogram (TEE) probe around the

anesthesia airway tube he was responsible for maintaining during surgery prefatory to a cardiologist coming into the operating room to actually place the probe into the appropriate position and perform a TEE. There are a host of procedural and substantive reasons for rejecting plaintiff's belated pursuit of these claims.

Beside the procedural flaw that the plaintiff never raised a claim against MBMC in his complaint for any alleged failure to obtain informed consent, the undisputed material facts and applicable law absolutely foreclose such a claim even had it been timely alleged. The undisputed material facts in the record clearly establish that it was Dr. Harris, and not any MBMC nursing personnel, who was responsible for and did obtain informed consent from Mrs. Paige for the AVR surgery. Documented in the medical record is Mrs. Paige's signed acknowledgment that she had consented to the AVR surgery after Dr. Harris had explained to her the nature of the surgery, its purpose, possible risk or consequences of the surgery and possible alternatives. (R. 299, 315-316, 360). While the law requires that a patient's informed consent be obtained for medical treatment, including surgery, there is no requirement that a hospital obtain separate informed consent from that obtained by the treating physician or surgeon for the same treatment or surgical procedure. Rather, the responsibility from obtaining informed consent is discharged by the physician or surgeon responsible for directing care. Jamison v. Kilgore, 903 So.2d 45, 47 (Miss. 2005); Whittington v. Mason, 905 So.2d 1261, 1264-66 (Miss. 2005); Cole v. Wiggins, 487 So.2d 203, 205 (Miss. 1986) ("A physician is under a duty under some circumstances to warn his patient of the known risks of proposed treatment or surgery, so that the patient will be in a position to make an intelligent decision as to whether he will submit to such treatment or surgery") (emphasis added). Hall v. Warden, 796 So.2d 271, 281 (Miss. App. 2001) ("If there is a physician-patient relationship the doctor automatically has the duty to inform and procure the consent of the patient as it relates to the proposed treatment") (emphasis added). Cf. Spinosu v. Weinstein, 168 A.D.2d 32, 40 (N.Y. App. Div. 1991) (holding surgical assistant who provided follow-up care to patient following surgery had no duty to provide informed consent where assistant did not actually perform the surgery for which plaintiff's alleged informed consent was not given); and Harnish v. Children's Hosp. Med. Ctr., 439 N.E.2d 240, 245 (Mass. 1982) (holding that

doctor who assisted surgeon in operation had no duty to obtain patient's informed consent and noting that it would be unreasonable for all individuals who assist in an operating room to obtain the patient's informed consent).

The case authorities cited by plaintiff (Brief of Appellant, p. 19) simply do not support a claim that MBMC had a duty to obtain informed consent for the surgery performed by Dr. Harris - especially in the undisputed factual circumstance where the medical records document that Dr. Harris obtain informed consent from the patient for the subject surgery.

Plaintiff's attempt to fabricate a claim against MBMC based on the allegation that Dr. Aden, the anesthesiologist who was involved in the AVR surgery, some how caused Mrs. Paige's death by lacerating her esophagus with a TEE probe is the very type of litigation mischief the rules of civil procedure and evidence are designed to prevent. Recall that the only mechanism of injury and death plaintiff alleged in his complaint was that Dr. Harris inadvertently lacerated Mrs. Paige's liver during the AVR surgery, and that she bled to death because the allegedly resulting hemorrhage was not timely diagnosed. It was this exclusive allegation as to Mrs. Paige's cause of death that was the subject of two years worth of discovery, including expert witness disclosures. Long after the final deadline for expert witness disclosures, and indeed, after MBMC had submitted its motion for summary judgment based on the three theories of liability actually raised in the complaint that were all tied to the assertion that Dr. Harris caused Mrs. Paige's death by lacerating Mrs. Paige's liver, and only thirty-two (32) days prior to trial, plaintiff submits a supplemental report from Dr. Bridges that raises the possibility that Dr. Aden may have been the one to have caused Mrs. Paige's death by puncturing her esophagus when he attempted to initially place a TEE probe around the anesthesia airway tube in Mrs. Paige's mouth and throat that Dr. Aden was responsible for maintaining during surgery. This new potential claim alleged that Dr. Aden was not trained to perform a transesophageal echocardiogram (TEE), so he may have been incompetent even to partially insert the probe around the airway tube he routinely inserts; and consequently, MBMC must have been negligent in granting him staff privileges to perform a TEE. Mind, plaintiff did not seek leave to amend his complaint to add Dr. Aden as a defendant at that late date (the "supplemental report" by Dr. Bridges was dated November 1, 2007), as the two year statute

of limitations had long since expired on such a claim; nor did plaintiff seek to amend his complaint to raise the derivative claim against MBMC on this factually unsubstantiated new theory. With a firm trial date only thirty-two (32) days away, plaintiff did not seek a continuance of the trial to actually try and factually support and pursue the theory. Plaintiff merely hoped to create enough last minute confusion to survive MBMC's motion for summary judgment.<sup>28</sup>

As noted above, the circuit court properly recognized that it was way too late in the proceedings to condone plaintiff's attempt to ambush MBMC with an factually unsupported new theory that grossly violated URCCC 4.04A and fundamental fairness. Therefore, the circuit court exercised its sound discretion and excluded Dr. Bridges' untimely disclosed opinions on the claim involving Dr. Aden's use of the TEE probe. The circuit court's ruling on this point was correct and should be affirmed for the reasons set forth above.<sup>29</sup>

Apart from the fatal procedural defects in plaintiff's attempt to overturn summary judgment and pursue a "TEE claim", there is no factual substance in the record to create a material issue of fact to support such a claim. First, the assumption that Mrs. Paige suffered an injury to her esophagus prior

---

28

Plaintiff also argues that Dr. Ramsey should likewise have been permitted to testify as an expert witness as to the allegations of Dr. Aden negligently attempted to assert a TEE probe; that Dr. Aden lacerated Mrs. Paige's esophagus; that Dr. Aden was not qualified to insert a TEE probe; and that MBMC was negligent in allowing Dr. Aden to make any use of a TEE probe. Plaintiff cites to an unsworn letter from Dr. Ramsey where he expresses opinions on the subject. However, this report was not submitted by plaintiff to the court until after the final judgment had been entered. (R. 1233). Additionally, just as plaintiff failed to demonstrate that Dr. Ramsey was qualified to testify in the field of cardiovascular surgery nursing and perfusion care, there is absolutely no indication in the record that Dr. Ramsey had any background, training or experience in the insertion or placement of TEE probes, the performance of TEE, the respective coordinate skills and roles of anesthesiologists and cardiologists in the initial placement of TEE probes around anesthesia airway tubes by an anesthesiologist and the placement of the probe in the proper position in the esophagus by a cardiologist for actual performance of the TEE by a cardiologist. Therefore, there was no basis under Rule 702, Mississippi Rules of Evidence to accept any expert testimony from Dr. Ramsey on this claim even had it been timely raised and submitted in sworn evidentiary form required by Rule 56(e).

29

There is quite another procedural problem in plaintiff's attempt to overturn on appeal the judgment in favor of MBMC based on the claim Dr. Aden caused Mrs. Paige's death by lacerating her esophagus with a TEE probe. Plaintiff asserted a factually inconsistent claim - that Dr. Harris caused Mrs. Paige's death by lacerating her liver with a French Blake drain. Plaintiff sought to impose separate liability against both MBMC and Dr. Harris on the claim that Dr. Harris lacerated Mrs. Paige's liver. That claim has now gone to judgment, resulting in summary judgment in favor of MBMC on the one hand, and a jury verdict and monetary judgment against Dr. Harris on the other. Plaintiff should now be judicially estopped from pursuing a contradictory claim concerning a laceration of a different body part by a different physician. Coral Drilling Inc. v. Bishop, 260 So.2d 463 (Miss. 1972) (plaintiff judicially estopped from pursuing claim that he was injured by a party driving a blue truck after he had pursued to judgment a claim that the same injury was caused by party driving a red truck).

to her death is simply not supported by the record. Rather, the undisputed material facts are conclusive that Mrs. Paige did not suffer, and could not have suffered, a laceration to her esophagus from a TEE probe prior to her death. Dr. Aden's testimony is undisputed that he ceased any effort to insert the TEE probe before the leading end ever reached as far as the opening to the esophagus, and that there could not have been any injury caused by the attempt to insert the probe because there was no blood present when the probe was removed from Mrs. Paige's oral cavity. (R. 451-453). Furthermore, when a nasogastric tube (NG) was placed through Mrs. Paige's esophagus into her stomach some five (5) hours after Dr. Aden's attempt to insert the TEE probe, it was noted that there was "no bloody drainage" (See MBMC record p. MBMC0089 entry for 13:25, or 1:25 p.m., R. 335; Deposition of Nurse Stephenson R. 562-563). Had there been a laceration of Mrs. Paige's esophagus from the attempted insertion of the TEE probe at about 8:00 a.m. there would certainly have been at least some "bloody drainage" from the "NG tube". Since there was not any bloody drainage it is conclusive that no laceration had occurred to that point in time. (R. 648-654).

Additionally, the erroneous assumption by Dr. Bridges in his untimely supplemental report that Mrs. Paige suffered a laceration to her esophagus prior to her death from the TEE probe is completely undermined by the autopsy report he claims to rely on, and by the testimony of the pathologist who performed the autopsy, Dr. Michael Hughson. The autopsy that Mr. Paige had performed on Mrs. Paige's body was not done until after she was embalmed. At autopsy Dr. Hughson did find "multiple trocar lacerations" to Mrs. Paige's esophagus, as well as to her stomach, small and large intestine; however, according to Dr. Hughson these lacerations were made after Mrs. Paige's death by the embalming trocar. Dr. Hughson was able to determine that the lacerations were made after Mrs. Paige's death because there was no sign that there had been any bleeding associated with these lacerations as would have occurred had the laceration been inflicted during her life. (See Deposition of Dr. Hughson, R. 1019-1029); and autopsy report (R. 869).

Dr. Bridges may be a very fine surgeon, but he is not a forensic pathologist. Dr. Bridges did not examine Mrs. Paige's body on autopsy, and he was in no position to dispute Dr. Hughson's autopsy findings that the lacerations to Mrs. Paige's esophagus, like those to her stomach, small and

large intestine, occurred after her death, and were caused by the embalming trocar.

Dr. Bridges' erroneous assumption about Dr Aden's use of the TEE probe and the practice of performing TEE during cardiovascular surgery at MBMC demonstrates a fundamental misunderstanding of undisputed facts that are in the record. Dr. Bridges assumes that Dr. Aden was permitted by MBMC to perform TEE without having demonstrating any competence in doing so.<sup>30</sup> Contrary to Dr. Bridges' mistaken factual assumption, Dr. Aden did not testify that he was not credentialed nor trained in the placement of a TEE probe; nor did Dr. Aden testify that he was allowed to perform TEE. Additionally, no where in the record can it be found that MBMC did not credential anesthesiologists, such as Dr. Aden, to place instruments such as TEE probes in a patient's esophagus, nor can it be found in the record that MBMC allowed Dr. Aden to perform TEEs. Rather, the undisputed proof in the record is that Dr. Aden is a board certified anesthesiologist who is indeed well trained to place instruments into a patient's esophagus, such as a TEE probe. Dr. Aden routinely intubates patients and inserts NG tubes and other instruments into patients' airways and their esophagus respectively. He testified that he has inserted TEE probes safely in patients as many as fifty (50) times or more over the many years he has practiced. (See Deposition of Dr. Aden, R. 1013-1015; and Affidavit of Dr. Brunson, R. 648-654). What Dr. Aden is not trained to do, what he is not credentialed to do, and what he does not attempt to do is perform a TEE; i.e. move the probe into the appropriate final position in the patient's anatomy to obtain images and interpret those images. That function is performed at MBMC by a cardiologist who comes in after an anesthesiologist, like Dr. Aden, has inserted the TEE probe around an endotracheal tube and into an initial position in a patient's

---

<sup>30</sup> Dr. Bridges' misstatement of the record in his untimely November 1, 2007 "supplemental report" is as follows: "Dr. Aden states in his deposition that he was not credentialed, and had not received any formal training in the placement of the TEE probe. The fact that (MBMC) allows anesthesiologists (including Dr. Aden) to perform TEE and place TEE probes without formal process for obtaining hospital privileges to perform this invasive and potentially life threatening procedure falls below the standard of care. Typically, hospitals require that an operator obtain a certificate documenting competency in the interpretation of TEE images and require that an individual be proctored for a certain number of TEE procedures by someone who is formally credentialed to perform the procedure prior to allowing a physician to perform the procedure independently. Alternatively, hospitals require that a physician document prior experience and credentialing obtained at another institution prior to granting a physician privileges to perform TEE. The failure on the part of the administration of (MBMC) to establish a process for credentialing and granting privileges to physicians prior to allowing them to perform TEE in an unsupervised manner is negligent and fails below the standard of care. Given the injuries to Mrs. Paige's esophagus occurred in this case, the negligence of (MBMC) may have contributed to her death as well." (R. 1051)

esophagus. It is the cardiologist who actually performs the TEE that require specialized training in the performance of TEE. It is those cardiologists at MBMC who are the ones who are credentialed to perform TEE. (See Deposition of Dr. Aden, R. 1010-1014); Deposition of Dr. Harris, R. 932-936; and Affidavit of Dr. Brunson, R. 648-654). As noted above, Dr. Bridges' assertion of negligence on the part of MBMC in credentialing physicians to place instruments in a patient's esophagus on the one hand, and to perform TEEs on the other, simply ignores facts in the record and assumes facts that are not in the record. Thus, his "opinion" on the negligence in credentialing Dr. Aden would not have been admissible to defeat MBMC's summary judgment motion even had such claim been properly raised it and Dr. Bridges' opinions been timely disclosed. Bullock v. Lott, 964 So.2d 1119, 1129-1134 (Miss. 2007) (expert may not base opinion on factual assumptions not supported by the record).

### CONCLUSION

The circuit court's ruling granting MBMC summary judgment on all claims raised by plaintiff's complaint was a correct result and should be affirmed on appeal. Likewise, the subsidiary discovery and evidentiary rulings by the circuit court were well within the court's broad discretion, and should not serve as a basis for reversal.

The undisputed material facts properly presented to the circuit court established that MBMC was entitled to judgment as a matter of law on plaintiff's claim that MBMC was vicariously liable for the alleged malpractice of Dr. Harris, on plaintiff's claim that MBMC cardiovascular surgery perfusionist, cardiovascular surgery nurses and cardiovascular surgery recovery nurses provided negligently substandard care, and on plaintiff's claim that MBMC was negligent in granting medical staff privileges to Dr. Harris to perform cardiovascular surgery at MBMC when he was allegedly not competent. MBMC can have no vicarious liability for Dr. Harris' treatment of Mrs. Paige because he was not the employee or agent of MBMC. Dr. Harris was a partner in his own private practice group. Mrs. Paige did not rely on MBMC to select Dr. Harris as the cardiovascular surgeon to treat her; rather, Mrs. Paige's own personal physician referred her to Dr. Harris. The care and treatment provided by MBMC's perfusionist and nurses comported with the standard of care applicable to them. The perfusionist and nurses assisted the physicians who were at all times continuously present at Mrs.

Paige's bedside. It is undisputed that the subject MBMC personnel diligently monitored Mrs. Paige's vital signs and lab results and immediately reported this information to the physicians present. Moreover, the applicable standard of care did not require these non-physicians to determine the significance of any change in Mrs. Paige's vital signs, or to diagnose the cause of her condition, or to initiate any treatment. Rather, these are duties that are the exclusive responsibility of the physicians present at the patient's bedside. Plaintiff did not present any sworn testimony from any qualified expert which created a material issue of fact on the allegations against the perfusionist and nurses. Dr. Ramsey clearly had no experience in the field of cardiovascular surgery perfusion, cardiovascular surgery nursing and cardiovascular surgery recovery, and therefore, the circuit court rightly excluded him from offering opinions as to the standard of care applicable to those fields of professional practice. The court likewise rightly excluded Dr. Bridges from giving any expert testimony in support of any claim against MBMC due to the gross failure of plaintiff to make timely disclosures. However, notwithstanding the untimely nature of Dr. Bridges' proposed testimony, such still did not create a mutual issue of fact as to the claims against the perfusionist and nurses. The undisputed material facts also entitled MBMC to judgment as a matter of law on the claim that it was negligent in granting staff privileges to Dr. Harris.

Finally, plaintiff's untimely and improperly asserted claims of lack of informed consent and of liability for Dr. Aden's alleged negligent use of a TEE probe are no basis to reverse judgment in favor of MBMC. Neither claim was included in the complaint, nor was either the subject of a properly presented and timely amendment. Moreover, neither claim finds factual support in the record.

Therefore, defendant MBMC urges the court to affirm the judgment of the circuit court in its favor.

Respectfully submitted,

MISSISSIPPI BAPTIST MEDICAL CENTER,  
INC., DEFENDANT/APPELLEE

BY:   
D. COLLIER GRAHAM, JR., 



OF COUNSEL:

WISE CARTER CHILD & CARAWAY  
401 EAST CAPITOL STREET, SUITE 600  
POST OFFICE BOX 651  
JACKSON, MISSISSIPPI 39205-0651  
TELEPHONE: (601) 968-5549

ATTORNEYS FOR DEFENDANT-APPELLEE

**CERTIFICATE OF SERVICE**

I, D. Collier Graham, Jr., one of the attorneys for defendant-appellee, hereby certifies that I have this day caused to be mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Corrected Brief of Appellee to the following:

Herbert Lee, Jr.  
Leonard McClellan  
Lee & Associates  
2311 West Capitol Street  
Jackson, MS 39209

Rebecca Wiggs  
Watkins & Eager  
Post Office Box 650  
Jackson, MS 39205-0650

Honorable Bobby B. DeLaughter  
Raymond Circuit Courthouse  
Post Office Box 27  
Raymond, MS 39154

THIS, the 11<sup>th</sup> day of December, 2008.

  
\_\_\_\_\_  
D. COLLIER GRAHAM, JR.