

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**EMMITT PAIGE, SR., INDIVIDUALLY AND
ON BEHALF OF ALL WRONGFUL DEATH
BENEFICIARIES OF CHERRYL PAIGE, DECEASED APPELLANT**

VS.

CAUSE NO. 2008-CA-00328

**MISSISSIPPI BAPTIST MEDICAL CENTER
(MBMC)**

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI
REPLY BRIEF OF APPELLANT**

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I. NOTICE PLEADINGS

The MBMC does not contest the fact that Mrs. Paige was not given informed consent regarding the TEE Probe procedure but rather asserts that it was the Dr. Harris' and Dr. Aden's responsibility to obtain the informed consent of Mrs. Paige to the TEE procedure. (Brief of Appellee pp _____).

As general matter, physician is under duty to inform potential patient of known risks and circumstances associated with course of treatment so that patient can make intelligent decision about whether to proceed; failure to do so is negligence.

Cole v. Wiggins, 487 So. 2d 203, 205 (Miss. 1986).

In his orders to MBMC, Dr. Harris directed the Hospital's staff to obtain Mrs. Paige's Informed Consent to AVR Surgery and the administration of general Anesthesia on February 16, 2007. See MBMC 009, R_____ Attached as Exhibit _____.

Prior to undergoing the catheterization, Cheryl Paige was required to sign a consent form. The form stated in relevant part:

This is to authorize the performance upon me the following surgical procedure:

AORTIC VALVE REPLACEMENT

This procedure is to be performed upon me under the direction of Dr. Harris and/or such associates, assistants, consultants and/or specialist as may be selected by him/her.

My consent to said operation is based on the following information and facts which have been explained to me by Dr. Harris.

(a) Nature of operation (b) purpose of operation (c) possible risks or consequences

of operation (d) possible alternative methods of treatment.

I further understand that the explanation which I have received may not be exhaustive and all inclusive and that other more remote risks may be involved. I do state, however, that the information which I have received is sufficient for me to consent to same as my own free act.

I further consent to and authorize the performance of any other operations or procedures, whether or not they may be foreseen at this time, which the above named doctor or his associates may discover and consider necessary or advisable during the course of the operation herein consented to, and which may be, in the medical opinion of said doctor, best performed during the course of the procedure consented to .

I further consent to the disposal by hospital authorities of any tissue, organ or member of any body which may be removed during the course of this operation.

I consent to the administration of anesthesia by or under the direction and supervision of any Anesthesiologist or Anesthetist selected by my surgeon". (Emphasis added).

(See MBMC 005, R ____).

A review of the consent form indicates that the form was prepared by MBMC. Plaintiff contends that the surgery consent form amounted to a misrepresentation, in that it failed to mention that death might result from the AVR. (See the Affidavit of Emmitt Paige R ____).

Whether MBMC had an obligation to provide Cheryl Paige with such a consent form containing this language need not be addressed, but once MBMC did so it was under an obligation to ensure that the information contained in the consent to surgery form was

accurate and not misleading.

In Berkline Corp. v. Bank of Mississippi, 453 So. 2d 699, 702 (Miss. 1984), this Court determined that the elements of a negligent misrepresentation claim are: 1) a misrepresentation or omission of fact; 2) materiality; 3) the failure to exercise ordinary care; 4) reasonable reliance; and 5) injury.

In this case Dr. Harris was allowed by MBMC to select an anesthesiologist or anesthetist to administer general anesthesia during Mrs. Paige's AVR surgery. The consent to AVR surgery form which was prepared by MBMC and executed by Cherryl Paige did not mention that death was a possibility and it indicated that Dr. Harris and MBMC were prepared to handle emergencies should the need arise. It is undisputed that Dr. Harris was allowed by MBMC to choose Dr. Barry Aden to administer general anesthesia for Mrs. Paige's AVR surgical procedure. **See MBMC 0005, R _____), See also Deposition of Dr. Aden pp _____), R _____).**

In his clinical orders to the staff at MBMC Dr. Harris gave his standard routine orders. During the process of discovery in this case was discovered that under these standing orders. **See MBMC 0009 , R_____.** Dr. Harris requested use and utilization of the Transesophageal Echocardiogram (TEE Probe). **The American College of Cardiology** describes (TEE) as a minimally invasive diagnostic procedure which requires the insertion of an endoscopic probe into the esophagus and through manipulating the probe through multiple imaging planes, a surgeon can obtain tomographic views of the heart and great vessels. Its clinical application includes but is not limited to detection and assessment of aortic dissection and other aortic pathologies and evaluation of a variety of congenital heart

disease in children and adults. (TEE Probe) involves small but definite risks such as breathing problems, heart rhythm problems, infection of the hearts valves and lacerations and bleeding of the esophagus. (R _____).

The American College of Cardiology and the American Heart Association, direct that the physician performing a TEE Examination needs good communication skills in order to explain the TEE procedure to patients in simple terms, including its risks, benefits and alternative approaches. On February 19, 2003, the American

In February of 2003, the American College of Cardiology, the American Heart Association, the American College of Physicians. The American Society of Internal Medicine Task Force on Clinical Competence in collaboration with the American Society of Echocardiography, the Society of Cardiovascular Anesthesiologists and The Society of Pediatric Echocardiography developed a Clinical Competence Report Statement on Echocardiography which provided a set of new recommendations recognizing the knowledge; cognitive and technical skills required for utilization of TEE and addressing the required training documentation and maintenance of competence in the utilization performance and interpretation of TEE, as follows:

The physician performing a TEE must be knowledgeable with regard to pharyngeal and esophageal anatomy; The proper use of conscious sedation, including the prompt recognition of possible complications, the various techniques of esophageal intubation and probe manipulation; The recognition and management of possible complications of probe insertion, including the infrequent occurrence of methemoglobinemia as a complication to benzocaine administration; and the absolute and relative contra indications to the performance of a TEE Examination. The operator must also have the necessary and

technical knowledge required to operate the ultrasound machine. (See JACC Vol. 41 No. 4; P. 694, Section D, February 19, 2003, attached hereto as "Exhibit "F"). The specific, cognitive and technical skills, knowledge and training required for competence in the utilization and proper performance and Interpretation of TEE is set out in (Table 7) and (Table 8) of the ACC/AHA Statement of Clinical Competence on Echocardiography, Section D, Journal of American College of Cardiology Vol. 41 No. 4, section D, pp. 694-695, February 19, 2003; attached hereto as Exhibit "F", R _____).

In this case it is undisputed that the surgery consent form prepared by MBMC did not inform Mrs. Paige that the TEE procedure would be used in her AVR surgery and the MBMC has not produced in the record any document or testimony that Mrs. Paige was informed about her risks, benefits or alternatives to TEE in her AVR surgery.

It is also undisputed in this case that Mrs. Paige died while on transport from the operating room to the cardiovascular ICU room on February 16, 2004.

The cause of death listed on Mrs. Paiges death certificate was post operative bleeding due to or as a consequence of AVR surgery. See Exhibit _____ R _____).

The undisputed testimony in this case also shows that during the intubation of Mrs. Paige on February 16, 2004, Pre-AVR surgery, Dr. Barry Aden tried to insert the TEE into Mrs. Paige's Esophagus through the use of various force maneuvers; but he was unsuccessful in all of his attempts to force the Tee into Mrs. Paige's Esophagus for 3 to 4 minutes at which point Dr. Harris walked in and made several attempts through force maneuvers to insert the TEE into Mrs. Paiges esophagus and these attempts were also un successful because of the narrowing of Mrs. Paige's airways. (See MBMC 00039, R

_____).

It is also significant to note that at the time Dr. Aden was attempting to force place the TEE probe into Mrs. Paige's esophagus, her systolic blood pressure jumped to over 200, indicative of a laceration or injury to the esophagus. **See Deposition of Dr. Aden p. 89-90 R _____) and MBMC 0039, R _____).** The Autopsy Report on Mrs.

Paige also indicated that she suffered multiple lacerations to the esophagus. **See Autopsy pp 2, R _____).**

Plaintiff offered the expert testimony of Dr. Calvin Ramsey M.D. a Board Certified Internal Medicine Physician who was Board eligible in Gerontology and Emergency Medicine. Dr. Ramsey's academic credentials included past assistant professor of medicine, critical care medicine at the university of Mississippi Medical Center from 1979-1986. During his tenure at UMC Dr. Ramsey taught the fundamentals of Internal Medicine, Critical Care Medicine, Geriatric Medicine and Emergency Medicine emphasizing the aspects of physical diagnosis history gathering and disease. Dr. Ramsey taught the entire medical staff at UMC including fellow physicians, and nurses. During his 30 year career, Dr. Ramsey also became a staff physician at Baptist Medical Center. As a former member of the MBMC medical staff Dr. Ramsey is familiar with the credentialing guidelines for physicians as well as the responsibilities of the hospital to the public to provide quality care. Dr. Ramsey opined that in the area of informed consent a serious breach was committed because Dr. Harris was not present when Mrs. Paige signed the MBMC 's consent for surgery form. Dr. Ramsey further opined that another example of unreasonable care received by Mrs Paige was the inefficiency of Dr. Barry Aden and Dr. William Harris to

insert the TEE Probe in Mrs Paige's esophagus. Dr. Aden during his deposition admitted that he lacked the training and or credentialing in Tee Probe placement or utilization. Dr. Harris also testified that he lacked the training or qualification to place or insert the Tee Probe. Dr. Aden testified that Dr. Harris assisted him in attempts to place the Tee Probe during Mrs Paige's AVR surgery. Dr. Ramsey opined that MBMC was negligent in allowing these physicians to perform invasive procedures such as the TEE on Mrs. Paige without proper training or credentials. Dr. Ramsey also noted that his review of Mrs Paige's autopsy showed multiple laceration of the esophagus. He opined that there was a strong probability that the laceration of the esophagus were induced from numerous attempts to insert the Tee Probe by Dr. Aden and Dr. Harris. R. 1307-1313).

The proffered expert testimony of Dr. Ramsey created genuine issues of material facts surrounding the lack of informed consent by the MBMC allowing Dr. Aden and Dr. Harris to attempt this TEE procedure on Mrs. Paige when both physician lacked training or credentials from the MBMC to perform such a procedure. A reasonable person might have concluded that MBMC was negligent under the circumstances based upon Dr. Ramsey's expert report . R 1307-1313).

However, the court granted MBMC's motion to strike Dr. Ramsey's expert testimony on the ground that he was not a surgical expert. (R . 1304).

Plaintiff also proffered the expert testimony of Dr. Charles Bridges ,a board certified cardiovascular surgeon, who testified in his supplement report of November 1, 2007 and opined as follows "there may have been direct injury to the esophagus during passage of the transesophageal echocardiography (TEE) probe as the autopsy report documents "trocar lacerations" in the esophagus but since the autopsy was performed after

embalming, one cannot rule out that some of these lacerations were caused by the TEE probe. It is well documented in the anesthesiologist, Dr. Aden's reports that his attempts to pass the Tee probe were unsuccessful. To a reasonable degree of medical certainty, the attempted passage of the TEE probe caused lacerations to the esophagus. Since, the autopsy was performed some 70 hours after Mrs. Paige's death and after she had been embalmed, one cannot rule out that the esophageal lacerations led to intestinal bleeding that was not diagnosed and may have been a contributing factor to the massive hemorrhage leading to her death. Neither Dr. Aden nor Dr. Harris in their depositions, nor the medical record provides evidence that consent was ever obtained for the TEE. Failure to obtain consent for this invasive procedure falls below the standard of care.

Esophageal bleeding and esophageal rupture are known complications of TEE and these complications of TEE can be lethal. The failure to explain the risks of this procedure to Mrs. Paige and get her consent falls below the standard of care. Furthermore, 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 Mississippi Baptist Medical Center allows anesthesiologists (including Dr. Aden) to perform TEE and place Tee probes without having a 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 Mississippi Baptist Medical Center to establish a process of credentialing and granting privileges to physicians prior to allowing them to perform Tee in an unsupervised manner is negligent and falls below the standard of care. Given that injuries to Mrs. Paige's esophagus occurred in this case, the negligence of Mississippi Baptist Medical Center may have contributed to her death as well."

However, the trial Judge granted the Defendant MBMC's motion to strike Dr. Bridges expert report as untimely. This constituted abuse of discretion and was prejudicial to Plaintiff's claims against MBMC. The supplemental report of Dr. Charles Bridges regarding the lack of training and the lack of credentialing by MBMC to either Dr. Harris or Dr. Aden to insert , interpret or utilize the TEE procedure on Mrs. Paige also created genuine issues of material fact that preclude summary judgment for MBMC. (R. _____).

In *Clark v. St. Dominic-Jackson Memorial Hospital* 660 So. 2d 970, this Court reversed a grant of summary judgment in favor of the Defendant hospital related to misrepresentations of the informed consent form which was prepared by the hospital. Id.

In Clark, the Plaintiff contended in part that the consent form failed to mention death might result from the cardiac catheterization and that the statements in the form concerning the hospital's ability to handle emergencies amounted to a misrepresentation. Deposition testimony in Clark indicated that the informed consent form that Plaintiff's decedent signed had been prepared by St. Dominic with physician assistance. The Court in Clark noted that while this Court's previous decisions on the matter of informed consent have dealt specifically with the physicians duty to warranty "(citing) Boyd a 1318, concluded that a

reasonable person might have concluded that should the need for emergency surgery arise, the hospital would be able to perform the operation. The Court noted that one of the Plaintiff's experts even stated that St. Dominic's consent form was incomplete and misleading. id.

The Court's holding in Clark is applicable to the facts of this case. In this case the informed consent form was prepared by MBMC, Plaintiff consented to AVR surgery to be performed by Dr. Harris and general anesthesia to be performed by an anesthesiologist to be selected by Dr. Harris. Dr. Harris chooses Dr. Aden. The facts of this case are distinguishable from Clark and that there Judge Clark had consented to and went into the hospital to have a cardiac catheterization, whereas here, Mrs. Paige consented to AVR surgery. Mrs. Paige consented to the AVR surgery, and to the administration of general anesthesiology during the surgery on forms prepared by MBMC. However, in this case, Dr. Harris ordered the use of the TEE procedure which is an invasive diagnostic procedure and he nor Dr. Aden obtained Mrs. Paige's informed consent for this procedure and did not explain the risks, benefits or alternatives of the TEE procedure to Mrs. Paige prior to their failed attempts to insert this tube into Mrs. Paige's esophagus. Plaintiff proffered expert testimony of two physicians who testified that the MBMC and the doctor's were negligent for their failure to obtain Mrs. Paige's consent for this invasive procedure.

Dr. Bridges also opined that MBMC was negligent for allowing Dr. Harris and Dr. Aden to attempt to perform the TEE procedure on Mrs. Paige in light of the fact that both Dr. Aden and Dr. Harris testified that they were not credentialed by the MBMC to perform such procedures. The autopsy of Mrs. Paige noted multiple trocar lacerations to the esophagus. Both Dr. Bridges and Dr. Ramsey testified these lacerations to the esophagus

were probably caused by the failed forced attempts of Dr. Aden and Dr. Harris to insert the TEE probe. Clearly, these expert opinions proffered by Dr. Ramsey and Dr. Bridges in his supplemental report created genuine issues of facts that precluded summary judgment in favor of Baptist. The Defendant MBMC argues that they would have been prejudice by the tardy supplemental report of Dr. Charles Bridges, and that Plaintiff did not move for a continuance as an alternative means of mitigating any prejudice that would accrue to MBMC with the trial date of December 3, 2007, thirty-two days away. The Plaintiff requested a continuance which the court granted extending the trial date for six months to June, 2008 . Although a granting a continuance, the court still failed to reconsider its order excluding the expert report of Dr. Ramsey. The trial court struck the supplemental report of Dr. Charles Bridges on November 29, 2007 and on the same day the Court granted MBMC's motion for summary judgement on all issues raised by plaintiff's complaint because they did not have any medical expert testimony even though the court had struck the expert testimony of two (2) of Plaintiff's causation experts. This clearly prejudiced plaintiff's right to have his day in Court against MBMC and it constitutes an abuse of the discretion granted trial courts regarding discovery matters. MBMC argues that Plaintiff was irresponsible in his argument in his original brief of Appellant by suggesting that the Trial Judge appeared biased in his favorable ruling for the defendant MBMC. However, the Court did not leave the Plaintiff's counsel any other alternative considering that on November 30, 2007, Plaintiff filed a motion asking the trial judge to reconsider the order striking the supplemental report of Dr. Bridges and the motion was denied prior to being served on Defendant MBMC. Plaintiff's counsel was in the process of preparing his Motion to ask the trial judge to recuse himself when was suspended from the bench for alleged

improper conduct in an unrelated case.

II . THE EXCLUSION OF DR. CALVIN RAMSEY AS AN EXPERT WITNESS

The trial court improperly excluded the testimony of Dr. Calvin Ramsey merely because he was not a cardiovascular surgeon and the lawsuit arose out the performance of cardiovascular surgery and post surgery complications that lead to the death of Plaintiff's decedent. No consideration was given to the provisions of M.R.E. 702 which does not require an expert witness to share the same profession or vocation as the defendant as a prerequisite to offering expert opinion testimony . The proffered testimony of Dr. Ramsey did not encompass the standard of care for cardiovascular surgeons and did not express an opinion as to whether Dr. Harris breached the applicable standard of care in the performance of aortic valve replacement surgery upon the decedent, Cherryl Paige. (R. 1307 -1313).

The fact that Dr. Ramsey is not a cardiovascular surgeon should not have disqualified him from testifying regarding proper hospital procedures, including the procedures nurses and other hospital employees should follow prior to surgery and when a patient's conditions worsens following surgery. Whether any doctor may testify regarding a particular matter depends upon his or her knowledge, training, experience and education. As this Court noted in **Partin v. North Mississippi Medical Center**, 929 So. 2d 924 (Miss. Ct. App. 2005), " [W]hile an expert's testimony will be limited to his or her demonstrated area of expertise, there is nothing in our law that prevents an OB/GYN (or some other kind of specialist, for that matter) from having expertise in general hospital procedures as well

as another specialty or area". Id., ¶ 20, p. 930, citing Brown v. Meadino, 504 So. 2d 1201 (Miss. 1987). This Court further noted in Partin that case law and the plain language of Rule 702 of the Mississippi Rules of Evidence leave little doubt regarding this point.

The test to be applied in determining whether an expert may testify and offer opinions is whether his specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact to in issue. The trial court's order excluding Dr. Ramsey's testimony simply stated that the exclusion was "based on Dr. Ramsey's lack of education, experience or training in the specialty of surgery which is at issue in this medical malpractice case. Dr. Ramsey's specialty is internal medicine. Dr. Harris is a thoracic surgeon". (R.E. Tab G, R. 261). The trial court also stated that 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". Id.

An examination of Dr. Ramsey's education, training and experience reveals that he possessed the requisite qualifications to offer opinion testimony regarding hospital procedures and the standard of care for hospital employees as it related to pre-operative and post operative care. Clearly, these are not subject matters likely to be possessed by lay people. (See Nunnally v. R.J. Reynolds Tobacco Co. 869 So. 2d 373, 384 ¶ 36(Miss. 2004). Dr. Ramsey was not only competent as an expert in his specialty of internal medicine, but also in areas of pre-operative and post operative care and monitoring in addition to hospital procedures and protocols. (R.1307-1309). In fact, he had worked as a physician at Mississippi Baptist Medical Center. Id. Plaintiff did not proffer Dr.

Ramsey as an expert in the specialty of thoracic surgery as Dr. Charles Bridges was designated, proffered and accepted by the trial court as Plaintiff's thoracic surgery expert.

In his complaint, Plaintiff alleged that Baptist Medical Center had a duty to provide competent physicians, surgical staff and assistants to perform and assist in the performance of cardiovascular surgery. The complaint further alleged that Baptist had a duty to supervise the work of surgical assistants to ensure that patients are monitored by medical staff following surgery in its cardiovascular unit and that Baptist breached each of these duties which proximately caused the death of Plaintiff's decedent, Cherryl Paige. (R.E. Tab 2, ¶ 8,9, R. 17-18). Dr. Ramsey's proffered testimony detailed his education, training and experience and supported Plaintiff's allegations that Baptist breached the standard of care in its pre-operative and post operative care of Cherryl Paige. (R. 1307-1309). Thus, a genuine issue or material fact was presented which should have been resolved by a jury. The trial court abused its discretion and effectively resolved this factual dispute by excluding Dr. Ramsey's testimony because he is not a thoracic surgeon. At the summary judgment level, the trial court should not make a determination of negligence vel non, but merely determine if there exist any genuine issues of material fact when the Plaintiff's evidence is given the benefit of all reasonable inferences. In the *instant* case, the trial court precluded the application of the proper summary judgment analysis by improperly disqualifying Plaintiff's expert without specifying why and how Dr. Ramsey's extensive education, training and experience could not assist lay jurors in understanding the evidence as it related to hospital procedures, pre-operative and post-operative care. The exclusion of Dr. Ramsey's testimony without any explanation except that he was not a thoracic surgeon, constitutes an abuse of discretion which requires a remand of this

action for a trial on the merits regarding the allegations against Baptist Medical Center.

**III. The Exclusion Of The Testimony Of Dr. Charles Bridges
Regarding The Negligence Of Baptist Medical Center**

Although the trial of this cause was scheduled to commence on December 3, 2007, the trial court granted Plaintiff's motion for a continuance and the trial was rescheduled for June 6, 2008. In the interim, Defendant Baptist moved for summary judgment and in opposition to the summary judgment motion, Plaintiff submitted the affidavit of Dr. Charles Bridges which contradicted Baptist's experts and specified the standard of care for Baptist and how the standard of care for Baptist was violated.

Plaintiff's submission of Dr. Bridges supplemental report in opposition to Baptist's summary judgment motion was proper and in conformity with Rule 56 (c) of the Mississippi Rule of Civil Procedure which permits the party opposing summary judgment to serve affidavits up until the day prior to the hearing. When there is conflict between a local court rule and the Mississippi Rules of Civil Procedure as there is between Rule 4.04 A of the Uniform Rules of Circuit Court Practice and Miss. R. Civ. Pro. 56 (c), the latter controls. Miss. R. Civ. Pro. 83 (a) mandates this result by providing that the conference of circuit, chancery and county court judges may make uniform rules and amendments thereto concerning practices in their courts, on the condition that the uniform rules cannot be inconsistent with Mississippi Rules of Civil Procedure. Miss. R. Civil Pro. 83 (a); see also **Illinois Central Railroad Co. v. Moore**, No. 2006-IA-00884-SCT decided on September 4, 2008.

Since the trial was rescheduled from December 3, 2007 until June 6, 2008, Baptist

would not have been prejudiced by the trial court's consideration of Dr. Bridges supplemental report which contradicted Baptist's affidavits that its employees were not negligent in the care and treatment of the decedent, Cherryl Paige. Dr. Bridges' supplementation was more than six months before the June 6, 2008 trial and like in **Roberts v. Colson**, 729 So. 2d 1242 (Miss. 1999) there could have been revised scheduling without adversely affecting the trial setting and negating any potential prejudice to Baptist.

IV THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGEMENT IN FAVOR OF BAPTIST MBMC ON ALL CLAIMS RAISED BY PLAINTIFF

Contrary to the Defendant MBMC'S argument in their brief, the court erred by granting Summary Judgement in favor of MBMC on all of Plaintiff's claims, as genuine issues of material fact exist as will be set out below.

The Defendant MBMC alleged that Plaintiff raised three types of claims against MBMC in his Complaint: (1) that Dr. Harris was allegedly the employee or agent of MBMC, and 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. (See, Brief of Appellee, MBMC R 4 at page 32). This is a narrow reading of Plaintiff's Complaint. For instance in paragraph 8, of the Complaint, the Plaintiff alleges in pertinent part:

The Defendant Baptist Medical Center owed Plaintiff decedent Cherryl Paige a duty to provide competent physicians and surgical staff and assistants to perform and assist in

the performance of cardiovascular surgery on patients who come to Baptist Medical Center for cardiovascular surgery. The Baptist Medical Center had a further duty to supervise the work of the physicians and surgical assistants they allow and or hire to perform Cardiovascular Surgery on patients that come to Baptist Medical Center to have surgery performed. Baptist Medical Center had a further duty to have and keep on duty medical staff in their Cardiovascular Unit to monitor patients like Cherryl Paige who come out of Cardiovascular Surgery at Baptist Medical Center.

The defendant Baptist Medical Center breached individually and collectively each of the duties which it owed to Cherryl Paige by failing to exercise reasonable care or that degree of care and diligence required in hiring and retaining, supervising and monitoring the work of Dr. Harris and the surgical staff, and as a result Defendant Dr. Harris and or his surgical staff caused lacerations to Plaintiffs decedent's large and small intestines, to her stomach and to her liver and as a result, Plaintiffs decedent, Cherryl Paige bled to death at Baptist Medical Center while under the care of Baptist Medical Center's Cardiovascular Surgeon and employees working as surgical assistants on the occasion complained of. The defendant Baptist Medical Center was further negligent by failing to have staff persons on duty to properly monitor Plaintiff's decedent after the Cardiovascular Surgery for complications and as a result Plaintiff vital signs seriously deteriorated and she lost large amounts of blood for a period of 40 minutes or more before anyone attempted to conduct exploratory surgery so as to determine the cause of her complication; R, 17-18). Moreover, in paragraph 9, of the Complaint , Plaintiff alleged as follows:

As a direct and proximate result of Baptist Medical Center's breaches as outlined above, Plaintiffs decedent, Cherryl Paige, suffered serious bodily injuries including but not limited

to laceration of her large and small intestines, laceration of her stomach and laceration of her liver and endured intense pain and suffering which culminated in her bleeding to death while in the care of Baptist Medical Center's Cardiovascular Unit.

Id. and finally in paragraph No. 10, the Plaintiff alleged that: the negligence of Dr. Harris, Baptist Medical Center and John Does 1 through 5 was individually and collectively the proximate cause and or a substantial factor in causing the Plaintiff's decedent, Cherryl Paige, to endure intense pain and suffering and to meet an untimely death.

The trial court erred by granting MBMC's motion for summary judgment on all of Plaintiff's claims. Genuine issues of material facts existed concerning the treatment. Mrs. Paige received while undergoing surgery and treatment at MBMC on February 16, 2004, therefore this Court should for reasons set out in Appellant's Brief and for the reasons that follow, reverse the trial Court's grant of summary judgment and remand this case to the trial court to be tried on its merits.

Among the issues raised by Plaintiff in his complaint that were not addressed by the trial court in its summary judgment order are the Plaintiff's claims (1) that the MBMC owed Cherryl Paige a duty to provide competent physicians and surgical staff and assistants to perform and assist in the performance of cardiovascular surgery on patients who come to Baptist Medical Center for cardiovascular surgery. (2) the Baptist Medical Center had a duty to supervise the work of physicians and surgical assistants they hired to perform cardiovascular surgery on patients that come to Baptist Medical Center to have surgery performed; (3) That Baptist Medical Center had a further duty to have and keep on duty medical staff in their cardiovascular recovery unit to monitor patients like Cherryl Paige who are transferred to cardiovascular ICU, post cardiac surgery. (R. _____).

These allegations placed MBMC on sufficient notice as to the claims being pursued by Plaintiff. Additionally, Plaintiff's response to Baptist's discovery requests provided further notice of Plaintiff claims against Baptist. M.R.C.P. 8, has eliminated the technical form of pleading and it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief is sought. Dynasteel Corp. v. Aztec Indus. Inc., 611 So. 2d 977, 984 (Miss. 1991) ; Comet Delta, Inc. v. Pate Stevedore Co., 521 So. 2d 857, 860 (Miss. 1988) The comment to Rule 8: " The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose in prior Mississippi practice." (Comment to Miss. R.Civ. P. 8).

On the 7th day of September the Plaintiff served his supplemental responses to the First Set of Interrogatories propounded to the Plaintiff by MBMC. Plaintiff is filing a contemporaneous motion to supplement the record in this action to add the Plaintiff's supplemental responses to the MBMC interrogatories to the record. In his supplemental response to the defendant MBMC's First Set of Interrogatories, Plaintiff set out the evidentiary basis and placed MBMC on notice of his claims regarding the lack of consent to utilize the TEE probe procedure in Mrs Paige's AVR surgery, as well as, the lack of training and credentials of Dr. Harris and Dr. Aden to utilize or attempt to insert TEE in Mrs Paige during AVR surgery. The Plaintiff's also provided a substantial factual basis for Plaintiff's claim that MBMC's staff failed to properly supervise Dr. Aden and Dr. Harris in their performance of the AVR surgery on Mrs. Paige, as set out in Plaintiff's original complaint. The Plaintiff's supplemental responses to defendant MBMC's First Set of Interrogatories also provided notice and a factual basis for Plaintiff's claims that MBMC"

was negligent for its medical staff's failure to properly monitor Cheryl Paige's vitals during the AVR surgery and post operatively. Contrary to the Defendant MBMC's argument in their brief, the Plaintiff provided competent medical expert testimony to substantiate the claims in his complaint through Joann Lathon, Plaintiff's nursing expert, Dr. Charles Bridges in his reports of August 18 and November 1 2007 and by way of the expert testimony of Dr. Calvin Ramsey.

The expert reports of Dr. Charles Bridges, Dr. Calvin Ramsey and Plaintiff's nursing expert, Mrs. Joann Lathon clearly raised genuine issues of material fact that precluded summary judgment, see Clark v. St. Dominic -Jackson Memorial Hospital, 660 So. 2d at 974 (Miss. 1995) This Court has held that a summary judgment motion should be granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Brown v. Credit Center, Inc., 444 So.2d 358 (Miss. 1983); Bourn v. Tomlison Interests, Inc., 456 So. 2d 747 (Miss. 1984). More notably, the Mississippi Supreme Court has adamantly stated, "if there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. Brown, 444 So. 2d at 363.

It is Plaintiff's contention that genuine issues of material fact exist as to whether MBMC was negligent in allowing non-credentialed physicians to perform a TEE on Cheryl Paige when the physicians admitted that they lacked training to insert, utilize or interpret TEE. R. _____).

According to the autopsy, Cheryl Paige sustained multiple lacerations to the esophagus. This is a known side effect of TEE procedure. Because the Defendants were

not trained in TEE , they failed to check for esophageal damages i.e. bleeding or lacerations to the esophagus before they proceeded to perform the scheduled AVR surgery. It is undisputed that Plaintiff bled to death upon exploratory laparotomy and it was discovered that 2/3 of Plaintiff's blood had drained into her abdominal cavity Plaintiff's experts, Dr. Charles Bridges and Dr. Calvin Ramsey both testified that injury to Cheryl Paige's esophagus was caused by Dr. Harris' and Dr. Aden's failed forced attempts to insert the TEE probe and could have contributed to Cheryl Paige's bleeding to death. These expert opinion clearly create a genuine factual dispute on the Plaintiff's claim concerning MBMC's negligence in allowing Dr. Aden and Dr. Harris to attempt to insert the Tee into Mrs. Paige's esophagus. There are also genuine issues of disputed facts concerning the MBMC as well as the Defendant Dr. Aden and Dr. Harris to obtain Mrs. Paige's consent to utilize Tee Probe in her care in light of her past medical history and in light of this Court's ruling in Clark, Supra.

The Plaintiff's expert Dr. Calvin Ramsey's report as well as the supplemental expert report of Dr. Charles Bridges November 1, 2007 clearly created genuine issues of material fact related to the lack of MBMC's, Dr. Aden and Dr. Harris's failure to obtain Mrs. Paige's consent to this invasive diagnostic test which according to the American College of Cardiology poses defined risks. Moreover this Court has held that no physician or hospital may subject one to medical treatment without the person's informed consent. Fox v. Smith, 594 So. 2d 596; 604 (Miss. 1992) Reikes v. Martin, 471 So. 2d 385, 392 (Miss. 1985); Ross v. Hodges 234 So. 2d 905, 908 (Miss. 1970)

In this action, all parties agree that a consent form was not signed by Mrs. Paige

with regard to the TEE procedure. In deciding Marshall v. Clinic for Women, a case also dealing with informed consent, the Mississippi Supreme Court was guided by the decision in Calabrese v. Trenton State College. Marshall v. Clinic for Women 490 So.2d 861, 864 (Miss. 1986). Calabrese holds that, where it is alleged that there is a complete failure to advise Plaintiff of any of the known and existing dangers associated with a proposed course of treatment, medical expert testimony establishing that such a failure constitutes a departure from the norms of medical practice is not an essential element of Plaintiff's case, because the duty of disclosure is imposed by law and not by medical consensus. Calabrese v. Trenton State College, 392 A. 2d 600, 606 (N.J. App. 1978) *aff'd*, 413 A. 2d 315 (N.J. 1980). Further, a failure to disclose any of the known and existing risks of proposed treatment when such risks might well affect a patient's decision to submit or forego the treatment, therefore, constitutes a prima facie violation of that duty. Id.

Here, given Mrs. Paige's past medical history, it is definitely reasonable to assume that had the decedent been made aware of the risks of the TEE procedure, it would have affected her decision to submit or forego treatment. Since the Defendant failed to obtain Mrs. Paige's consent, a *prima facie* violation of its duty has been established. As a direct and proximate cause of their breach of the aforementioned duty, Mrs. Paige suffered intense pain, and suffered multiple lacerations and was bleeding from her esophagus.

The Defendant Baptist argues that it is the responsibility of the physicians to get informed consent from the patient for surgical procedures. See Smith, *Supra*, However, this argument would be inconsistent with the facts of this case. Dr. William Harris requested that the staff nurse or the circulation nurse obtain Mrs. Paige's informed consent

to the AVR surgery and to the administration of general anaesthesia on February 16, 2004 . Further, the consent to surgery form was prepared by MBMC.

A reasonable jury could find that the Baptist who prepared the informed consent form, and the MBMC staff personnel who obtained Mrs. Paige's informed consent to the AVR surgery should have obtained Mrs. Paige's consent to the TEE procedure since there was not an informed consent to the TEE procedure on file. (R_____)

Finally, an issue of fact is present with regard to whether Baptist was negligent in employing a staff that failed to recognize Mrs. Paige's emergency situation in a timely manner to provide appropriate treatment. Plaintiff's Supplemental Designation of Experts filed on September 7, 2007 set forth at least four areas in which Baptist was negligent in its treatment and care of Cheryl Paige.

Had the trial court considered and not excluded the expert opinions of Plaintiff's expert Dr. Calvin Ramsey and the supplemental expert opinion of Dr. Charles Bridges as well as the expert report of Mrs Joann Lathon clearly genuine issues of material facts exist therefore the trial courts grant of summary judgement in favor to MBMC should be reversed and remanded for a trial on the merits

V. CONCLUSION

Based upon the foregoing arguments and authorities, this Court should reverse the decision of the trial court granting summary judgment in favor of Baptist Medical Center and remand this case to the Circuit Court of Hinds County for trial on the merits.

Respectfully Submitted,
EMMITT PAIGE

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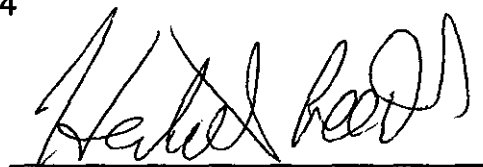
CERTIFICATE OF SERVICE

I, Herbert Lee, Jr., one of the attorneys for Appellant, do hereby certify that I have this date caused to be mailed, via U.S. Mail, postage pre-paid , a true and correct copy of the Appellant's Reply Brief to the following:

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THIS the 4th day of February, 2009.


HERBERT LEE, JR.