

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PAULA LEE VAUGHN

APPELLANT

VS.

CIVIL ACTION NO. 2008-TS-00987

MISSISSIPPI BAPTIST MEDICAL CENTER

APPELLEE

**BRIEF OF APPELLEE
MISSISSIPPI BAPTIST MEDICAL CENTER**

ORAL ARGUMENT NOT REQUIRED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Ms. Paula Lee Vaughn - Plaintiff/Appellant;
2. Bill Waller, Sr. - Counsel for Plaintiff/Appellant;
3. Mississippi Baptist Medical Center, Inc. - Defendant/Appellee;
4. Gaye Nell Currie, Wise Carter Child & Caraway, P.C. - Counsel for Defendant/Appellee;
5. Eugene R. Naylor, Wise Carter Child & Caraway, PC. - Counsel for Defendant/Appellee; and
6. Honorable Swan Yerger, Hinds County Circuit Court Judge

SO CERTIFIED this the 23rd day of March, 2009.

Respectfully submitted,

Mississippi Baptist Medical Center, Inc.

BY:


GAYE NELL CURRIE

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STATEMENT OF THE ISSUES

1. Whether the trial court appropriately granted summary judgment finding that no genuine issue of material fact existed with regard to the proximate cause of Vaughn's infection.
2. Whether the trial court appropriately granted summary judgment where Vaughn presented no proof from a qualified medical expert that Mississippi Baptist Medical Center's staff or employees proximately caused any injury or damages to Vaughn.
3. Whether the trial court appropriately denied Vaughn's Motion to Amend Rulings of the Court requesting additional time to designate a qualified expert witness where Vaughn had over one and one-half years to proffer the required expert testimony to establish the essential elements of her claim but failed to do so.

STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings

Vaughn filed her original complaint on October 9, 2006, alleging that Brandon Nursing Home and Rehabilitation Center, LLC, (“Brandon Nursing Home”) and Mississippi Baptist Medical Center were negligent in the care and treatment provided to Paula Vaughn at their respective facilities. R.5-21; R.E.1-17. Vaughn was admitted to Mississippi Baptist Medical Center on October 24, 2005, upon orders of her physician, with a history of hypertension, diabetes, congestive heart failure, transient ischemic activity, urinary tract infections, gastrointestinal complaints and depression. R. 428; R.E.19. Dr. McMullan performed a coronary bypass or mitral valve repair and thereafter she remained under the care of her attending physicians until Dr. McMullan discharged her on November 2, 2005. Specifically, Vaughn alleged that due to allegedly negligent care received at Mississippi Baptist Medical Center during October 24 through November 2, 2005, her surgical leg wounds became infected due to the presence of feces and urine in her wound. R.7.; R.E. 3. Furthermore, Vaughn alleged that negligent care received at Brandon Nursing Home from November 21, 2005 to November 28, 2005 caused the infection to worsen, particularly because Brandon Nursing Home failed to administer a required treatment of a “wound vacuum” to her leg wounds. R.8; R.E. 4. In addition, Vaughn claimed her wounds were allowed to be contaminated with feces and urine, and that the nursing home failed to clean and dress her wounds. R.9; R.E. 5. Vaughn also claimed to have suffered two falls during the week that she was in the nursing home. R. 8-9; R.E. 4-5. Vaughn further alleged that during her admission to Brandon Nursing Home she was physically and emotionally abused, which abuse caused Vaughn additional pain and increased infection. R.9; R.E. 5. Vaughn settled her claim against Brandon Nursing Home and an Agreed Order of Dismissal with Prejudice was entered on May 2, 2007, dismissing Brandon Nursing Home as a defendant.

R.143. Thereafter, Vaughn requested leave to amend her complaint and on or about July 11, 2007, she filed her amended pleading, redirecting all of her claims for injuries and damages solely against Mississippi Baptist Medical Center. R. 183.

A Scheduling Order was entered in this cause on September 19, 2007, which required that Vaughn designate her experts on or before November 2007. R. 365. Vaughn filed a designation of experts on November 2007, but did not designate a medical doctor as an expert to give opinions on the essential element of causation. R. 406-419. Rather, Vaughn designated Crystal Keller, R.N., to give opinions regarding alleged nursing negligence and to give opinions regarding medical diagnosis and causation. Although Vaughn also designated three treating physicians to give opinions regarding their care and treatment of her, none of them were designated to, nor did Plaintiff proffer any opinions from any of them, regarding the alleged negligence of the nursing or other staff at Mississippi Baptist Medical Center or the elements of causation/damages. Id.

Fifteen (15) months after Vaughn initially filed her Complaint and following the completion of discovery, Mississippi Baptist Medical Center filed its Motion for Summary Judgment on the basis that Vaughn could not meet her burden of proof as she had no qualified expert testimony to establish the essential element of causation. R. 479-482; R.E.70-73. The only medical experts before the trial court who were qualified to speak medical diagnosis and causation were Dr. Martin McMullan, Vaughn's treating cardiovascular surgeon, and Mississippi Baptist Medical Center's expert, Dr. Rathel Nolan, Professor of Medicine, Division of Infectious Disease, University of Mississippi Medical Center, both of whom concluded that Vaughn did not have an infection at the time of her discharge from Mississippi Baptist Medical Center on November 2, 2005; and that furthermore, her subsequent post-hospitalization infection, which developed after her discharge from Mississippi Baptist Medical Center, was not caused by or contributed to by any alleged negligence

of the nursing staff at Mississippi Baptist Medical Center. R. 683-684, 688-690; R.E. 93-94, 98-100. Based thereon, the trial court properly held that there was no genuine issue of material fact present and summary judgment was appropriate. Feeling aggrieved, Vaughn instituted this appeal.

II. Statement of the Facts

Paula Vaughn, age 74, was admitted to Mississippi Baptist Medical Center on October 18, 2005, with complaints of shortness of breath and a history of congestive heart failure. She had a past medical history significant for hypertension, insulin dependent diabetes, fatigue, syncope, transient ischemic activity, urinary tract infections, gastrointestinal complaints, abdominal pain and depression. Upon admission to Mississippi Baptist Medical Center, attending physicians determined that Vaughn was in need of a coronary bypass and mitral valve repair. The procedure was performed by Dr. Martin McMullan on or about October 24, 2005. Vaughn tolerated the procedure well without complications. R. 670; R.E. 80.

Vaughn remained at Mississippi Baptist Medical Center under the care of attending and consulting physicians until on or about November 2, 2005, when Dr. McMullan made the medical determination that Vaughn was an appropriate candidate for discharge to a hospital with a swing bed. He, along with Vaughn's family, made arrangements for transfer of Vaughn to Montfort Jones Hospital, Kosciusko, Mississippi.¹ On Dr. McMullan's order, Vaughn was discharged from Mississippi Baptist Medical Center and transferred to Montfort Jones. R. 683; R. 93. At the time of her discharge, and at no time during her admission to Mississippi Baptist Medical Center during October 24 through November 2, 2006, were Vaughn's wound sites infected. R. 673-674, 689; R. E. 83-84, 99. Significantly, the record of admission to Montfort Jones, and thereafter prior to

¹ Vaughn makes repeated references in her brief to Mississippi Baptist Medical Center having discharged Vaughn. This is a complete fabrication and misstatement.

discharge, reflect that she had no infection present in her surgical wounds at that time. R. 686-687; R.E. 96-97. Likewise, the surgical wounds were noted to be dressed and intact. Id. Vaughn remained at Montfort Jones Hospital until November 4, 2005, at which time she was discharged home at her request.

It is unknown what transpired with Vaughn during the two day period when she was at home and was not being cared for by medical personnel. However, what is known is that Vaughn returned to Montfort Jones Hospital on November 6, 2005, in a very different condition from that which existed at the time of her discharge two days prior thereto.

On November 6, 2005, Vaughn returned to Montfort Jones Hospital presenting with weakness, dehydration, acute renal failure, and an apparent graft site infection. R. 430; R.E. 21. Between the time of her discharge from Montfort Jones on November 4 and her return to Montfort Jones on November 6, 2005, her left surgical wound site became infected. On admission, she had decreased appetite, weakness and fatigue and slight shortness of breath. She had swelling and her skin turgor was markedly diminished. According to laboratory studies, Vaughn's white blood count was 17,000, blood urea nitrogen was 82 and her creatine level was 5.4. On November 7, 2005, Vaughn was transferred to Mississippi Baptist Medical Center for further treatment. Id.

On this second presentation to Mississippi Baptist Medical Center, Vaughn was noted to be in acute renal failure and to have an infection at the site of the graft from her previous coronary bypass grafting.² A culture of the wound site revealed diptheroids and moderate growth coagulase negative staphylococcus. R. 689; R.E. 99. These organisms are present on the skin of all individuals. Contrary to Vaughn's assertions in her brief, these organisms do not present by or through feces,

²Although, Vaughn asserts she had an infection in both wound sites the documentation by physicians and care-givers at this time indicate an infection was present only in the left leg surgical wound site.

urine or waste product. R. 689; R.E. 99. Their presence on the wound site of Paula Vaughn occurred as a natural consequence of her open wound, her immuno-compromised condition and her other co-morbid medical conditions. Further, the diptheroids are non-pathenogenic and did not cause the infection. R. 689-690; R.E. 99-100. The coagulase negative staphylococcus, an organism present on the entire population, was cultured from the wound site. The presence of this staphylococcus did not, however, occur as a result of alleged negligence or failure on the part of staff at Mississippi Baptist Medical Center to care and treat Vaughn post-operatively during her initial admission, but was the result of Vaughn's underlying illness, post-operative and co-morbid conditions. Furthermore, the onset of infection of Vaughn's wound undisputedly occurred at place and time other than when she was a patient at Mississippi Baptist Medical Center during October 24 through November 2, 2005. R 689-690; R.E. 99-100.

Vaughn remained at Mississippi Baptist Medical Center until November 21, 2005, at which time she was discharged on orders of her treating physician to Brandon Nursing Home. During her residency at Brandon Nursing Home, the facility failed to continue the use of the wound vac or other wound care treatment of the type previously instituted at Mississippi Baptist Medical Center. Vaughn suffered two falls while residing at Brandon Nursing Home, incurring injury to her back and head. Vaughn did not receive assistance to go to the bathroom and was found to defecate and urinate on herself. The nursing home failed to clean and dress her wounds. After her second fall, a family member insisted she be discharged due to the abuse and neglect incurred at the facility. Vaughn then returned home. However, her condition did not improve so she returned to Mississippi Baptist Medical Center. R. 8-9; R.E. 4-5.

On December 5, 2005, Vaughn presented for a third time to Mississippi Baptist Medical Center where she remained until December 28, 2005. Vaughn presented with acute renal failure,

dysphagia, lower extremity thigh wounds and a urinary tract infection. Consultations from cardiovascular surgery, renal, wound care and gastrointestinal services were ordered. Vaughn was found to have worsening renal function as well as pancytopenia (decreased blood cells). She was initially started on Rocephin for the urinary tract infection which was later switched to Levaquin. Vaughn was also treated by consulting specialists for her various medical presentations as well as wound care. On examination of her wounds, it was noted that the wound vacs had been discontinued during her admission to Brandon Nursing Home. Urine cultures revealed the presence of Klebsiella pneumoniae. Klebsiella bacteria is present in the urine and waste material of individuals. R. 432; R.E. 23. The Klebsiella bacteria did not originate while Vaughn was a patient at Mississippi Baptist Medical Center and did not present as a result of a deviation from the applicable standard of care by personnel at Mississippi Baptist Medical Center. R. 689-690; R.E. 99-100. Clinical laboratory results conclusively demonstrate that no such bacteria was present at the time of Vaughn's discharge from Mississippi Baptist Medical Center on November 21, 2005. Further, medical records, and the only competent medical testimony presented demonstrate there was no infection in her leg graft sites when she was discharged from Mississippi Baptist Medical Center. R. 686, 689-690; R.E. 96, 99-100. The presence of bacteria and the onset of the urinary tract infection occurred at a time following her discharge from Mississippi Baptist Medical Center, during either her admission to Brandon Nursing Home or during the period of time that she was at home. Id.

During her admission to Mississippi Baptist Medical Center between December 5-9, 2005, Vaughn's conditions were appropriately and timely treated and nursing and other hospital personnel appropriately carried out the orders of Vaughn's attending physicians.³ R. 432-439, 689-690; R.E.

³Although Vaughn offered her own criticism of nursing care, as a matter of undisputed fact, Vaughn's own treating physician attested to the proper carrying out of orders and that he was adequately

23-30, 99-100. On December 9, 2005, Vaughn was transferred to the Mississippi Hospital for Restorative Care for treatment of her bilateral thigh wounds and pancytopenia. During her admission, she continued to receive intravenous antibiotics, wound care, monitoring of her hemoglobin, hematocrit and platelets as well as continued consultation with specialists. The care and treatment provided during this admission was appropriate and was not necessitated by any deviation from the applicable standard of care by personnel at Mississippi Baptist Medical Center. R. 689-690, R.E. 99-100. Vaughn was subsequently discharged by her physician from the facility to return home. She later became a resident of Choctaw Nursing Home.

It is important to understand that Vaughn was a patient at Mississippi Baptist Medical Center during the year of 2005 on three different occasions. The first occasion was necessitated by her underlying need for cardiac surgery. The surgery was performed without incident and she was discharged from the facility by her treating physician to Montfort Jones Memorial Hospital. The second admission was necessitated by Vaughn's acute renal failure and onset of an infection in her left graft wound site which infection manifested at some point following her discharge from Montfort Jones Memorial Hospital. The third and final admission to Mississippi Baptist Medical Center occurred after Vaughn had been a resident at Brandon Nursing Home, had not received the ordered wound care for treatment of her leg wounds, after she had been at home for some period of time without medical care, and had developed a urinary tract infection as well as renal failure and a blood disorder. She was readmitted to Mississippi Baptist Medical Center for treatment for those conditions which, as Vaughn alleged in her original Complaint, had not been addressed by Brandon Nursing Home and which had developed after her previous admissions to Mississippi Baptist

advised and informed so as to diagnose and treat Vaughn.

Medical Center. Vaughn was appropriately treated on each presentation to Mississippi Baptist Medical Center and at all times during her admission thereto, the staff met or exceeded the standard of care applicable to them. R. 689-90; R.E. 99-100. None of the injuries or conditions of which Vaughn complains were proximately caused by any alleged negligence of the staff at Mississippi Baptist Medical Center. Id.

SUMMARY OF THE ARGUMENT

Substantive law defines the essential elements of a claim and identifies which facts are truly material for purposes of summary judgment. Mallery v. Taylor, 805 So. 2d 613 (Miss. App. 2002). In a medical malpractice action, the plaintiff bears the burden of proof at trial and, the burden of production on summary judgment. Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So.2d 790, 794 (Miss.1995). In order to establish a *prima facie* case of medical negligence, a plaintiff must present competent expert testimony as to the applicable standard of care, breach, and **proximate causation**. Phillips v. Hull, 516 So.2d 488, 491 (Miss.1987). Mississippi case law is very specific in the requirement that a plaintiff **must** present qualified expert medical testimony to establish each of the elements of *prima facie* case of medical malpractice. Coleman v. Rice, 706 So. 2d. 696, 698 (Miss.1997). Vaughn failed to meet her burden of production in opposition to Defendants' Motion for Summary Judgment, and she failed to demonstrate a genuine issue of material fact as concerns the onset of an infection and/or medical causation between alleged negligence and injuries or damages claimed. Vaughn presented no qualified, medical expert to give testimony that any alleged breach of the standard of care by the nursing staff at Mississippi Baptist Medical Center caused or contributed to Vaughn's claimed injuries or damages. The only qualified medical experts in this cause have attested that Vaughn was not suffering from any infection in her surgical wound sites at the time her physician, Dr. McMullan, discharged her from Mississippi Baptist Medical Center on

November 2, 2006, and that no alleged negligence on the part of the nursing staff at Mississippi Baptist Medical Center caused or contributed to any alleged injury to Vaughn. Without such testimony to prove proximate causation, Vaughn's claim failed as a matter of law. Therefore, the trial court correctly held summary judgment was appropriate.

On appeal, Vaughn asks this Court for relief in three (3) alternate ways. Vaughn first asks the Court to allow the opinion of her nursing expert, Crystal Keller, on medial causation despite this Court's prior rejection of such a profer by Keller in a prior case. In the alternative, Vaughn asks the Court to find that the medical diagnosis of an infection is a matter within the province of lay persons, and to therefore accept conclusory assertions of Vaughn's children that an infection was present and as to what caused the infection. Failing in these requests, and despite having elected not to designate or profer physician testimony to the trial court, Vaughn asks this Court for another bite of the apple, and to remand this case so that she can hopefully develop requisite medical testimony. Vaughn had her day in Court and Mississippi Baptist Medical Center should not be subjected to unending litigation at Vaughn's whim. The ruling of the trial court and dismissal with prejudice should be affirmed.

ARGUMENT

I. Standard of Review

This Court uses a *de novo* standard of review when passing on questions of law including summary judgment. Ellis v. Anderson Tully Co., 727 So. 2d 716, 718 (¶14)(Miss. 1998). Where the moving party establishes the Plaintiff's inability to meet any one of the essential elements of her claim, "all other contested issues of fact are rendered immaterial." Williams v. Bennett, 921 So. 2d 1269, 1272 (Miss. 2006) (*citing Celotex Corp. v. Caterett*, 477 U.S. 317, 323 (1986)). Likewise, where a non-moving party who bears the burden of proof at trial fails to present credible evidence

to support any single essential element of her claim, other issues become immaterial and the movant is then entitled to judgment as a matter of law. Crain v. Cleveland Moose Lodge 1532, 641 So. 2d 1186,1188 (Miss. 1994). Furthermore, this Court will not overturn on appeal the trial court's decision "unless [it is] manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Stanton v. Delta Regional Medical Center, 802 So. 2d 142, 145 (Miss. 2001). In this case, as Vaughn presented no competent, qualified medical expert to establish an essential element of her medical malpractice claim - the element of causation - the trial court correctly applied the appropriate legal standard and summary judgment was granted.

II. Summary Judgment Was Appropriately Granted As Vaughn Failed to Present Evidence to Establish an Essential Element of Her Claim.

Vaughn asserted a medical negligence claim against Mississippi Baptist Medical Center claiming that its nursing staff was negligent in their care and treatment of Paula Vaughn during her admission to the hospital between October 24, 2005 and November 2, 2005, and that such negligence caused or contributed to the development of an infection in Vaughn's surgical wound sites.⁴ To prove such allegations, Vaughn must have presented competent, qualified medical expert testimony not only to the alleged breaches of the standard of care by the nursing staff at Mississippi Baptist Medical Center, but also that such alleged breaches proximately caused or contributed to the claimed injury. Vaughn presented no competent, qualified medical expert to give any opinions regarding causation, and significantly, her own treating physician testified, to a reasonable degree of medical certainty, that Vaughn had no infection in her wound sites or elsewhere during her initial admission to Mississippi Baptist Medical Center. R. 683; R.E. 93. The Montford-Jones Hospital

⁴Vaughn contends in her Brief on Appeal "that during the course of Vaughn's hospital stay from October 24, 2005-November 2, 2005, she developed an acute infection in her leg wounds from defecation and urination." Appellant's Brief at p. IV.

records also confirm the absence of infection upon transfer from Mississippi Baptist Medical Center. R. 686-87; R.E. 96-97.

The only expert offered by Vaughn to support her claim was Crystal Keller: a nurse who this court has previously pronounced is not, as a matter of law, qualified to make a medical diagnosis or to give opinions regarding medical causation. Richardson v. Methodist Hospital of Hattiesburg, Inc., 807 So.2d 1244 (Miss. 2002). Nonetheless, Vaughn proffered this nurse, asking the trial court, and now this Court, to substitute her opinions for those of Vaughn's treating physician. The trial court properly recognized that Nurse Keller was not qualified to give opinions regarding medical diagnoses and causation, and appropriately granted summary judgment to Mississippi Baptist Medical Center as no genuine issue of material fact was present with regard to an essential element of Vaughn's claim. R. 727; R.E. 120.

A. Nurse Keller Is Not Qualified to Make a Medical Diagnosis.

Vaughn alleges that during her initial admission to Mississippi Baptist Medical Center from October 24, 2005 through November 2, 2005, improper nursing care caused her to develop infections in her surgical wound sites. Such claim, however, presupposes that infections were present in the wound sites at that time. To the contrary, Vaughn's treating physician testified that no infections were present in Vaughn's wounds at that time.⁵ R. 683; R.E. 93. Nonetheless, Vaughn's expert, Nurse Keller, in direct contravention to the diagnosis made by Vaughn's treating physician, and acting outside the scope of her license and authority, seeks to offer a medical diagnosis of Vaughn

²Upon Vaughn's second admission to Mississippi Baptist Medical Center, she did have an infection to her left surgical wound site. However, this infection manifested at a time and place other than Mississippi Baptist Medical Center and was not the result of contamination of the wounds with feces and urine, but was the result of naturally occurring bacteria found on the skin of all individuals. *See infra*, Section B; R.689-90, R.E. 99-100.

as having an infection in her wound sites. Nurse Keller is, however, not only unqualified to make such a medical diagnosis or to speak to issues of medical causation, she is prohibited from doing so by law. § 73-15-5, Miss. Code Ann. (Rev. 2008); Richardson v. Methodist Hospital of Hattiesburg, Inc., 807 So.2d 1244 (Miss. 2002).

Section 73-15-5(2), provides:

The “practice of nursing” by a registered nurse means the performance for compensation of services which require substantial knowledge of the biological, physical, behavioral, psychological and sociological sciences and of nursing theory as the basis for assessment, diagnosis, planning, intervention and evaluation in the promotion and maintenance of health; management of individuals' responses to illness, injury or infirmity; the restoration of optimum function; or the achievement of a dignified death. *“Nursing practice” includes, but is not limited to, administration, teaching, counseling, delegation and supervision of nursing, and execution of the medical regimen, including the administration of medications and treatments prescribed by any licensed or legally authorized physician or dentist. The foregoing shall not be deemed to include acts of medical diagnosis or prescriptions of medical, therapeutic or corrective measures. . . .*

Miss. Code Ann. (Rev. 2008)(emphasis added). The Mississippi Legislature has specifically confined nursing practice to those areas of the medical regimen not to include the making of a medical diagnosis. Nonetheless, Nurse Keller is doing just that - attempting to offer a medical diagnosis of an infection in Vaughn’s wound sites during Vaughn’s initial admission to Mississippi Baptist Medical Center.

To support her position, Vaughn mistakenly, and short-sightedly, relies upon the first sentence of statute for support of her assertion that nurses indeed may make medical diagnoses. However, the first sentence of the statutory section refers to a “nursing diagnosis.”⁶ A nursing

³Nursing diagnosis is defined as “[t]he patient problem identified by the nurse for nursing intervention.” TABOR’S CYCLOPEDIC MEDICAL DICTIONARY, 19th Ed. 2001.

diagnosis is not the same as a medical diagnosis and is no substitute for requisite proof on medical/legal causation. Nurses may make assessments and diagnose a patient's problem from a nursing perspective, i.e. what nursing care needs to be implemented. They cannot, however, diagnose a medical condition or prescribe medical, therapeutic or corrective measures. §73-15-5(2), Miss. Code Ann. (Rev. 2008). The limiting language of the second sentence of the statute, which Vaughn omits, specifically prohibits nursing practice from involving the act of making medical diagnoses. §73-15-5(2), Miss. Code Ann. (1972). Furthermore, not only is Nurse Keller prohibited by law from making such a medical diagnosis, her diagnosis is not based upon medical facts and is simply incorrect.

Dr. Martin McMullan, Vaughn's treating physician, testified under oath that no infection was present in Vaughn's surgical wound sites during her initial hospitalization at Mississippi Baptist Medical Center. Specifically, Dr. McMullan, stated as follows:

Q. Was there any indication to you that Ms. Vaughn had any infection inside her incisions?

A. No. The incisions were healing quite appropriately.

* * *

Q. If, Dr. McMullan, you had seen any sign or symptom of infection, would you have noted that here in the record?

A. Yes.

Q. And based upon your personal observation of Ms. Vaughn's leg and chest incisions and the reporting you received from personnel, did you feel adequately informed about her condition and (sic) postoperatively?

A. Yes.

* * *

Q. If a nurse notes the presence of serosanguineous fluid, is that any indication of an infection in a wound site?

A. No.

* * *

Q. In your opinion, did Ms. Vaughn have an infection at either of her wound sites?

A. No. In my opinion, she had no evidence of infection at this point in time.

* * *

Q. Based upon your observations, your care and treatment, the information you obtained at Baptist Hospital, did Ms. Vaughn have any evidence or signs and symptoms of an infection at the time of discharge?

A. Not – at this time.

Q. If Ms. Vaughn had, in your medical opinion, had signs and symptoms of an infection, would you have discharged her?

A. No.

R. 674, 683-685; R.E. 84, 93-95.⁷ Without a doubt, Dr. McMullan testified that Vaughn had no infection present in her wound sites at the time he discharged her from Mississippi Baptist Medical Center on November 2, 2005, her first hospitalization period. Moreover, Dr. McMullan's medical opinion is substantiated by the medical records from the facility to which Ms. Vaughn was transferred. R. 686; R.E. 96.

The medical records from Montfort Jones Memorial Hospital confirm that at the time Vaughn was transferred to that facility from Mississippi Baptist Medical Center on November 2, 2005, she was not suffering from any infection. R. 686; R.E. 96. Upon admission to Montfort

⁴Dr. McMullan testified, and it is undisputed that seroganguineous fluid (blood-tinted) is not the result of infection. R. 685; R.E. 95. Nurse Keller offers such an opinion in opposition to established medical fact.

Jones, the staff assessed Vaughn's condition and noted in the record that there was no infection present. R. 686; R.E.96. The absence of infection is not noted merely once, but is indicated in two separate portions of the record. R. 686; R.E. 96. Furthermore, the narrative nursing notes indicate on November 2, 2005, that Vaughn's "incision areas [are] pink [and] healing." R. 687, R.E. 97. Nonetheless, Vaughn asks this Court to ignore the testimony of her treating physician and the undisputed facts in medical records, and to accept Nurse Keller's unqualified "opinion." Nurse Keller's erroneous substitution of her opinions for those of Vaughn's treating physician is not only contrary to the law of this State and medically incorrect, but is a tactic of Nurse Keller which has previously been rejected by this Court. Richardson, 807 So. 2d 1244, 1248 (Miss. 2002) (holding Nurse Keller is not competent to give opinions regarding medical diagnoses and causation). The trial court properly struck Nurse Keller's opinions regarding her medical diagnosis of infection and entered summary judgment herein. R. 725; R.E. 119.

B. Nurse Keller Is Not Qualified to Speak to Medical Causation.

Not only do Vaughn and Nurse Keller take the position that Nurse Keller is qualified to make a medical diagnosis of an infection, an infection which did not exist, they further take the position that she is qualified to speak to medical causation, i.e. the cause of a fictional infection. Specifically, they assert that Nurse Keller may opine that alleged negligence of the nursing staff at Mississippi Baptist Medical Center during Vaughn's initial hospitalization caused Vaughn to develop an infection in her wound sites. However, as a matter of law, Nurse Keller is not qualified to speak to the issue of medical causation. Richardson v. Methodist Hospital of Hattiesburg, Inc., 807 So.2d 1244 (Miss. 2002). In fact, this Honorable Court has so stated to Nurse Keller and Vaughn's

counsel herein.⁸ Id.

In Richardson, a wrongful death action, Nurse Keller attempted to give opinions regarding the cause of death of patient. 807 So. 2d at 1245. Nurse Keller opined therein that the alleged negligence of the nursing staff caused or contributed to the patient's death. Rejecting Nurse Keller as a qualified expert on causation, this Court held Nurse Keller "**would not be allowed to render medical opinions** as to the multiple medical diseases and/or conditions suffered by the Plaintiff during this lengthy hospitalization . . . **or the cause of these conditions** and/or the cause of her death." Id. at 1248 (emphasis added). Nonetheless, despite this admonishment, Nurse Keller is once again attempting to give opinions regarding medical conditions and causation, i.e. that Vaughn's wound sites were infected and that the cause of the infection was the negligence of the nursing staff in allowing the wounds to be contaminated with feces and urine. Opinions which are unsupported by the medical records herein and the testimony of Vaughn's treating physician who observed and cared for her during the pertinent times at issue.⁹

Vaughn relies upon several cases in her Brief on Appeal for the proposition that nurses are qualified to speak to medical causation. However, these cases are not controlling nor persuasive, and are distinguishable from the facts at bar. In fact, some of these same arguments were made to this Court in Richardson and rejected. Specifically, this Court in Richardson, rejected the plaintiff's argument that Sonford Prods. Corp v. Freels, 495 So. 2d 468 (Miss. 1986), *overruled on other grounds*, Bickham v. Dept. of Mental Health, 592 So. 2d 96, 98 (Miss. 1991), supported the position

⁸Not only was Nurse Keller the nurse expert in the Richardson case, but Mr. Waller was also counsel for plaintiff therein.

⁹As in this case, the patient's treating physician in Richardson was unsupportive of Nurse Keller's opinions on proximate cause. 870 So.2d at 1246.

that Nurse Keller was qualified to give opinions on medical causation or to speak to the link between the alleged nursing care and the patient's death. Richardson, 870 So.2d at 1248 (¶18). In Sonford, a toxicologist in a worker's compensation claim was allowed to testify with regard to the effect of toxic chemicals in the workplace. Id. However, this Court limited the expert's opinions to the cause and effect of chemicals and the relationship between decedent's employment and his death. Id. at 474. As a toxicologist, the Court found that Dr. Verlangler was "equally competent to speak to the cause and effect of chemicals in our environment as medical doctors." Id. at 473. However, as the law of this state holds, nurses are not as qualified as physicians to make medical diagnoses or give opinions on medical causation. § 73-15-5(2), Miss. Code. Ann (Rev. 2008); Richardson, 807 So.2d at 1248.

The holding of the Court of Appeals in Sacks v. Necaise, 991 So. 2d 615 (Miss. App. 2007), is likewise not controlling or persuasive. The issue involved therein was whether the nursing staff breached the standard of care by allowing a chemotherapy drug to continue to be administered intravenously in spite of the fact the patient was experiencing pain, swelling, and discoloration to the arm at the site of the IV. Id. The plaintiff sued the physician on the basis of his vicarious liability for his nursing staff. Id. at 9. Because the physician testified in his deposition that the drug caused the injury in question, and furthermore, that it was a breach of the standard of care of the nursing staff to continue to administer the drug when the patient's arm was swollen, proximate cause was established. Id. at 14. The Appellate Court found that it was within the scope of nursing practice to allow the nurse expert to speak to the issues of nursing standard of care, particularly monitoring the patient for signs of extravasation, the effects of extravasation on the tissue, and the issue of hypersensitivity versus extravasation. Id. at 28. However, the Appellate Court did not hold that the nurse was qualified to speak to medical causation. Furthermore, such testimony from the

nurse expert was not required as proximate cause had previously been established by the testimony of the defendant physician. Id. at 14.

In addition, Vaughn's reliance upon case law from other jurisdictions is misplaced. This Court is not bound by the decisions of courts from other jurisdictions on similar questions. In any event, the decision in Mellies v. National Heritage, Inc., is not persuasive. 636 P. 2d. 215 (Kan. App. 1981). In fact, the court therein specifically stated that nurses cannot give testimony as to medical treatment which requires a physician's attention, such as in this case, the diagnosis and treatment of an infection. Id. at 915. Rather, the nurses' testimony in that case was limited to the prevention, care and treatment of pressure sores, matters which largely involve nursing duties.¹⁰ Id. at 224. While Ms. Keller may be qualified to give testimony regarding the "interventions to assist in the prevention of infection. . . and notifying the physician timely of these changes in a patient's status," she is not qualified to diagnose an infection or to state what caused or contributed to the development of such an infection. R. 662-63.

Furthermore, it is pertinent to note that as was the case in Richardson, Vaughn's treating physician herein is not supportive of Keller's diagnosis of infection. Dr. McMullan specifically testified that Vaughn was not suffering from any infection prior to or at the time she was discharged from Mississippi Baptist Medical Center on November 2, 2005. Therefore, any alleged breaches of the standard of care of the nursing staff during this admission could not be and are not the cause in fact of any injury to Ms. Vaughn.

Furthermore, Defendant's infectious disease expert, Dr. Rathel Nolan, concluded that the

⁷In fact, it is commonly recognized that nurses are the primary care givers with regard to decubitus care, with physicians becoming involved only if the wound becomes infected and needs debridement.

post-hospitalization infection resulted not from a breach of the standard of care by the nursing staff at Mississippi Baptist Medical Center, but as a result of the presence of certain bacteria on Vaughn's skin: naturally occurring organisms which are present on the skin of all individuals but which do not result in harm unless there is an open wound to infiltrate. R. 689-690; R.E. 99-100. Thus, the mere fact that Vaughn had open wounds allowed the bacteria to penetrate Vaughn's skin and result in infection. This is naturally occurring process was not the result of any negligence on the part of anyone at Mississippi Baptist Medical Center but was a consequence of Vaughn surgical procedure and in any event did not occur until after Vaughn's discharge from Mississippi Baptist Medical Center.¹¹

Nurse Keller is not qualified to give opinions regarding medical causation. Furthermore, her opinions cannot be given credence, especially when they are unsupported by not only the applicable medical records, but the testimony of the only professionals qualified to speak to such issues. Because Nurse Keller is not qualified to give opinions regarding medical diagnosis and causation, the trial court appropriately determined that Vaughn had failed to meet her burden of production as she could not establish an essential element of her claim. Thus, summary judgment was appropriate as a matter of law.

C. The Diagnosis of an Infection and its Resultant Cause Are Not Matters Within the Purview of Laypersons.

Vaughn not only asserts that Nurse Keller is qualified to give opinions regarding medical diagnosis and causation, but as an alternative argument, suggests that her family members are

⁸All surgical patients are warned about the risk of infection. It is the presence of this and similar bacteria which necessitate such a warning. Despite the best of care, infections can nonetheless result. However, in this case, the infection did not occur until after Vaughn was no longer under medical care at Mississippi Baptist Medical Center.

qualified to speak to the issue of whether an infection was present, when it was present and its cause.

Vaughn asserts that based upon her family members testimony explaining the “gross appearance resulting from contamination of the wounds by urine and feces . . . including discoloration, swelling, discharge and odorous material” that “obviously,” Vaughn’s wounds were infected during her initial admission to Mississippi Baptist Medical Center. Appellant’s Brief, p. 10. Essentially, Vaughn is asking this court to ignore the testimony of Vaughn’s treating physician, medical tests and the pertinent medical records and to supplant them with testimony of family members who claim to have seen unsightly conditions and who themselves believe caused infection.

Vaughn further asserts that because family members saw what they believed was pus coming out of Vaughn’s surgical leg wounds prior to her initial discharge from the hospital, that an infection must have been present. Significantly, however, Vaughn’s treating physician, Dr. McMullan, explained that what Vaughn’s family may have seen was fat necrosis, or evidence of dying fat cells. R.667; R.E. 77. This is an expected consequence of a surgical wound such as Vaughn’s. *Id.* Likewise, the presence of serosanguineous fluid does not indicate an infection is present. R. 685; R.E. 95. Although to a lay person, the presence of these substances maybe disconcerting, they are actually part of the healing process. Such misconceptions are examples of why lay testimony is no substitute for medical observations, tests and documentation.

Vaughn mistakenly relies upon the patient teaching record from Mississippi Baptist Medical Center to support her claim that lay persons may make medical diagnoses. Such a notion defies logic. This teaching tool is utilized to educate patients to report changes and conditions to medical professionals so that an examination and diagnosis can be made by their physician and treatment instituted, if necessary. However, this educational device is not a substitute for a medical diagnosis but is merely a method utilized to make the patient to be aware of conditions which may warrant

further investigation. It, by no means, qualifies a patient or a nurse to make a medical diagnosis.

The case law cited by Vaughn in her Brief on Appeal is not supportive of her position on lay testimony and is easily distinguished from the case at bar. In Gatlin, a mother sued the anesthesiologist and the hospital for alleged negligence which resulted in the death of her son. 772 So.2d 1023 (Miss. 2000). The mother's expert testified that it was the anesthesiologist's responsibility to secure enough blood for the patient during surgery. The anesthesiologist argued it was the hospital's responsibility. Id. at 1025. The mother offered no expert testimony as to the standard of care applicable to the hospital with regard to the blood bank personnel, but only offered an expert on anesthesiology. Id. at 1026. As the Court noted therein, the plaintiff made the decision to focus her case on the alleged negligence of the anesthesiologist, not the blood bank personnel. Id. at 1207. Thus, the issue of the admissibility of lay person testimony with regard to causation never arose.

The Dailey case involved the administration of a labor-inducing drug to a male cancer patient. 790 So.2d 903 (Miss. 2001). While the plaintiff therein argued that the administration of medication to the wrong person was a matter within the knowledge of lay persons, she nonetheless presented expert testimony to establish that the administration of the Pitocin proximately caused damage to the patient in the form of hypertension, tachycardia, and dyspnea. Id. at 915 (§ 15). Likewise, the nursing personnel admitted in their depositions that they had breached the standard of care by administering the wrong medication to the wrong patient. Id. at 916 (§ 16). Thus, since plaintiff therein had offered a qualified medical expert to testify as to the adverse effects of the drug on the patient, proximate cause was established, and a genuine issue of material fact was present to submit to a jury. Id. at 917 (§ 21). Although the Court agreed that the administration of the wrong

medication to the wrong patient was a matter within common knowledge,¹² the trier of fact did not have to rely upon lay person testimony with regard to proximate cause. It was established by a qualified expert.

Lastly, the case of Kelley v. Frederic, 573 So. 2d 1385 (Miss. 1990), is also unsupportive of Vaughn's position. At issue therein was a dispute over the actual treatment rendered to the patient by the physician. The physician testified he performed certain procedures while the patient testified that the physician did not perform such procedures. The physician testified he administered an injection, the patient said he did not receive any shot. The physician testified he debrided the soft tissue, replaced the bone chip and sewed a tendon. The patient adamantly denied this happened and asserted the physician merely took a pair of tweezers and removed a piece of metal shaving. Id. at 1387. The defendant physician offered testimony of a supporting expert that if the facts as asserted by him were true, there was no breach the standard of care. Id. at 1388. However, that same expert testified that if the facts as testified to by the plaintiff were true, then the physician's treatment would have been extreme. Id. Thus, a genuine issue of material fact existed as to what treatment was instituted as the patient and physician testified as to contradicting findings and treatment.

⁹This Court has generally accepted that in cases where an incorrect medication is given or a foreign object is left in a person after surgery, the doctrine of *res ipsa loquitur* will apply. See Coleman v. Rice, 706 So.2d 696, 698-99 (Miss.1997); Dailey v. Methodist Med. Ctr., 790 So.2d 903, 912 (Miss. Ct. App.2001). However, *res ipsa loquitur* is not applicable simply because there is an untoward result. Austin v. Baptist Mem'l Hosp.-North Mississippi, 768 So. 2d 929 (Miss. 2000). Rather, this Court has held the doctrine should be cautiously applied; and, only in cases where (1) the instrumentality causing the injury is under the control and management of the defendant; (2) the injury is such that it would not occur if those in control of the instrumentality used proper care; and (3) the injury is not be due to any voluntary act by the plaintiff. " Winters v. Wright, 896 So.2d 357, 363 (Miss. 2003). The doctrine is inapplicable to the case subjudice as an infection can, and does, occur despite the best of care, and Mississippi Baptist Medical Center did not have exclusive control and management of Vaughn or her treatment. In fact, she was seen at multiple facilities over the course of time at issue and was home without care for periods of time as well. Furthermore, Vaughn requested early discharge from Montfort Jones Hospital only to return days later in renal failure and with an infected left leg graft site.

Therefore, it was left to the province of the jury to determine whose testimony was more credible. Id. at 1389. Contrary to the position taken by Vaughn, there is not a simple “disagreement between Baptist Hospital’s experts and Vaughn’s experts and treating physicians.”¹³ Brief of Appellant at p. 23. Only Dr. McMullan and Dr. Nolan are qualified to speak to the issues of medical diagnoses and causation, Nurse Keller and Vaughn’s family members are not.

When Vaughn presented to Mississippi Baptist Medical Center for the second time, her condition was dramatically different from when she was first discharged. She was in renal failure and her wound site was infected. The wound was cultured to identify the infection and to determine the presence of bacterial agent(s). The results of the culture indicated that Vaughn’s post-hospitalization infection was not the result of bacteria associated with either feces or urine.¹⁴ Rather, the infection resulted from coagulase negative staphylococcus which is present on the skin of all individuals. R. 689, R.E. 99. Thus, as a consequence of her open wound, her immuno-compromised condition and her other co-morbid conditions, these bacteria infiltrated Vaughn’s system and an infection resulted. Thus, even if taken as true, that Vaughn’s family members observed feces and urine on her wound site, the presence of such material did not cause Vaughn’s infection as is demonstrated by the medical testing and the testimony of Dr. Nolan, an expert in infectious diseases. R. 689-90; R.E. 99-100.

While it is true that lay persons can testify with regard to factual matters, i.e. they can state

¹⁰Although Vaughn designated some of her treating physicians as experts, these physicians were not designated to give any testimony regarding causation or any alleged negligence which may have occurred while Vaughn was a patient at Mississippi Baptist Medical Center. R. 406-419.

¹¹The uncontroverted testimony of Dr. McMullan indicates no infection was present in Vaughn’s wound sites during her initial admission to Mississippi Baptist Medical Center, which opinion is confirmed by the medical records from Montfort Jones Hospital on November 2, which note no signs and symptoms of infection upon her admission to that facility. R. 683-87; R.E. 93-97.

what conditions they observed, only a physician can state to a reasonable degree of medical certainty whether or not an infection actually exists. Only a physician can state to a reasonable degree of medical certainty what caused the infection, i.e. what type of bacteria is present or what the source of bacteria may be. “[M]atters in the realm of medical opinion where the lay person testimony would be of little or no probative value” cannot raise a dispute of fact to the level of a “genuine issue.” Kelley v. Fredrick, 573 So.2d 1385, 1388 (Miss. 1990). Thus, claims by family members that they saw feces, urine or pus in her wounds do not create a genuine issue of material fact with regard to medical causation, especially where the undisputed medical testimony indicates that no infection existed at the time and Vaughn’s post-admission infection did not result from the conditions of which the family members complain.

Frankly, it is hard to imagine a better example than the facts presented in the case at bar of why lay testimony is insufficient to prove medical causation. Had Vaughn’s treating physicians relied upon her family members’ observations, the likely result would be additional harm to the patient, maybe even death: the physicians would have prescribed medications to address bacteria which are present in feces/urine, not the coagulase negative staphylococcus which cultured from the wound. Had the physicians ordered the wrong medication to address the cause of the infection, one can only imagine what would have happened. It is reasonable to think that under such circumstances, particularly with Vaughn’s multiple underlying medical conditions, that the failure to appropriately treat the agents causing the infection would have likely resulted in Vaughn becoming septic, her organs failing and her ultimate death. Such life and death matters are not resolved upon lay observations. To the contrary, such situations demonstrate the need for a qualified physician to make a medical diagnosis using his/her specialized training and diagnostic tools.

In the case at bar, lay witness opinions, were/are ineffectual in the fact of qualified medical experts opinions that Vaughn did not suffer from any infection during her hospitalization at Mississippi Baptist Medical Center from October 24, 2005 through November 2, 2005. Furthermore, a qualified medical doctor stated to a reasonable degree of medical certainty, that the cause of Vaughn's subsequent, post-hospitalization infection was coagulase negative staphylococcus, not bacteria which is contained in feces and urine. In addition, Dr. Nolan has attested to a reasonable degree of medical certainty that nothing the nursing staff at Mississippi Baptist Medical Center did or failed to do caused Vaughn any injury. R. 689-690; R.E. 99-100. The trial court properly held that not only was Nurse Keller not qualified to give opinions on medical diagnoses and causation, but likewise, neither were Vaughn's family members. Therefore, without evidence of causation, an essential element of her claim, summary judgment was required as a matter of law.

D. Not Only Did Vaughn Fail to Prove Causation with Regard to Vaughn's Wound Infection, She has Failed to Prove a Causal Link Between Alleged Nursing Negligence and any Injury to Vaughn.

Vaughn asserts that "Baptist was obligated to administer care and treatment of the infected wounds on the second and third admissions so as to minimize and/or cure the infection and ensuing complications." Brief of Appellant, p. 2. Furthermore, she alleges that the failures on the part of the nursing staff resulted in Vaughn developing a duodenal ulcer (ulcer in the colon), duodenitis, gastritis, and stricture of the gastroesophageal junction, all of which are medical conditions which a nurse or a lay person is not qualified to diagnose or to give an opinion to a reasonable degree of medical certainty as to their cause. Brief of Appellant, p. VII. However, again, Vaughn presented no competent expert testimony to establish to a reasonable degree of medical certainty that any alleged breaches of the standard of care by the nursing staff during these admissions caused or contributed to any injury of Vaughn, much less that that Vaughn's medical conditions could have

been “cured” or “minimized.”¹⁵ Instead, Vaughn simply tosses around family members’ testimony of unsanitary conditions and allegations of substandard care, ostensibly with the hope that the Court will overlook her complete failure to prove an essential element of her malpractice claim.

Not only does Vaughn bandy about accusations of negligence, she makes numerous misstatements of fact. Over and over again she incorrectly states that “Baptist discharged” her from its facility. A hospital cannot and does not discharge a patient, only a physician can discharge a patient. In fact, Dr. McMullan testified that **he** discharged Vaughn from the hospital. R. 674; R.E. 84. Furthermore, she criticizes the hospital for her being discharged prior to her wounds being healed. Yet, Dr. McMullan testified that, for patients in Vaughn’s condition, it is not uncommon for surgical wounds such as Vaughn’s to take months to heal. R. 668; R.E. 78. Vaughn also takes issue with the hospital for failing to order a culture, but again, a hospital does not order tests, a physician does.¹⁶

Throughout Vaughn’s Brief on Appeal, she argues that “there is nothing more than a disagreement between Baptist Hospital’s experts and Vaughn’s experts and treating physicians.” Brief of Appellant, p. 23. She further argues that it is within the province of the jury to weigh the credibility of the evidence, Such arguments, however, ignore the law. Nurse Keller is not qualified to give testimony regarding medical diagnosis and causation and neither can her family members.

¹²Vaughn proffers in support of her claim the purported testimony of Dr. Victor Kessler, whom she claims would testify that Vaughn’s gastrointestinal problems resulted as a consequence of the administration of antibiotics to treat her infections. However, she did not submit any affidavit from Dr. Kessler in opposition to the motion for summary judgment. In any event, Dr. Kessler is not designated to testify that any nursing negligence caused Vaughn’s gastrointestinal problems. In fact, Dr. Kessler’s designation does not even purport to state anything about negligence or causation whatsoever. R. 415-416.

¹³Significantly, all though all these issues are matters which are addressed by physicians, not nurses or the hospital itself, Vaughn has never taken the position that Dr. McMullan or any of her treating physicians were negligent in their care and treatment of her.

The only competent evidence before the Court, on the issues of medical diagnoses and causation is that of the testimony of Dr. McMullan and the Affidavit of Dr. Nolan. R. 664-668; R. 683-85; R. 688-90; R.E. 74-78, 93-95, 98-100. Although the burden of production is on Vaughn, she submitted no qualified expert to speak to the issue of causation whatsoever, whether it is the cause of Vaughn's infection or the cause of any other of Vaughn's multiple medical problems or injuries.

When a party opposing summary judgment on a claim as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law. Scales v. Lackey Memorial Hospital, 988 So.2d 426, (Miss. 2008)(upholding summary judgment where Plaintiff failed to present expert testimony to support claim of medical negligence). In the case at bar, there can be “no genuine issue as to any material fact,’ **since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.**” Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc., 519 So. 2d 413, 416 (¶ 3) (Miss. 1988) (citations omitted.)(emphasis added). *See also*, Maxwell v. Baptist Memorial Hospital-DeSoto, 2008 WL 2170726 (Miss. App. 2008) (absence of expert testimony supporting each element of plaintiff’s medical malpractice claim entitles defendant to judgment as a matter of law). Vaughn has “**utterly failed to make any showing as to an essential element of her claim, proximate cause**” Grisham, 519 So. 2d at 417 (emphasis added). Therefore, summary judgment is appropriate herein as a matter of law.

III. The Trial Court Properly Struck the Affidavit of Crystal Keller for being Outside the Scope of Nursing Practice.

Vaughn argues that should this Court accept the fact that Keller is not qualified to give testimony regarding causation, she should, nonetheless, be allowed to give testimony at trial of this

cause with regard to the alleged pain and suffering of Vaughn. In making this contention, Vaughn relies on this Court's holdings in Richardson, *supra*. Such reliance is, however, misplaced.

The Richardson Court dismissed the wrongful death action therein as there was no qualified expert to give any opinions with regard to cause of death. However, based upon the treating physician's testimony, the Richardson Court held that a genuine issue of fact was present with regard to the survival action, or with regard to Wheelless' pain and suffering prior to her death. Nurse Keller appropriately testified therein as to her opinions regarding the duty of the nursing staff and their alleged breaches of the standard of care. In addition, the patient's treating physician testified that these deviations from the standard of care by nursing staff negatively impacted Wheelless' medical condition. *Id.* At 1246-47. Based upon the treating physician's testimony, causation was established. Keller could speak to duty and breach of duty by the nursing staff, but only the physician was qualified to speak to the essential element of causation. Because the physician established proximate cause, or the causal link between the nursing negligence and the patient's pain and suffering, the Court held a jury issue was present. *Id.* at 1247 (¶ 13). Such is not the case herein. Vaughn tendered no qualified expert herein to speak to causation with regard to any claims asserted.

Six pages in Vaughn's Brief on Appeal are dedicated to Nurse Keller's opinions regarding alleged breaches of the standard of care by the nursing staff at Mississippi Baptist Medical Center.¹⁷

¹⁴Mississippi Baptist Medical Center has denied, and continues to deny, that its nursing staff breached the standard of care in their care and treatment of Vaughn. However, it has never taken the position that Nurse Keller is not qualified to speak to the limited issues of the standard of care applicable to nurses and breaches of those standards of care. Nevertheless, the substantive law requires that not only must Vaughn establish (1) duty and (2) breach of duty, she must also establish (3) proximate cause. Without such, her claim fails as a matter of law. Phillips v. Hull, 516 So.2d 488, 491 (Miss. 1987); Coleman v. Rice, 706 So.2d 696, 698 (Miss. 1997).

This litany of opinions, however, does not create a genuine issue of material fact to prevent summary judgment. “[T]he presence of fact issues in the record does not per se entitle a party to avoid summary judgment.” Dailey, *quoting Roebuck v. McDade*, 760 So.2d 12 (¶ 9) (Miss. App. 1999) (citations omitted). Rather, a factual issue must be a material issue, one which matters in an outcome determinative sense. Id. Thus, Keller may give 1000 factual opinions regarding alleged breaches of the standard of care by the nursing staff at Mississippi Baptist Medical Center but without qualified medical expert testimony to establish the presence of infection upon initial discharge or that anyone or all of these alleged breaches proximately resulted in some injury to Vaughn, there is no genuine issue of material fact to present to a jury and Vaughn’s claim of medical negligence fails as a matter of law.¹⁸

The substantive law requires that Vaughn must prove each and every element of a medical malpractice claim. Coleman, 706 So.2d at 706. Without proof of causation, no genuine issue of material fact exists to present to a jury. Id. The trial court correctly found that Vaughn had presented no qualified medical expert testimony to establish a causal link between the alleged negligence of the nursing staff at Mississippi Baptist Medical Center and Vaughn’s alleged injuries. Therefore, as Vaughn offered no competent expert to testify with regard to the essential element of causation, the trial court appropriately granted summary judgment.

IV. The Lower Court Appropriately Denied Vaughn’s Motion to Amend Rulings of the Court.

Vaughn asserts on appeal that the lower court erred when it failed to allow her additional

¹⁵Vaughn recites in her Brief on Appeal fourteen (14) categories of alleged breaches of the standard of care by the nursing staff at Mississippi Baptist Medical Center. However, Vaughn has failed to present any qualified medical expert to give an opinion that any one of these alleged breaches proximately caused any harm.

time within which to retain a new, qualified medical expert to give opinions regarding the essential element of causation with regard to her medical malpractice claim. First and foremost, Vaughn's motion to amend the rulings of the court is not recognized under Rule 60, Mississippi Rules of Civil Procedure or otherwise. Even assuming *arguendo*, Vaughn was proceeding under Rule 60, Mississippi Rules of Civil Procedure, then she failed to articulate any reason to alter or amend the court's rulings or judgment in this case.

Vaughn contends that because §11-1-58(1)(a)¹⁹, Mississippi Code, requires that a plaintiff must consult with a qualified expert prior to filing suit, that such statute supports her claim that she should be allowed to find a qualified expert after the fact. The logic of such an argument escapes this writer. The clear language of the statute requires that the attorney for the plaintiff must consult with a qualified expert prior to filing suit. This does not mean that because a party's chosen expert is later determined to be unqualified that a plaintiff may have a second bite at the apple to find and hire another. If it did, parties in cases where their experts have been disqualified could simply start their case over. Conceivably, prior to suit, a plaintiff could consult with a veterinarian, file suit, stop the statute of limitations from running, and when challenged on the lack of qualification of her

¹⁹ Section 11-1-58 provides in pertinent part:

“the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:(a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action;

expert, shop around for a new qualified expert to support her claim, extending the life of her claim indefinitely. Surely, this was not the intent of the Legislature in requiring plaintiffs to obtain qualified expert support for their claim prior to filing suit.

The motion for summary judgment in this case was filed after more than one and one-half years of discovery, including amended scheduling orders and extensions of time to designate expert witnesses.²⁰ R. 365. Mississippi Baptist Medical Center, in reasonable reliance on the scheduling order, filed its motion for summary judgment, and the trial court properly declined Vaughn's request to start over and pursue a new expert. *See, Bowie v. Montfort Jones Memorial Hospital*, 861 So.2d 1037 (Miss. 2003). Vaughn was the master of the claims she chose to pursue and parties against who to proceed. She had more than sufficient time to develop requisite expert testimony to support her burden of proof. Vaughn's request for additional time to substitute another expert was without merit, was properly denied by the trial court, and should be upheld herein. Vaughn's decision to proffer nursing testimony instead of requisite physician testimony resulted a failure of her burden in opposition to Mississippi Baptist Medical Center's motion for summary judgment pursuant to Rule 56, Mississippi Rules of Civil Procedure. Summary judgment was appropriate.

CONCLUSION

Vaughn filed suit against Brandon Nursing Home alleging negligence in her care and treatment at their facility. After settling her claim against Brandon Nursing Home, she amended her Complaint to redirect all of her claims for injuries and damages solely against Mississippi Baptist

¹⁷Significantly, Vaughn did not file a Rule 56(f) motion after being served with the motion for summary judgment. She has never asserted that she was unable to defend the motion or that any additional time was required to do so. Rather, she has maintained throughout these proceedings that her expert was indeed qualified. Only after the trial court has ruled otherwise, and on appeal, in the event this Court upholds the lower court's decision, does she assert that another expert is even needed.

Medical Center. However, she failed to meet her burden of proof on such claims. Neither Nurse Keller, nor Vaughn's family members, are qualified to speak to causation. Dr. McMullan, Vaughn's treating physician, has testified unequivocally that Vaughn had no infection in her wounds sites at the time he discharged her from Mississippi Baptist Medical Center. The medical records from Montfort Jones Hospital support Dr. McMullan's testimony. Likewise, the physician expert designated by Mississippi Baptist Medical Center has attested that Vaughn's post-hospitalization infection resulted as a natural consequence of bacteria found on the skin of all individuals, not that present in feces/urine, and resulted in an infection due to Vaughn's underlying immunocompromised condition and her underlying medical condition, not due to any negligence on the part of the staff at Mississippi Medical Center. Dr. Nolan has also testified that nothing the nursing staff did or failed to do caused Vaughn any harm whatsoever. Vaughn failed to meet her burden of proof by failing to provide qualified expert testimony to establish an essential element of her medical malpractice claim - causation. A complete failure on the non-moving party's part to provide proof of an essential element of her claim renders all other facts immaterial and entitles the moving party to judgment as a matter of law. Because Vaughn offered no qualified expert to give opinions regarding the essential element of her claim, it must fail as a matter of law. Therefore, as the trial court properly granted summary judgment in this cause, it's decision should be affirmed herein.

Dated this the 23rd day of March, 2009.

Respectfully submitted,

Mississippi Baptist Medical Center

BY:


GAYE NEIL CURRIE

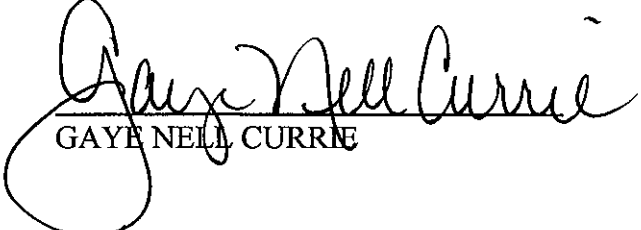
CERTIFICATE OF SERVICE

I, Gaye Nell Currie, one of the attorneys for Mississippi Baptist Medical Center, do hereby certify that I have this date caused to be mailed, U. S. Mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

Bill Waller, Sr.
Waller and Waller
Post Office Box 4
Jackson, Mississippi 39205-0004

Honorable W. Swan Yerger
Circuit Court Judge District 7
Post Office Box 327
Jackson, Mississippi 39205-0327

Dated this the 23rd day of March, 2009.


GAYE NELL CURRIE

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