

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.

MISSISSIPPI BAPTIST MEDICAL CENTER

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

**HONORABLE WILLIAM F. COLEMAN
CIRCUIT COURT JUDGE
407 EAST PASCAGOULA STREET
JACKSON, MS 39201**


**REBECCA LEE, WIGGS, ESQ.
JENNIFER ROGERS, ESQ.
WATKINS & EAGER PLLC
P.O. BOX 650
JACKSON, MS 39205**

**D. COLLIER GRAHAM, JR., ESQ.
WISE CARTER CHILD & CARAWAY
P.O. OFFICE BOX 651
JACKSON, MISSISSIPPI 39205-0651**

**BAPTIST MEDICAL CENTER
1225 NORTH STATE STREET
JACKSON, MS 39202**

**EMMITT PAIGE, SR.
2525 MCFARLAND ROAD
RAYMOND, MS 39154**

SO CERTIFIED, this the 4th day of September, 2008.



Herbert Lee, Jr.

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Statement of the Issues:

- I. THE COURT ABUSED ITS DISCRETION IN LIMITING PLAINTIFFS RIGHT TO DISCOVERY OF DEFENDANTS MBMC'S CORPORATE BY-LAWS, MEDICAL STAFF BY-LAW AND ORGANIZATIONAL CHARTS**
- II. WHETHER THE TRIAL COURT ERRED BY EXCLUDING THE SUPPLEMENTAL REPORT OF PLAINTIFF'S CARDIOVASCULAR SURGERY EXPERT AND THE REPORT OF DR. CALVIN RAMSEY EN ROUTE TO GRANTING SUMMARY JUDGMENT TO BAPTIST MEDICAL CENTER**
- III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF BAPTIST MEDICAL CENTER**

STATEMENT OF THE CASE

II. Course of Proceedings and Disposition By Court Below

This medical negligence and wrongful death action was filed on March 4, 2005 by Emmitt Paige, Sr., individually and on behalf of the wrongful death beneficiaries of Cherryl Paige against Dr. William Harris, the Mississippi Baptist Medical Center (Baptist) and John Does 1 through 5 (R. 13). On October 15, 2007, Baptist moved for summary judgment (R. 292) and on October 30, 2007, Plaintiff responded to Baptist's motion for summary judgment. (R. 823). On November 29, 2007 the trial court granted Baptist's motion for summary judgment. (R. 124-44). Plaintiff requested reconsideration of the order granting Baptist's summary judgment and on January 9, 2008, the Court denied Plaintiff's request for reconsideration of its order granting Baptist's summary judgment motion. (R.1334). On February 6, 2008 Plaintiff filed his Notice Of Appeal to this Court. (R. 1338).

B. Statement Of Facts

On February 16, 2004, Plaintiff's decedent, Cherryl Paige, age 44, presented to the Baptist Medical Center in Jackson, Mississippi for the purpose of undergoing aortic valve replacement surgery. During the course of the surgery, Cherryl Paige's liver was lacerated by Dr. William Harris, who performed the surgery. The lacerations to the liver were not diagnosed for a period of forty (40) minutes or more at which time, Dr. Harris conducted exploratory abdominal surgery. By this time, Cherryl Paige had bled to death while under the care of Dr. Harris at the Baptist Medical Center. (R. 15-16-18). Plaintiff filed suit against Dr. Harris and Baptist Medical Center on March 4, 2005, alleging medical negligence against Dr.

Harris and Baptist Medical Center. More specifically, Plaintiff alleged that Baptist Medical Center owed Cheryl Paige a duty to provide competent physicians and surgical staff to perform cardiovascular surgery, a duty to have sufficient staff in the Cardiovascular Recovery Unit to properly monitor patients, post aortic valve replacement surgery and a duty to exercise reasonable care in the hiring, retaining, supervising and monitoring the work of Dr. Harris and the his surgical staff. (R. 17).

Plaintiff further alleged that Cheryl Paige's death was proximately caused by the negligence of Dr. Harris and Baptist Medical Center. (R. 17-18). After Baptist Medical Center answered the complaint denying any liability and asserting the affirmative defenses that Dr. Harris was not an agent employee of Baptist and that the care and treatment of Cheryl Paige met or exceeded the applicable standard of care, (R. 22-23), the parties undertook discovery.

In an effort to ascertain the true nature of the relationship between Dr. Harris and Baptist and to determine whether Baptist properly investigated and credentialed Dr. Harris, properly monitored surgeries he performed at Baptist and provided the necessary support staff, Plaintiff submitted various discovery requests to Baptist, including interrogatories and requests for production of documents. Baptist refused to produce any of the documents requested that would reveal the nature and extent of its relationship with Dr. Harris, including any investigation conducted into the events surrounding the untimely death of Cheryl Paige.

Baptist initially refused to even produce a copy of its corporate by-laws and medical staff by-laws on the alleged grounds that these documents were not relevant to any issue raised in the lawsuit and the requests were made merely for the purpose to annoy and harass.

(R. 173-174). The same objections were made to Plaintiff's request for copies of the competency assessment records of the nurses and doctors who participated in the treatment of Cherryl Paige on February 16, 2004. (R. 175-176). Baptist even refused to produce a copy of its organizational chart on the grounds that the request was not relevant and for the reasons that the request was "unduly overbroad, vague, ambiguous, burdensome and oppressive". (R. 174).

After unsuccessfully attempting to resolve this discovery dispute regarding the requested documents, Plaintiff filed a motion to compel Baptist to respond to his legitimate discovery requests. (R. 173-177, 198-203).

Following a hearing on Plaintiff's Motion To Compel held on August 10, 2008, the trial court ordered Baptist to produce its corporate and medical staff by-laws to the Court for in-camera inspection by August 17, 2007 for a determination by the Court of whether said by-laws contain any information relevant to any issue contained in the complaint. The Court also ordered Baptist to provide to Plaintiff the results of competency assessments of Dr. William Harris and the results of any Peer Review Investigation regarding the death of Cherryl Paige. (R. 219). The Court's order further provided that the Court "may revisit the question of the relevancy of discovery of competency assessments of Baptist nurses and/or Dr. Barry Aden should Plaintiff raise a substantial claim of negligence on the part of particular individual nurses and/or Dr. Aden which proximately caused or contributed to the death of Mrs. Paige, and support such claims with a report from a qualified expert witness". (R. 220).

After its in-camera review of Baptist's corporate and medical staff by-laws and

organizational chart, the Court issued a Supplemental order regarding Plaintiff's Motion To Compel Discovery on September 24, 2007.

In this supplemental order, the Court compelled Baptist to produce to Plaintiff selected portions of its corporate and medical staff by-laws and organizational chart. The documents in redacted form were ordered produced within ten (10) days with the un-redacted copies of the documents reviewed by the Court in-camera to be filed under seal by the circuit clerk. (R. 222-223). Thus, Plaintiff was never permitted to review the complete corporate and medical staff by-laws and Baptist never produced the results of competency assessments of Dr. Harris or the results of any Peer Review Investigation regarding the death of Cheryl Paige as ordered by the Court on August 28, 2007. (R. 219-220).

Shortly thereafter, on October 15, 2007, Baptist moved for summary judgment and Dr. Harris moved to exclude the testimony of Dr. Calvin Ramsey, one of Plaintiff's designated experts. Baptist joined in Dr. Harris' motion to exclude Dr. Ramsey's testimony. The Court granted Dr. Harris' motion to exclude Dr. Calvin Ramsey's testimony "based on Dr. Ramsey's lack of education; experience or training in the speciality of surgery which is at issue in this medical malpractice case." (R. 1304). The Court reasoned that Dr. Ramsey's speciality is internal medicine and Dr. Harris is a thoracic surgeon and that the treatment provided by Baptist's staff was in the context of surgery under Dr. Harris' orders. (R. 1304). The Court therefore effectively shielded all Baptist staff from liability simply because they were working under Dr. Harris' orders irrespective of whether they were negligent or competent.

A copy of Dr. Ramsey's expert report which was before the Court, clearly revealed that Dr. Ramsey did not purport to offer any testimony regarding the standard of care for

cardiovascular surgery as stated by the Court. (R.1304). Rather, Dr. Ramsey's report clearly detailed his education, training and experience (R. 1307-08) and stated that Baptist staff violated the standard of care in several areas and that Dr. Harris violated the applicable standard of care regarding informed consent which had nothing to do with the performance of the aortic valve replacement surgery. Dr. Ramsey's Report stated that both Dr. Harris and Baptist breached the standard of care "by not paying careful attention to pre-operative data that had the potential to destabilize Mrs. Paige's surgery" (R. 1311). Dr. Harris and Baptist violated the standard of care by allowing Cheryl Paige to undergo open heart surgery without the benefit of an updated chest x-ray or updated hematological data. Id. The nursing staff and the surgical charge nurse in particular, violated the standard of care by failing to document in the record a preoperative physical assessment regarding the cardio-pulmonary findings on the day of surgery. The nursing staff failed to call Dr. Harris' attention to the abnormalities on the chest x-ray and Dr. Harris testified in his deposition that he depended on the nurses to report abnormal findings to him. Id. Additionally, Dr. Ramsey stated that Dr. Harris committed a serious breach of the standard of care by not having the records reflect that he was present when Mrs. Paige signed her informed consent form for him to perform cardiac surgery. (R. 1310-11). Dr. Ramsey further stated that Baptist violated the standard of care by permitting Dr. Harris and Dr. Aden to place the TEE probe because neither had the requisite training and credentials to place the TEE probe which is an invasive procedure and which exposed Cheryl Paige to the unnecessary risk of esophageal perforations and lacerations. All of these opinions by Dr. Ramsey were stated to a reasonable degree of medical certainty as required by the precedents of this Court. (R. 131-13).

Plaintiff requested the Court to reconsider its order excluding Dr. Ramsey's testimony, but the request was denied. (R. 1298-1303). Plaintiff moved to exclude the testimony of three of Dr. Harris' expert witnesses, Dr. Reginald Martin, Dr. Michael Hughson and Dr. Barry Aden because they did not possess "the education experience or training in the speciality of surgery which is at issue in this medical malpractice action." The Court refused to apply the same rationale used to exclude Dr. Ramsey's testimony and denied Plaintiff's motion to exclude Dr. Harris' and Baptist's experts who did not possess the education, experience and training in cardiovascular surgery. (R. 1317).

After Baptist moved for summary judgment on October 15, 2007, Plaintiff submitted the supplemental report of his cardiovascular surgery expert, Dr. Charles Bridges which stated, among other things detailed how Baptist violated the standard of care in its treatment and care of Cheryl Paige. Baptist promptly moved to strike this supplemental report of Dr. Bridges as untimely because it was submitted on November 1, 2007, in violation of Rule 4.04 (a) of the Uniform Rules of Circuit and County Court, Rule 26(F) (1) (B) of the Mississippi Rules of Civil procedure and after the deadline set by the Court for completion of expert related discovery. (R. 1033-1036). The Court granted Baptist's motion to exclude Dr. Bridges supplemental report as untimely (R. 1151), but denied Plaintiff's motion to strike the supplemental expert designations of Baptist and Dr. Harris which were also submitted beyond the deadline designated by the Court for completion of all expert related discovery. (R. 1271).

Moreover, the trial court severely restricted Plaintiff's discovery requests to Baptist after Baptist had initially refused to answer any of Plaintiff's discovery requests. Following a

hearing on Plaintiff's Motion to Compel Baptist to respond to Plaintiff's discovery requests, the trial court ordered Baptist to produce to Plaintiff "to the extent that it has not already done so" the following documents: (1) job descriptions for all its employees who were directly involved in the care of Cherryl Paige, (2) the result of competency assessments of Dr. William Harris, M.D. (3) the results of any Peer Review Investigation regarding the death of Cherryl Paige. (R. 219). The competency assessment of Dr. Harris and the results of any Peer Review Investigation regarding the death of Cherryl Paige were never produced by Baptist.

STANDARD OF REVIEW

This Court employs a de nova standard when reviewing the trial court's grant or denial of summary judgment. **Moss v. Batesville Casket Co.**, 935 So. 2d 393, 398 (¶ 15)(Miss. 2006). Decisions made by the trial court regarding discovery are reviewed under an abuse of discretion standard. **Prime Rx, LLC v. McKendree, Inc.**, 917 So. 2d 791, 794 (¶ 7)(Miss. 2005).

SUMMARY OF ARGUMENT

The trial court improperly and unduly restricted the efforts of Plaintiff to obtain discovery from Baptist Medical Center in this medical negligence case and then granted summary judgment in favor of Baptist. The Complaint alleged that Baptist was negligent in failing to provide competent staff in the care and treatment of Cherryl Paige which resulted in her death following aortic valve replacement surgery. In order to ascertain the true relationship between the surgeon and Baptist and the competency of the Baptist staff who assisted in the surgery, Plaintiff propounded discovery requests to Baptist which Baptist refused to answer.

Following a hearing on Plaintiff's motion to compel on the eve of trial, the trial court

ordered Baptist to produce to Plaintiff such basic information as its corporate and medical by-laws and part of its organizational chart, but refused to allow Plaintiff access to the complete corporate and medical by-laws to which he was entitled. This severely hampered Plaintiff in obtaining an expert in the field of hospital administration.

The trial court also improperly excluded the testimony of one of Plaintiff's medical experts on the ground that he was not a thoracic surgeon and ignored those portions of his report that had nothing to do with thoracic surgery but focused on the negligence of Baptist. On the other hand, the trial court permitted the testimony of Baptist's experts who were not thoracic surgeons and relied upon their testimony to grant summary judgment. The court abused its discretion regarding discovery issues by consistently restricting Plaintiff's discovery and refusing to apply the same rationale to Plaintiff's and Defendants' pre-trial motions even when the motions otherwise sought identical relief based upon identical reasons. Even so, the record contains sufficient issues of material fact that precluded summary judgment.

ARGUMENT

I. THE COURT ABUSED ITS DISCRETION IN LIMITING PLAINTIFFS RIGHT TO DISCOVERY OF DEFENDANTS MBMC'S CORPORATE BY LAWS , MEDICAL; STAFF BY-LAW AND ORGANIZATIONAL CHARTS.

In this case the Baptist committed gross violations of the discovery rules by producing documents to Plaintiff nearly two (2) years after the said discovery had been propounded and then only after the Circuit Court entered an order compelling Baptist to produce the requested documents. See Ekornes - Duncan v. Rankin Med. Ctr. 808 So. 2d 955 (Miss. 2002).

The purpose of the discovery rules is to prevent trial by ambush. Ambush is more likely in a malpractice action against a member of a profession, since as here, a lawyer is dealing with unfamiliar territory. Because of this, courts should allow an attorney ample time prior to trial to receive the names of experts and to discover meaningful information as to what their testimony will be. Nichols v. Tubb 609 So. 2d 377 (Miss. 1992).

A. The trial court abused its discretion when it limited the Plaintiffs rights to discovery of certain documents requested from the Defendant MBMC be produced to the Court in camera.

In his supplemental order regarding Plaintiffs motion to compel discovery, Judge DeLaughter comes to the conclusion that "the cause before the court is Plaintiffs motion to compel certain discovery from Defendant MBMC. Further, subsequent to the in camera inspection of certain documents Judge DeLaughter opined "that some of the documents should be produced to the Plaintiff, under protective order, due to their sensitive nature. Discovery in this case was ongoing and the deadline for providing expert disclosures had expired on September 7, 2007. Plaintiff had put the court on notice in its motion to extend the expert discovery deadline that Plaintiff needed the information, namely ,the MBMC corporate by-laws medical staff by-laws and MBMC's organizational chart, that the court was considering in camera, to decide whether or not Plaintiff needed to hire a hospital administrator expert. ~~The Court entered an order granting Plaintiff motion extending the time to name experts, but it did not enter its supplemental until September 24, 2007. See R. 221-23 and in that order the court allowed the defendant MBMC, 10 days from the 24th day of September 2007, to make the productions to Plaintiffs in a redacted form. This clearly deprived the Plaintiff of the opportunity to consider hiring the hospital administrator expert.~~

On November 29, 2007, less than 30 days later Judge DeLaughter granted the Defendant MBMC's motion for summary judgment against Plaintiff on grounds that Plaintiffs did not produce admissible evidence from a competent expert that defendant MBMC was negligent. (See R. 1243-44 and the transcript of the hearing on Plaintiffs motion to compel pp. 70-72). The Plaintiff obviously had insufficient time to submit the redacted documents to a competent hospital administrator and to get an opinion before the court granted the Defendant MBMC's motion for summary judgment. It is the Plaintiffs contention that under the totality of the circumstance an objective reasonable person, when considering the court's ruling on Plaintiffs Motion to compel discovery as expressed in the transcript of the hearing at pp 69-72, and when one reviews the court's ruling, in camera inspection of discovery, as well as the Circuit Judge's Order to strike the supplemental report of Dr. Charles Bridges on the same day the court granted Defendant MBMC's motion for summary judgment for lack of an expert opinion coupled with the Court's decision to exclude the testimony and report of Dr. Calvin Ramsey in route to the grant of defendant's summary judgement, leads an reasonable person to conclude that Judge DeLaughter abused his discretion on his rulings in discovery matters and the trial judge was partial towards defendant MBMC which deprived Plaintiff of his right to his day in Court. against defendant MBMC for their negligence in treating and caring for his wife proximately causing and or contribution to her untimely death. Hathcock v. Southern Farm Bureau Cas. Ins., 912 So. 2d 847 (Miss. 2005); Dodson v. Singing River Hosp. Sys., 839 So. 2d. 530, 534 (Miss. 203); Collins v. Josh., 611 So. 2d 898; 903 (Miss. 1992). Therefore Plaintiff prays that this Court reverses the trial court's order granting defendant MBMC's summary judgement and remand this cause to the Circuit Court of Hinds County to

be heard on the merits.

II. WHETHER THE TRIAL COURT ERRED BY EXCLUDING THE SUPPLEMENTAL REPORT OF PLAINTIFF'S CARDIOVASCULAR SURGERY EXPERT AND THE REPORT OF DR. CALVIN RAMSEY EN ROUTE TO GRANTING SUMMARY JUDGMENT TO BAPTIST MEDICAL CENTER

The trial court set a deadline of September 7, 2007 for the completion of all expert related discovery. Transcripts of Hearing on Motion to Extended Discovery deadline pp. 73-74. On November 1, 2007, Plaintiff's Cardiovascular surgery expert, Dr. Charles Bridges, submitted a supplemental report after reviewing additional records. Dr. Bridges supplemental report detailed the negligence of Baptist's staff in care and treatment of Cherryl Paige, but was excluded by the Court as being untimely.

Baptist filed a Motion to strike the Supplemental expert report of Plaintiffs Cardiovascular Surgeon Dr. Charles Bridges which Plaintiff submitted and served on Baptist in response to Baptist Motion for Summary Judgement on November 1, 2007.

On November 29, 2007, the same day the Court granted summary judgement in favor of Baptist. [R. pp 1107, 1108] the Court also granted Baptist Motion to Strike the Supplemental report of Plaintiffs' Expert Cardiovascular surgeon dr. Charles Bridges [R. 1006]. The Plaintiff in this case argues that he was held to an improper standard and that the supplemental reports of Dr. Bridges, which obviously injected factual disputes, regarding the negligence of the MBMC in this case, should not have been stricken because it amounted to a seasonable supplementation.

In Robert.v. Colson, 729 so. 2d 1243, 124 (Miss. 1999) Robert filed her complaint

in February, 1996. On March 24, 1997, Dr. Colson moved to dismiss or compel Robert to identify her expert. A trial date was set for December 8, 1997. On March 25, 1997, Robert properly supplemented her discovery responses with respect to expert testimony. The circuit court struck Robert's response on its own motion August, 1997. The Court reversed and remanded, finding that Robert's initial answer that she had not made any decision as to experts was appropriate when given, and was seasonably supplemented such that dismissal was not appropriate. Dr. Bridges had submitted his initial report in August, 2007 wherein he detailed the negligence of Dr. William Harris in the care and treatment of Cherryl Paige.

The expert report of Dr. Ramsey and the supplemental expert report of Dr. Bridges were both filed prior to the trial Court's ruling on Baptist's summary judgment. Following the Court's striking of the supplemental report of Dr. Bridges as untimely, Plaintiff sought to have the experts designated by Defendants past the expert related discovery deadline excluded for the same reason, but the request was denied. Although trial judges are afforded considerable discretion in managing pre-trial discovery and disclosure the discretion is not unlimited. Thompson v. Patino, 784 So. 2d 220 (Miss. 2001). Summary judgment is too drastic a penalty to impose for the submission of a supplemental expert report past the expert discovery deadline, especially where defendants also submitted additional expert designations past the expert discovery deadline. If the trial court had not excluded the timely expert report of Dr. Ramsey and the supplemental report of Dr. bridges there undoubtedly would have been disputed issues of material facts precluding summary judgment in favor of Baptist. Prior to ruling on Baptist's summary judgment, the trial court should have considered

all of the Rule 56 (c) evidence in the record rather than excluding the evidence demonstrating triable factual issues on summary judgment motions, the non-moving party should be given the benefit of every reasonable doubt. **Tucker v. Hinds County**, 558 So. 2d 869, 872 (Miss. 1990). Where, as here, one party swears to one version of the matter in issue and another says the opposite, there are obviously issues of fact sufficient to deny summary judgment. Where triable issues of fact exist, the trial court's decision to grant summary judgment should be reversed. **Richmond v. Benchmark Construction Corporation**, 692 So. 2d 60 (Miss. 1997).

Even though the lower court excluded the testimony of Plaintiff's expert, Dr. Ramsey, Dr. Ramsey was clearly a qualified expert pursuant to the requirements of Mississippi Rules of Evidence 702 which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience training or education, may testifying thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Clearly, Dr. Ramsey was as an expert by knowledge, skill, experience, training and education to offer an opinion on whether Baptist's care and treatment fell below the applicable standard of care and whether permitting utilization of the TEE probe by doctors untrained and uncredentialed in its use constituted negligence by Baptist. In granting summary judgment in favor of Baptist, the trial court simply ignored evidence in the record which contradicted

Baptist's assertions that its personal complied with the standard care. If the trial court had considered the assertions in Dr. Ramsey's expert report that Baptist violated the standard of care. If the trial court had considered the assertions in Dr. Ramsey's expert report that Baptist violated the standard care and treatment of Cherryl Paige, summary judgment would have been appropriately denied. By striking Dr. Ramsey's expert report on the dubious ground that Dr. Ramsey was not an expert in cardiovascular surgery, the Court improperly failed to even consider those portions of Dr. Ramsey's report that were unrelated to cardiovascular surgery, but rather focused on the non-surgical aspects of Cherryl Paige's care and treatment by Baptist. The Court's order granting summary judgment to Baptist specifically states: "The Court's ruling is based on Dr. Ramsey's lack of education, experience or training in the speciality of surgery which is at issue in this medical malpractice case. Dr. Ramsey's speciality is internal medicine. Dr. Harris is a thoracic surgeon". (R. 1269). The Court did not cite any authority for its conclusion that limited Plaintiff's experts to thoracic surgeons simply because one of the defendants was a thoracic surgeon and Cherryl Paige was in the hospital to undergo thoracic surgery. This analysis effectively granted immunity to the hospital and its staff for negligence alleged in the complaint and set forth in Dr. Ramsey's report. For example, Dr. Ramsey stated that Baptist violated the standard care by permitting Dr. Harris and Dr. Aden to utilized the transeophageal echocardiograph (TEE) without the requisite training and credentials and that the lacerations to Cherryl Paige's esophagus noted on the autopsy report were likely caused by the numerous attempts to insert the TEE. (R. 1312).

By summarily excluding Dr. Ramsey's expert report because he was not a thoracic surgeon, the trial court did not even consider those expert opinions which did not pertain to

the surgery, but which focused on the negligence of Baptist. Both the expert report of Dr. Calvin Ramsey and the supplemental expert report of Dr. Charles Bridges demonstrated that there were genuine issues of material fact regarding the negligence of Baptist in its care and treatment of Cherryl Paige which made summary judgment inappropriate. See **Drummond v. Buckley**, 627 So. 2d 264 (Miss. 1993).

When the Court's exercise of its discretion to strike the supplemental report of Dr. Charles Bridges as untimely is viewed in light of the numerous discovery violations committed by Baptist in this case it can clearly be said that the court abused its discretion in this case and effectively tipped the scale in favor of the Defendant Baptist in this case by striking the supplemental expert opinion of Plaintiff's expert on November 29, 2007 and on the same day granting summary judgment for the Defendant Baptist on November 29, 2007. See **Mississippi United Methodist Conference v. Telaya Brown**, Supreme Court of Miss. No. 2005-M-02092.

In this case the complaint was filed on March 4, 2005. The Plaintiffs had to file motion to compel the Defendant Baptist to respond to discovery which it contended it needed in order for its experts to prepare their expert opinion. Plaintiff also filed several motions to extend the deadline to designate experts related to the Defendant Baptist's failure to comply with discovery rules, in fact the circuit court was put on Notice on March 10, 2006 that Plaintiff needed defendant to produce documents requested so that Plaintiff could decide whether or not they needed to hire an expert hospital administrator, the Defendant Baptist did not cooperate and continued to violate the Rules of discovery until August 10, 2007 when the Court held a hearing on Plaintiffs motion to compel. (See R. 27-29 and R. 173 and R.1-92

Transcript of the hearing ain Plaintiffs motion.

The Plaintiff named Dr. Bridges and Dr. Ramsey as experts on April 17, 2007, (See R. pp 31-36). It is also essential to note that the Circuit Court also granted the motion of Defendant to strike the expert testimony of Dr. Calvin Ramsey on October 12, 2007 only three(3) days before the Defendant Baptist filed its motion for summary judgment on October 15, 2007. (See R. pp 261 and 262 and See also R. 885). The Court also entered an order denying Plaintiffs motion to reconsider its order excluding the testimony of Dr. Ramsey until January 9, 2008, but yet the Court did not consider the opinions of Dr. Ramsey before it granted Defendant Baptist motion for summary judgment while Plaintiffs motion to reconsider was pending. (See R. 1335, R. 1318-1334).

Although the supplemental expert report of Dr. Bridges had been submitted after the deadline for disclosure of expert related discovery the Circuit Court could have found some penalty to impose that was less drastic than striking Dr. Bridges supplemental report. See Mississippi Power Light Co. v. Lumpkin, 725 So. 2d 733 (Miss. 1998) (exclusion of evidence due to discovery violation is extreme measure). See Thompson v. Patino supra (Citation Omitted).

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF BAPTIST MEDICAL CENTER

Standard of Review For Summary Judgment

This Court applies a de novo standard of review of a lower courts' grant or denial of summary judgment. Hudson v. Courtesy Motors, Inc., 794 So. 2d 999, 1002 (Miss. 2001).

The proponent of a summary judgment motion bears the burden of showing that there are no genuine issues of material fact such that he is entitled to judgment as a matter of law.

Collier v. Trustmark Nat'l Bank, 678 So. 2d 693, 696 (Miss. 1996).

The motion may not be defeated merely by responding with general allegations, but must set forth specific facts showing that issues exist which necessitate a trial. **Drummond v. Buckley**, 627 So. 2d 264, 267 (Miss. 1993). After viewing the evidence in a light most favorable to the non moving party, this Court will only reverse the decision of the trial court if triable issues of facts exist. **Travis v. Stewart**, 680 So. 2d 214, 216 (Miss. 1996).

A fact is material if it "tends to resolve any of the issues properly raised by the parties.

Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So 2d 790, 794 (Miss. 1995).

Issues of facts sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite". **Tucker v. Hinds County**, 558 So 2d at 872, (Miss. 1990).

If any triable issues of fact exist, the lower courts decision to grant summary judgment will be reversed. **Richmond v. Benchmark Constr. Corp.**, 692 So. 2d at 60, 61 (Miss. 1997).

This instant action contains several issues of fact which should have precluded the granting of summary judgment. As Mississippi case law holds, 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). This 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.

First, a genuine issue of fact is present with regard to whether Baptist was negligent in allowing non-credentialed persons to perform a Transeophageal Echocardiography ("TEE). The trial Court's stated rationale in granting Baptist summary judgment motion on this issue was that expert testimony is necessary to ascertain duty, breach and proximate cause, given that the claim raises an issue of professional negligence. *However, the trial court failed to recognize the expert opinion tendered by Dr. Ramsby on the this issue by excluding Dr. Ramsey's testimony because he was not a thoracic surgeon.*

In this instant action, it is both clear and undisputed that the Baptist Hospital Medical Staff had knowledge that the Dr. Harris would perform a TEE on its premises on February 16, 2004. It is also undisputed that Defendant had knowledge on February 16, 2004 that neither Dr. William Harris nor Dr. Barry Aden were credentialed to insert, utilize perform or interpret the TEE.

It is Plaintiff's contention that the simple issue of whether a hospital is negligent in allowing a surgeon and anesthesiologist to perform a procedure that they admittedly were not credentialed to perform on their premises is, negligent. Given his extensive skill training knowledge and expertise, in treating and caring for patients for Thirty-One (31) years as an internal medicine specialist, Dr. Ramsey was qualified and competent to testify with regard to whether Baptist was negligent in allowing Dr. Harris and Dr. Aden to perform procedures

that they were not qualified to perform.

3.

Plaintiffs also contended that Baptist was negligent in its failure to obtain informed consent from Mrs. Paige with regard to the utilization of the TEE procedure. According to Mississippi Law, no physician or hospital may subject one to medical treatment without that persons' 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 *Calabrese v. Trenton State College*; *Marshall v. Clinic for Women* 490 So.2d 861, 864 (Miss. 1986)., This court held 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 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. 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 fore go the treatment constitutes a prima facie violation of that duty. *Id.*

Given Mrs. Paige's past medical history, it is definitely reasonable to assume that had the she been made aware of the risks of the TEE procedure, it would have undoubtedly affected her decision to submit or forego treatment. Since Baptist failed to obtain Mrs. Paige's consent, a prima facie violation of their duty was established. As a direct and proximate result of the breach of this duty, Mrs. Paige suffered lacerations to her esophagus.

An issue of fact was also present with regard to whether Baptist was negligent in as much as the staff at Baptist failed to recognize Mrs. Paige's emergency situation in a timely manner to provide appropriate treatment. The trial court's stated rationale in granting Baptist summary judgment on this point was that Plaintiff's failed to submit any admissible evidence to rebut Baptist's multiple affidavits demonstrating that its nurses and other personnel involved in the treatment of the decedent met or exceeded the applicable standard of care.

The report of Plaintiff's expert, Dr. Bridges dated August 18, 2007, clearly stated that no one including the Baptist's staff members on the surgical team recognized Mrs. Paige life threatening symptoms and conditions in a timely manner to save her life by giving her a sufficient amount of blood and returning her to the operation room within a few minutes of her arrival in the Intensive care unit to determine the source of the blood loss.

The expert medical opinion of Dr. Calvin Ramsey was submitted prior to the expiration of both the expert discovery deadline and uniform Circuit Court Rule 4.0.4. At page 6 of his expert report, Dr. Ramsey stated that in his expert opinion, Baptist breached the standard of care by not paying careful attention to pre-operative data that had the potential to destabilize Mrs. Paige's surgery, which represented unreasonable care. The trial Court ruled in Baptist's favor by striking Plaintiff's expert on this issue and granting Baptist's Motion to Exclude the Testimony Dr. Calvin Ramsey. . The trial Court's grounds for granting the motion was that Dr. Ramsey was a non-surgical expert. Conversely, when Plaintiff filed his motion to exclude the testimony of Defendants' expert asserting exactly the same rationale, this trial court inconsistently ruled in favor of the Defendants.

Undoubtedly, if the trial Court had ruled consistently on both motions, a genuine issue

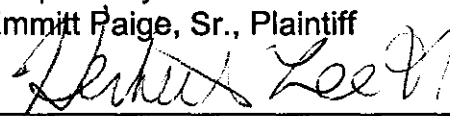
of fact would have been presented. The views of the non-surgical opposing experts were in direct contradiction with each other, creating genuine issues of material fact, which should have been left for the jury to decide. **Brown v. Credit Center, Inc.** 444 So.2d 358 (Miss. 1983); **Bourn v. Tomlison Interests, Inc.**, 456 So.2d 747 (Miss. 1984).

CONCLUSION

Based upon the foregoing arguments and authorities, this Court should find that the trial court abused its discretion by limiting Plaintiff's discovery and that the record contains sufficient issues of disputed material facts to warrant presentation to a jury. The trial court's grant of summary judgment in favor of Baptist should thus be reversed and this case remanded for a trial on the merits of Plaintiff's claims against Baptist.

Respectfully Submitted
Emmitt Paige, Sr., Plaintiff

BY:


HERBERT LEE, JR.,
LEONARD McCLELLAN,
LEE & ASSOCIATES
2311 West Capitol Street
Jackson, Mississippi 39209
Telephone: 601-355-9895
Facsimile: 601-355-7955
Attorneys For Plaintiff's

CERTIFICATE OF SERVICE

I, Herbert Lee, Jr. hereby certify that I have this day served, by United States Mail, Postage prepaid, a true and correct copy of Appellant's Brief to the following:

D. Collier Graham, Jr., Esq.
Wise Carter Child & Caraway
600 Heritage Building
401 East Capitol Street
P.O. Office Box 651
Jackson, Mississippi 39205-0651

Honorable William Coleman
Circuit Court Judge
Post Office Box 327
Jackson, Mississippi 39205

This the 4th day of September, 2008.


HERBERT LEE, JR.

CERTIFICATE OF SERVICE

I, Herbert Lee, Jr., one of the attorneys for Plaintiff, do hereby certify that I have this day caused to be mailed by U. S. Mail, postage prepaid, a true and correct copy of Appellant's Brief to the following:

Collier Graham, Esq.
Wise, Carter, Child & Caraway
401 East Capitol Street Ste. 600
Post Office Box 651
Jackson, Mississippi 39205-0651

Honorable Bobby B. DeLaughter, Circuit Court Judge
Post Office Box 327
Jackson, Mississippi 39205

This the 4th day of September, 2008.

A handwritten signature in cursive script, appearing to read "Herbert Lee, Jr.", written over a horizontal line.

HERBERT LEE, JR.